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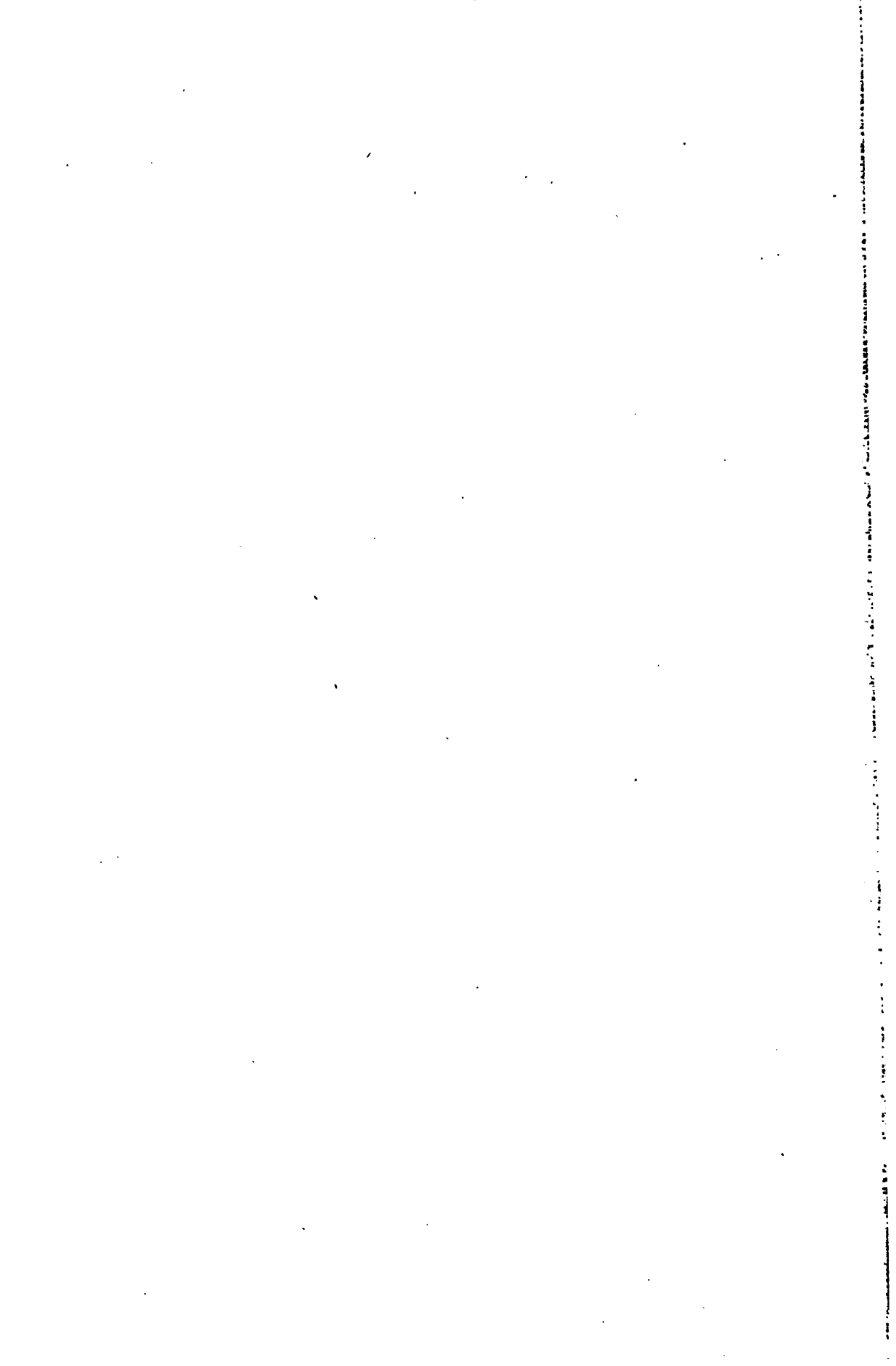
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THE
SOUTHEASTERN REPORTER,
VOLUME 53.

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST
VIRGINIA, AND SUPREME COURTS OF NORTH
CAROLINA, SOUTH CAROLINA, GEORGIA.

PERMANENT EDITION.

APRIL 14—JULY 21, 1906.

WITH TABLE OF SOUTHEASTERN CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

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54

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JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

GEORGIA—Supreme Court.

WILLIAM H. FISH, CHIEF JUSTICE.

ANDREW J. COBB, PRESIDING JUSTICE.

• ASSOCIATE JUSTICES.

J. H. LUMPKIN.

BEVERLY D. EVANS.

JOHN S. CANDLER.¹

MARCUS W. BECK.

SAMUEL C. ATKINSON.²

NORTH CAROLINA—Supreme Court.

WALTER CLARK, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

PLATT D. WALKER.

HENRY G. CONNOR.

WILLIAM A. HOKE.

GEORGE H. BROWN, JR.

SOUTH CAROLINA—Supreme Court.

Y. J. POPE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

EUGENE B. GARY.

IRA B. JONES.

C. A. WOODS.

VIRGINIA—Supreme Court of Appeals.

JAMES KEITH, PRESIDENT.

JUDGES.

RICHARD H. CARDWELL.

GEORGE M. HARRISON.

JOHN A. BUCHANAN.

STAFFORD G. WHITTLE.

WEST VIRGINIA—Supreme Court of Appeals.

HENRY C. McWHORTER, PRESIDENT.

JUDGES.

HENRY BRANNON.

GEORGE POFFENBARGER.

JOSEPH M. SANDERS.

FRANK COX.

¹Resigned January 15, 1906.

53 S.E.

²Appointed January 15, 1906.

(III)*

RULES OF PRACTICE.

SUPREME COURT OF NORTH CAROLINA.*

Revised and Adopted at February Term, 1906.

APPLICANTS FOR LICENSE TO PRACTICE LAW.

1. When examined.

Applicants for license to practice law will be examined on the first Monday in February and the last Monday in August of each year, and at no other time. All examinations will be in writing.

2. Requirements and course of study.

Each applicant must have attained the age of twenty-one years or will arrive at that age before the time for the next examination, and must have studied:

Ewell's Essentials, 3 volumes.
Clark on Corporations.
Schouler on Executors.
Bispham's Equity.
Clark's Code of Civil Procedure.
Volume 1, Revisal (1905) of North Carolina.
Constitution of North Carolina.
Constitution of the United States.
Creasy's English Constitution.
Sharswood's Legal Ethics.
Sheppard's Constitutional Text Book.
Cooley's Principles of Constitutional Law.
(Or their equivalents.)

Each applicant must have read law for two years at least, and shall file with the clerk a certificate of good moral character, signed by two members of the bar, who are practicing attorneys of this court and also a certificate of the dean of a law school, or a member of the bar of this court, that the applicant has read law under his instruction, or to his knowledge or satisfaction, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence of proficiency.

If the applicant has obtained license to practice law in another state, in lieu of the certificate of two years reading and proficiency he can file (with leave to withdraw) his law license issued by said state.

3. Deposit.

Each applicant shall deposit with the clerk a sum of money sufficient to pay the license fee before he shall be examined, and if, up-

on examination he shall fail to entitle himself to receive a license, the money will be returned to him, as provided by the statute.

APPEALS—WHEN HEARD.

4. Docketing.

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the clerk.

5. When heard.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this court must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under rule 17; if the appellee files a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this court may be filed at such term or at the next succeeding term. If filed seven days before the court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent, it is submitted upon printed argument under rule 10.

Appeals in criminal actions shall each be heard at the term at which it is docketed, unless for cause or by consent it is continued: Provided, however, that a cause from the First, Second and Third districts, which is tried between January 1st and the first Monday in February, and between August 1st and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

6. Appeals in criminal actions.

Appeals in criminal cases, docketed seven days before the call of the docket for their dis-

*For rules as previously amended, see 39 S. E. v.

tricts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated, shall be called immediately at the close of argument of appeals from the Sixteenth district, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. Call of each judicial district.

Causes from each of the districts will be called on Tuesday of the week for said district, as follows:

From the 1st district, on Tuesday of the first week.

From the 2d district, on Tuesday of the second week.

From the 3d district, on Tuesday of the third week.

From the 4th district, on Tuesday of the fourth week.

From the 5th district, on Tuesday of the fifth week.

From the 6th district, on Tuesday of the sixth week.

From the 7th district, on Tuesday of the seventh week.

From the 8th district, on Tuesday of the eighth week.

From the 9th district, on Tuesday of the ninth week.

From the 10th district, on Tuesday of the tenth week.

From the 11th district, on Tuesday of the eleventh week.

From the 12th district, on Tuesday of the twelfth week.

From the 13th district, on Tuesday of the thirteenth week.

From the 14th district, on Tuesday of the fourteenth week.

From the 15th district, on Tuesday of the fifteenth week.

From the 16th district, on Tuesday of the sixteenth week.

8. End of docket.

The call of causes not reached and disposed of during the period allotted to each district, and those put to the foot of the docket, shall begin at the close of argument of appeals from the Sixteenth district, and each cause, in its order, tried or continued, subject to rule 6.

9. Call of the docket.

Each appeal shall be called in its proper order; if any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise the first call shall be peremptory; or at the first term of the court in the year a cause may, by consent of the court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the court shall otherwise direct. The appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. Submission on printed argument.

When, by consent of counsel, it is desired to submit a case without oral argument, the court will receive printed arguments, without regard to the number of the case on docket, or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket, but the court, notwithstanding, can direct an oral argument to be made, if it shall deem best.

11. If orally argued.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. If brief filed by either party.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were an appearance by counsel. When a printed brief is filed, a copy thereof shall be served on the opposite counsel, if any is in attendance on the court, at least twenty-four hours before the cause is called for argument, and if default is made herein, the costs of printing shall not be taxed in favor of the defaulting party, though he should be successful in the action.

13. Cases heard out of their order.

In cases where the state is concerned, involving or affecting some matter of general public interest, the court may, upon motion of the attorney general, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the court, at the instance of the party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, may make the like assignment in respect to it.

14. Cases heard together.

Two or more cases involving the same question may, by leave of the court, be heard together, but they must be argued as one case, the court directing, when the counsel disagree, the course of argument.

WHEN DISMISSED.

15. If appeal not prosecuted.

Cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district

to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. Motion to dismiss.

A motion to dismiss an appeal for non-compliance with the requirements of the statute in perfecting an appeal, must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with by a writing, signed by the appellee or his counsel, to that effect, or unless the court shall allow appropriate amendments.

17. Dismissed by appellee.

If the appellant in a civil action shall fail to bring up and file a transcript of the record seven days before the court begins the call of causes from the district from which it comes at the term of this court at which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, and filing said certificate or certified transcript of the record in this court, may have the appeal docketed and dismissed at appellant's cost, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

18. When appeal dismissed.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid, or offered to pay, the costs of the appellee in procuring the transcript of the record, or proper certificate, and in causing the same to be docketed.

TRANSCRIPTS.

19. Transcript of record.

(1) Record.—In every record of an action brought to this court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable.

(2) Pages Numbered.—The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject-matter contained therein.

(3) Index.—On some paper attached to the record, there shall be an index thereto, in the following or some equivalent form:

Summons—Datepage 1
Complaint—First cause of action....page 2
Complaint—Second cause of action..page 3
Affidavit for attachment, etc.....page 4

20. Insufficient transcript.

If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be dismissed or put to the end of the district, or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the clerk, or some other person, to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in each case by the appellant, and execution therefor may immediately issue.

21. Marginal references.

A case will not be heard until there shall be put in the margin of the record, as required in rule 19 (2), brief references to such parts of the text as are necessary to be considered in a decision of a case.

22. Unnecessary records.

The cost of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal not needed to explain the exceptions or errors assigned, and not constituting a part of the record of the action of the court taken during the progress of the cause, shall, in all cases, be charged to the appellant, unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

PLEADINGS.

23. Memoranda of.

Memoranda of pleadings will not be received or recognized in the supreme court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

24. Assigning two or more causes of action.

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. When scandalous.

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the court to be stricken from the record, or reformed, and for this purpose the court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

26. Amendments.

The court may "amend any process, pleading or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at

any time before final judgment, or may make proper parties to any case, where the court may deem it necessary and proper for the purpose of justice, and on such terms as the court may prescribe." Code, § 965.

EXCEPTIONS.

27. How assigned.

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers and not in term time, within ten days after notice thereof, appellant shall file the said exceptions in the clerk's office. No exception not thus set out, or filed and made a part of the case or record, shall be considered by this court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

PRINTING RECORDS.

28. What to be printed.

Fifteen copies of the entire transcript sent up in each action shall be printed, except in pauper appeals. If these latter, the counsel for the appellant shall furnish a sufficient number of printed or typewritten briefs for the use of the court, giving a succinct statement of the facts applicable to the exceptions, and the authorities relied on. Should the appellant gain the appeal, the cost of the same shall be taxed against the appellee.

The printed transcript shall be in the order required by rule 19 (1), and shall contain the marginal references and index required by rule 19 (2) and (3), though, for economy, the marginal references in the manuscript may be printed as sub-heads in the body of the record, and not on the margin. The transcript shall be printed immediately after docketing the same, unless it is sent up printed.

29. How printed.

The transcript on appeal shall be printed under the direction of the clerk of this court,

and in the same type and style, and pages of same size, as the reports of this court, unless it is printed below in the required style and manner. If it is to be printed here, the party sending up an appeal shall send therewith a deposit in cash, for that purpose, to the clerk of this court, of sixty cents (which includes ten cents for the clerk) for each printed page—said cash deposits to be estimated at fifty cents for each page of the transcript of the record.

30. If not printed.

If the transcript on appeal (except in pauper appeals) shall not be printed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed when called in its regular order (as set out in rule 5), the appeal shall, on motion of appellee, be dismissed; but the court may, on motion of appellant, after five days' notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

31. Costs of printing.

The actual cost of printing the transcript on appeal shall be allowed to the successful party, not to exceed, however, fifty cents per page of one copy of the printed transcript, and not exceeding fifty pages of the above specified size and type, unless otherwise specially ordered by the court; and the clerk of this court shall be allowed ten cents additional for each such page for making copy for the printer, unless the appellant shall send up a duplicate manuscript or typewritten copy for that purpose, or shall have the copies printed below.

Judges and counsel should not incur the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that such unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motion for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

32. Printed briefs.

Printed briefs of both parties shall be filed in all cases (except in pauper appeals as required in rule 28). Such briefs may be sent up by counsel ready printed, or they may be printed under the supervision of the clerk of this court if a proper deposit for cost of printing is made, as specified in rule 29. They must be of the size and style prescribed by rule 29. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited if discovered after brief filed.

ARGUMENT.**33. Oral arguments.**

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) The counsel for the appellant may be heard for one hour, including the opening argument and reply.

(3) The counsel for the appellee may be heard for one hour.

(4) The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

(5) The time for argument may be extended by the court in a case requiring such extension, but application for extension must be made before the argument begins. The court, however, may direct the argument of such points as it may see fit outside of the time limited.

(6) Any number of counsel may be heard on either side within the limit of the time above specified; but, if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the court, so as to avoid tedious and useless repetition.

34. Appellant's brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except that as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exceptions and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment, and, if statutes are material, the same shall be cited by the book, chapter and section. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application. If not filed by 10 a. m. on Tuesday of the week preceding the call of the district to which the cause belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless, for good cause shown,

the court shall give further time to print brief.

35. Copies of brief to be furnished.

Fifteen copies shall be delivered to the clerk of the court, one of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel.

36. Brief of appellee.

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner. Said briefs shall be filed before 10 a. m. on Tuesday of the week of the call of the district to which the cause belongs, shall be noted by the clerk on his docket, and a copy furnished by him to opposite counsel on application. On failure to file said brief by that time, the cause will be heard and disposed of without argument from appellee, unless, for good cause shown, the court shall give further time to prevent brief.

37. Cost of briefs.

The actual cost of printing his brief not exceeding fifty cents per page of the size of the pages in the North Carolina Reports, and not exceeding twenty pages, shall be allowed to the successful party, to be taxed in the bill of costs.

38. Reargument.

The court will, of its own motion, direct a reargument before deciding any case, if, in its judgment, it is desirable.

39. Agreement of counsel.

The court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this court.

40. Entry of appearance.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the court.

CERTIORARI AND SUPERSEDEAS.**41. When applied for.**

Generally the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this court next after the judgment complained of was entered in the superior court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

42. How applied for.

The writs of certiorari and supersedeas shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of certiorari may be allowed, upon motion in writing. In all other cases, the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit and such other evidence as may be pertinent.

43. Notice of.

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the court may, for just cause shown, shorten the time for such notice.

ADDITIONAL ISSUES.**44. If other issues necessary.**

If, pending the consideration of an appeal, the supreme court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the court, and certified to the superior court for trial, and the case will be retained for that purpose.

MOTIONS.**45. In writing.**

All motions made to the court should be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the session of the court.

ABATEMENT AND REVIVOR.**46. Death of party.**

Whenever, pending an appeal to this court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes, and, if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the court: Provided, such order shall be served upon the opposing party.

47. When appeal abates.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.**48. When certified down.**

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the superior courts, certificates of the decisions of the supreme court, which shall have been on file ten days, in cases sent from said court. Revisal 1905, § 1549.

THE JUDGMENT DOCKET.**49. How kept.**

The judgment docket of this court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each judgment was entered. On this docket the clerk of the court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money—stating the names of the parties, the term at which such judgment was entered, its number on the docket of the court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

EXECUTIONS.**50. Tests of executions.**

When an appeal shall be taken after the commencement of a term of this court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

51. Issuing and return of.

Executions issuing from this court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the superior court of said county held next after the

date of its issue, and thereafter successive executions will only be issued from said superior court, and, when satisfied, the fact shall be certified to this court, to the end that an entry to this effect be made here.

Executions for the costs of this court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of term, returnable, on a day named, at the next succeeding term of this court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

PETITION TO REHEAR.

52. When filed.

A petition to rehear may be filed at the same term, or during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the justices to whom it is submitted under rule 53, such justices may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined.

53. What to contain.

The petition must assign the alleged error of the law complained of; or the matter overlooked; or the newly-discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this court, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this court; that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion; and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

The petitioner shall endorse upon the petition the names of the two justices, neither of whom dissented from the opinion, to whom the petition shall be sent by the clerk, and it shall not be docketed for rehearing unless both of said justices endorse thereon that it is a proper case to be reheard: Provided, however, that when there have been two dissenting justices, it shall be sufficient for the petitioner to designate only one justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall endorse on the petition the date on which it was received, and it shall be delivered by him to one of the justices designated by the petitioner.

There shall be no oral argument before the justices or justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the court (unless the court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing, the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points, thus certified as may be directed by the justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

54. Notice of.

Before applying for an order to restrain the issuing of an execution, or the collection and payment of the same, written notice must be given the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a rehearing of the cause, with a copy of the petition therefor. The court may, however, grant a temporary restraining order without notice.

CLERK AND COMMISSIONERS.

55. Report of funds in hands of.

The clerk and every commissioner of this court who, by virtue or under color of any order, judgment or decree of the supreme court, in any action or matter pending therein, has received, or shall receive, any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said court held next after the first day of January in each year, report to the court a statement of said fund, setting forth the title and number of the action or matter, the term of the court at which the order or orders under which the clerk or such commissioner professes to act was made; the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. Report recorded.

The reports required by the preceding paragraph shall be examined by the court, or some member thereof, and their or his approval indorsed shall be recorded in a well-bound book, kept for the purpose, in the office of the clerk of the supreme court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.**57. Books taken out.**

No book belonging to the supreme court library shall be taken therefrom except into the supreme court chamber, unless by the justices of the court, the governor, the attorney general, or the head of some department of the executive branch of the state government, without the special permission of the marshal of the court, and then only upon the application in writing of a judge of a superior court, holding court or hearing some matter in the city of Raleigh, the president of the senate, the speaker of the house of representatives, or the chairman of the several committees of the general assembly; and in such cases the marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

CLERK.**58. Minute book.**

The clerk shall keep a permanent minute book, containing a brief summary of the proceedings of this court in each appeal disposed of.

59. Clerk to have opinions typewritten and sent to judges.

After the court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the court, to the end that the same may be carefully examined, and the bearing of the authorities cited may be considered prior to the day when the opinion shall be finally offered for adoption by the court and ordered to be filed.

LIBRARIAN.**60. Reports by him.**

The librarian shall keep a correct catalogue of all books, periodicals and pamphlets in the library of the supreme court, and report to the court on the first day of the spring term of each year, what books have been added during the next year preceding his report to the library, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

61. Sittings of the court.

The court will sit daily, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law.

62. Citation of reports.

Inasmuch as all the reports prior to the 63d have been reprinted by the state, with the number of the volumes instead of the name of the reporter, counsel will cite the volumes prior to the 63d as follows:

1 & 2 Martin	as 1 N. C.	9 Iredell, Law, as 21 N. C.
Taylor & Conf.	" 2 "	10 " " " 22 "
1 Haywood,	" 3 "	11 " " " 23 "
2 " "	" 4 "	12 " " " 24 "
1 & 2 Car. Law	" 5 "	13 " " " 25 "
Repository, N. C. Term,	" 6 "	1 " " Eq. " 26 "
1 Murphey,	" 7 "	2 " " " 27 "
2 " "	" 8 "	3 " " " 28 "
3 " "	" 9 "	4 " " " 29 "
1 Hawks,	" 10 "	5 " " " 30 "
2 " "	" 11 "	6 " " " 31 "
3 " "	" 12 "	7 " " " 32 "
4 " "	" 13 "	8 " " " 33 "
1 Devereux, Law,	" 14 "	9 " " " 34 "
2 " "	" 15 "	10 " " " 35 "
3 " "	" 16 "	11 " " " 36 "
4 " "	" 17 "	12 " " " 37 "
1 " Eq.	" 18 "	13 " " " 38 "
2 " "	" 19 "	14 " " " 39 "
3 & 4 " "	" 20 "	15 " " " 40 "
1 " Eq.	" 21 "	16 " " " 41 "
2 " "	" 22 "	17 " " " 42 "
1 Iredell, Law,	" 23 "	18 " " " 43 "
2 " "	" 24 "	19 " " " 44 "
3 " "	" 25 "	20 " " " 45 "
4 " "	" 26 "	21 " " " 46 "
5 " "	" 27 "	22 " " " 47 "
6 " "	" 28 "	23 " " " 48 "
7 " "	" 29 "	24 " " " 49 "
8 " "	" 30 "	25 " " " 50 "
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		32 " " " 57 "
		33 " " " 58 "
		34 " " " 59 "
		35 " " " 60 "
		36 " " " 61 "
		37 " " " 62 "

☞ In quoting from the REPRINTED Reports counsel will cite always the marginal (i. e., the original) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

RULES OF PRACTICE IN THE SUPERIOR COURTS.

Revised and Adopted by the Justices of the Supreme Court, by Virtue of Code, § 961.

RULES.**1. Entries on records.**

No entry shall be made on the records of the superior courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. Surety on prosecution bond and bail.

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several superior courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace.

3. Opening and conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. Examination of witnesses.

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

(The above rules substantially prescribed by the supreme court at January term, 1815.)

6. Decision of right to conclude not appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, the court shall decide who is so entitled, and, except in the cases mentioned in rule 8, its decision shall be final and not reviewable.

7. Issues.

Issues shall be made up as provided and directed in Code, §§ 395, 396.

8. Judgments.

Judgments shall be docketed as provided and directed in Code, § 433.

9. Transcript of judgment.

Clerks of the superior courts shall not make out transcripts of the original judgment docket, to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing magistrates' judgments.

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the superior court shall be furnished to applicants at the same time after such rendition of judgment, and, if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to supreme court.

In every case of appeal to the supreme court, or in which a case is taken to the supreme court by means of the writ of certiorari as a substitute for an appeal, it shall be the duty of the clerk of the superior court, in preparing the transcript of the record for the supreme court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same.

On the same paper attached to the transcript

of the record, there shall be an index to the record in the following or some equivalent form:

Summons—Datepage 1
Complaint—First cause of action....page 2
Complaint—Second cause of action..page 3
Affidavit of Attachment.....page 4

and so on to the end.

12. Transcript on appeal—When sent up.

Transcripts on appeal to the supreme court shall be forwarded to that court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the superior court. Code, § 551.

13. Reports of clerks and commissioners.

Every clerk of the superior court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment or decree of the court in any action or proceedings pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act, were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the judge of the superior court holding the first term of the court in each and every year, who shall examine, or cause to be examined and, if found correct, and so certified by him, shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari.

The superior court shall grant the writ of recordari only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of supersedeas, if prayed for as required by Code, § 545. In such case, the writ shall be made returnable to the term of the superior court of the county in which the judgment or proceeding complained of

was granted or had, and ten days' notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the superior court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of certiorari in like manner, except that in case of the suggestion of a diminution of the record if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. Judgment—When to require bonds to be filed.

In no case shall the court make or sign any order, decree or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. Next friend—How appointed.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen, and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. Guardian ad litem—How appointed.

All motions for a guardian ad litem shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. Cases put at foot of docket.

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When opinion is certified.

When the opinion of the supreme court in any cause which has been appealed to that

court has been certified to the superior court, such cause shall stand on docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Acts 1887, c. 192, § 3.

20. Calendar.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court, or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases set for a day certain.

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. Calendar under control of court.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Non-jury cases.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. Appeals from justices of the peace.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. On consent continuance—Judgment for costs.

When civil actions shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to file pleadings—How computed.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. Counsel not sent for.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal dockets.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First—All criminal causes at issue. Second—All warrants upon which parties have been held to answer at that term. Third—All presentments made at preceding terms, undisposed of. Fourth—All cases wherein judgments nisi have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the state.

29. Civil and criminal dockets—What to contain.

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First—The names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

30. Books.

The clerks of the superior courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.



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REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

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(105 Va. 225)

PRESTON v. JOHNSON et al.

(Supreme Court of Appeals of Virginia. March 22, 1906.)

1. MORTGAGES — DEED BY TRUSTEE UNDER DEED OF TRUST—RECITALS.

Where a deed executed by a trustee under a deed of trust does not recite that there was any notice of the terms of sale, as required by the deed of trust, the validity of the trustee's deed is not affected by Va. Code 1904, § 3333a, providing that, whenever title to property claimed under a conveyance in execution of a sale under a deed of trust is called in question, if it appear from the face of the conveyance that the sale has been regularly made in accordance with the terms of the deed of trust, the conveyance shall be prima facie evidence that the sale was regularly made.

2. SAME—FORECLOSURE—SALE—NOTICE.

Where a deed of trust authorized the trustee to sell the property after advertisement of the time, place, and terms thereof, a sale made after an advertisement containing no notice of the terms of sale is invalid.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1050.]

Appeal from Circuit Court, Elizabeth City County.

Bill in chancery by C. H. C. Preston against R. E. Johnson and others, asking that the cloud on title to real estate created by a pretended sale under a deed of trust be cleared, and for other relief. From a decree dismissing the bill, complainant appeals. Reversed.

Nelms & Wise, for appellant. S. Gordon Cumming, for appellees.

WHITTLE, J. We shall confine our observations in this case to the single question of the sufficiency of the notice under the provisions of the deed of trust to warrant the sale made by the trustee of the land in controversy.

The deed stipulated that, in the event of a sale, it should be made at such place, in the county where the land is situated, as the trustee might determine, after advertisement of the time, place, and terms thereof, for such time and in such manner as he should deem advantageous, for cash sufficient to defray the expense of executing the trust and to discharge the debt, and the residue, if any, of the purchase price to be on such

credit and secured in such manner, as the grantor might direct, or in fault of such direction, as the trustee might determine.

Notice of the time and place of sale was given by publication in a weekly newspaper published in the town of Hampton, but it affirmatively appears that there was no notice or advertisement of any kind of the terms of sale, and that fact is not recited in the deed from the trustee to the purchaser, so that the case is not affected by section 3333a, Va. Code 1904.

The sale was made at the front door of the courthouse in Hampton on an inclement day and in the presence of very few persons; and after one other bid made by a kinsman of the appellee specially invited to attend the sale the land was sold to the appellee, the cestui que trust, at less than one-third its value. Neither the grantor nor the appellant, to whom the land had been sold subject to the deed of trust, was apprised of the sale, or afforded an opportunity to prevent it, or in any manner to protect his interest. Appellant, immediately upon learning of the sale, tendered to appellee the amount of his debt, together with the cost and expenses of sale, but the offer was rejected, and thereupon this suit was instituted to annul the sale.

It is the well-settled doctrine in this jurisdiction that a trustee for sale is the agent of both debtor and creditor, and as such it is incumbent upon him to act toward each with perfect fairness and impartiality; and, moreover, in executing the trust he must in all material particulars substantially conform to the stipulations of the deed. *Norman v. Hill*, 2 Pat. & H. 676; *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746; *Harris v. Harris*, 6 Munf. 367; *Gibson's Heirs v. Jones*, 5 Leigh, 403; *Wood's Ex'r v. Krebbs*, 33 Grat. 685; *Sulphur Mines Co. v. Thompson's Heirs*, 93 Va. 293, 315, 316, 25 S. E. 232; *Wilson v. Wall*, 99 Va. 353, 355, 38 S. E. 181; 2 Min. Inst. (4th Ed.) 341.

In a note to *Tyler v. Herring*, 19 Am. St. Rep. 263, 287, 288, Mr. Freeman observes: "Where the instrument creating the trust has given directions concerning the mode of sale, they must be substantially pursued

Any direction regarding the notice of sale is material, and the trustee is not at liberty to disobey it. His sale made without complying with it will, in most jurisdictions, be regarded as either absolutely void, or as liable to be vacated upon complaint of any person interested in the execution of the trust"—citing *Sears v. Livermore*, 17 Iowa, 297, 85 Am. Dec. 564.

The learned annotator then proceeds: "Manifestly the objects to be accomplished by a notice of sale are to advise the public of what is to be sold, and the time when, the place where, and the terms upon which, it may be bought, and the essentials of a notice under a trust deed are, therefore, a statement of the time, place, and terms of sale, and such a description of the property to be sold as if read by persons familiar with the neighborhood, will advise them of what is to be sold, and upon what terms it can be bought, and induce them to attend the sale as prospective bidders, should they feel an inclination to invest in the property to be sold."

"The power of sale generally stipulates that it shall be exercised only after giving notice by advertisement for a certain time in some newspaper, or after giving some other prescribed notice. In several states the notice to be given is prescribed by statute, and in such case the statute must be followed, whatever may be the provisions of the power in this respect. In either case a sale made without the proper prescribed notice is invalid. * * * The purchaser is bound to know what the requirements of the deed or statute are in this respect, and to see that they have been complied with; and the mortgagor and others interested in the equity may redeem all the same if the power is illegally exercised." 2 Jones on Mortgages (5th Ed.) § 1810; Lewin on Trusts (notes by Flint) bottom p. 576; 1 Devlin on Deeds (2d Ed.) §§ 389, 398, 403; 2 Perry on Trusts (5th Ed.) p. 188; Hill on Trustees, p. 746; *Greenleaf v. Queen*, 1 Pet. (U. S.) 144, 7 L. Ed. 85; *Alley v. Lawrence*, 12 Gray (Mass.) 873; *Hunt v. Townshend*, 31 Md. 836, 100 Am. Dec. 63, *Farr v. Sims* (S. C.) 24 Am. Dec. 400; *Yellowly v. Beardsley* (Miss.) 24 South. 973, 71 Am. St. Rep. 538.

Applying these familiar principles to the case in judgment, it was the duty of the trustee to have given appellant an opportunity to define the terms of sale with regard to the excess of the purchase price beyond what was required to discharge the debt and expenses of sale; and he ought also to have advertised the terms of sale as prescribed by the deed.

Without intending, in any manner, to impute bad faith to the trustee in this instance, nevertheless his failure to observe these essential provisions of the deed renders the transaction invalid; and the decree appealed from, which sustained the sale, must therefore be reversed.

(105 Va. 213)

BEATTY v. BEATTY.

(Supreme Court of Appeals of Virginia. March 23, 1906.)

APPEAL—DECISIONS REVIEWABLE—INTERLOCUTORY DECREE.

In a suit for separate maintenance, an interlocutory decree awarding the plaintiff a pendente lite allowance for her support until the further order of the court, requiring the defendant to pay the costs of suit incurred by the complainant to date of decree, and referring the cause to a commissioner in chancery to inquire and report on the value of the property of the defendant, the amount of his income, and what would be a reasonable allowance to be paid for the support of the complainant and her child, was not appealable.

Appeal from Corporation Court of Newport News.

Action by Hattie L. Beatty against J. P. Beatty. From an interlocutory decree, the defendant appeals. Appeal dismissed.

A. Johnston Ackiss, for appellant. John W. Friend, for appellee.

HARRISON, J. The bill in this cause was filed by Hattie L. Beatty, alleging that her husband, J. P. Beatty, had turned her and their daughter Margaret, a child about 12 years of age, out of doors, and had abandoned them, in distress for want of the necessaries of life; that, although her husband had sufficient means, he had wantonly and cruelly refused and neglected to provide suitable maintenance for herself and their child. The prayer of the bill is that the said Beatty may, upon the final hearing, be required to pay complainant such reasonable sums of money for the support of herself and their daughter as their necessities may require and his ability may justify, and that by like decree he may be required to pay complainant such sums of money during the pendency of her suit as may be needful for the support of herself and child and to defray the expenses of her suit.

The defendant demurred to the bill, and filed an answer denying its material allegations. Evidence was taken, and upon the hearing a decree was entered overruling the demurrer, awarding the plaintiff a pendente lite allowance for her support until the further order of the court, and requiring the defendant to pay the costs of suit incurred by the complainant to the date of the decree, including a fee of \$100 to her counsel. Thereupon the cause was referred to a commissioner in chancery to inquire and report upon the value of the real and personal property of the defendant, and the amount of his reasonable income from all sources; what would be a reasonable allowance to be paid by the defendant for the support of the complainant and her child; and what would be a reasonable attorney's fee to her counsel. In making these inquiries, the commissioner is directed to consider all evidence then in the cause and such other evidence as may be offered by either party, and to return all evidence that

may be taken before him to the court. From this interlocutory decree an appeal was allowed to this court.

The statute (Code 1887, § 3466 [Va. Code 1904, p. 1854]) provides that a petition for appeal shall be rejected when it is from an interlocutory decree or order, if the court or judge to whom it is presented deems it proper that the case should be proceeded in further in the court below before an appeal is allowed therein.

Beyond making certain preliminary and temporary allowances, nothing was decided. On the contrary, the cause was referred to a commissioner to take evidence and make certain inquiries, which the court deemed essential before finally adjudicating the rights of the parties. The decree appealed from had not responded to the chief object of the suit, which was to secure a permanent separate maintenance from the husband. If, upon the incoming of the report, the court was of opinion that the complainant was not entitled to the relief sought, her bill could and would have been dismissed without a petition to rehear the decree appealed from.

For this court to pass upon the merits of the cause at this stage of the proceedings would be to finally adjudicate the rights of the parties in advance of such an adjudication by the lower court. We are of opinion that the cause should have been proceeded in further before an appeal was asked for or allowed.

For these reasons this appeal must be dismissed as improvidently awarded.

(105 Va. 72)

EVANS v. ATLANTIC COAST LINE RY.*
(Supreme Court of Appeals of Virginia. March 1, 1906.)

1. MALICIOUS PROSECUTION — REQUISITES OF ACTION — TERMINATION OF PROSECUTION.

A dismissal of a criminal case by the county court on appeal from a justice's judgment of conviction terminates the prosecution within the rule requiring a prosecution to end by an acquittal in order to entitle accused to maintain an action for malicious prosecution.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 70-78.]

2. SAME — MALICE — WANT OF PROBABLE CAUSE.

Malice in the instigation of a criminal prosecution may be inferred from want of probable cause.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 67.]

3. SAME — ABSENCE OF PROBABLE CAUSE — SUFFICIENCY OF EVIDENCE.

In a suit for malicious prosecution, evidence held sufficient to authorize a finding that no probable cause existed for the charge made by defendant against plaintiff.

4. SAME — ADVICE OF COUNSEL — ESSENTIALS OF DEFENSE — BURDEN OF PROOF.

In a suit for malicious prosecution, where the advice of counsel is relied upon as a defense, the burden is on defendant to show that he sought counsel with an honest purpose of being informed as to the law; that he made a full, correct, and honest disclosure to counsel of all the material facts in his knowledge bear-

ing on plaintiff's guilt; and that he was in good faith guided by the advice of counsel in causing plaintiff's arrest.

5. SAME — SUFFICIENCY OF EVIDENCE.

In a suit for malicious prosecution, evidence held sufficient to authorize a finding that defendant's detective, who instigated the prosecution, had not made to the attorney who advised the prosecution a full, correct, and honest disclosure of the facts which he knew or should have known after a reasonably careful investigation bearing on defendant's guilt.

6. SAME — ACTS OF AGENT — LIABILITY OF DEFENDANT.

A detective employed by defendant, and on whose information alone a warrant for plaintiff's arrest was sworn out by defendant, is to be regarded as the agent of defendant in instigating the prosecution.

Buchanan, J., dissenting.

Error to Circuit Court, Norfolk County.

Action by A. H. Evans against the Atlantic Coast Line Railway. There was a judgment for defendant, and plaintiff brings error. Reversed.

Rehearing denied.

Herbert L. Britton and Jeffries & Lawless, for plaintiff in error. Brooke & Elliott, for defendant in error.

KEITH, P. On the 23d of December, 1900, the Atlantic Coast Line Railway procured a warrant for the arrest of A. H. Evans, charging him with the larceny of a pair of shoes, the goods and chattels of the company. The prisoner was taken before a justice of the peace and found guilty. From this judgment he appealed to the county court of Norfolk county, where the case was continued, from time to time, until the 17th of July, 1901, when it was dismissed, and the prosecution finally terminated. Thereupon Evans brought suit against the Atlantic Coast Line Railway, charging it with having maliciously and without probable cause charged him with larceny and caused his arrest, and claiming damages.

This action was tried, and the jury rendered a verdict in favor of Evans for \$2,000, which was set aside as being contrary to the law and the evidence, to which order the plaintiff excepted and tendered a bill of exceptions which contains a record of the proceedings upon that trial, which was signed and made a part of the record. At a subsequent day the whole matter of law and fact was submitted to the court, which entered judgment for the defendant, and thereupon a writ of error was obtained from this court.

The only questions which we need to consider are those relating to the first trial. It is contended on behalf of plaintiff in error that the court erred in setting aside the verdict, that the jury had been properly instructed, and the evidence warranted their finding.

In *Scott v. Shelor*, 28 Grat. 891, it was held that in an action for malicious prosecution, to warrant a verdict and judgment for damages, it must be proved on the part of

*Rehearing denied March 27, 1906.

the plaintiff, first, that the prosecution alleged in the declaration has been set on foot and conducted to its termination, and that it ended in the final acquittal and discharge of the plaintiff; second, that it was instigated or procured by the co-operation of the defendant; third, that it was without probable cause; fourth, that it was malicious.

In *Graves v. Scott*, 104 Va. —, 51 S. E. 821, it was held that the first requirement is sufficiently met where it appears that the particular prosecution has ended favorably to the accused, that there need not be a final acquittal, but that the reasonable rule seems to be "that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."

That the prosecution in this case had ended, within the meaning of the rule, and that it was instigated and procured by the co-operation of the defendant, cannot be doubted.

Malice, it is said in *Scott v. Shelor*, supra, may be inferred from the want of probable cause, but want of probable cause can never be inferred from the plainest malice.

We shall, therefore, inquire next whether probable cause existed in this case to justify the defendant in error in the course which it pursued; and, if it shall be found that such probable cause did not exist, its absence will be sufficient to warrant the inference of malice.

The facts are as follows: Evans was employed by the Atlantic Coast Line Railway as a watchman at its Pinner's Point depot. A number of articles had been stolen from the custody of the railroad at that place, and it employed a Richmond detective to go down and make investigation, and, if possible, to discover the thief. The detective, acting upon information, went to a barroom kept by one Wilkins, and asked if certain packages had been left there by Evans. Wilkins replied that he was informed by Thomas, a colored employé, that three bundles had been left there by Evans, and thrown upon a top shelf in the barroom. These bundles were taken down. One of them contained a pair of old trousers, the second a pair of old shoes, and the third a pair of shoes which had been abstracted from the custody of the railway. Armed with these facts, the detective and the forwarding agent of the railway company consulted counsel, who advised them upon the facts communicated to him that there was probable cause for the arrest of Evans. Thereupon a warrant was sworn out against him, he was taken before a justice of the peace, found guilty, an appeal was taken to the county court, where it remained for some months, and was finally dismissed by the court.

The testimony for the plaintiff in error tended to prove the following facts: That in

the latter part of September, or early in October, 1900, he had been down in North Carolina, where he had formerly resided, and that upon his return, which was not later than the 10th or 12th of October, he left three packages at the barroom of Wilkins, with the colored employé Thomas; that one of these packages contained an old pair of trousers, another an old pair of shoes, and the third a pair of new shoes which he had purchased when in North Carolina.

It further appeared that on October 13, 1900, a shipment of shoes was made by A. E. Nettleton, of Syracuse, N. Y., to Bullock & Fleming, of Montgomery, Ala., and that it was from this lot of shoes the pair was taken, with the larceny of which Evans was charged.

Shoes shipped by freight from Syracuse, N. Y., would not reach Pinner's Point in less than two or three days; or, however that may be, it is certain that shoes which were shipped from that point on October 13th were not at Pinner's Point on October 12th. It is highly probable that they were not there for several days after their shipment. According to the testimony of Thomas, the only shoes belonging to Evans, left by him, or any one for him, at the barroom of Wilkins, were left not later than the 12th day of October.

It further appears that the depository of the shoes was not under the control of Evans, nor used exclusively by him; that it was a place in which, or at which, the patrons of Wilkins' barroom were in the habit of leaving packages; and that several were so left during the period covered by this investigation. Upon these facts we think the jury were warranted in finding that no probable cause existed for the charge made against Evans.

But it is said that the railroad is protected by the advice of counsel.

In order that such advice may be a shield against a suit for malicious prosecution, the burden is on the defendant to prove that he sought counsel with an honest purpose of being informed as to the law; that he made a full, correct, and honest disclosure to his counsel of all material facts in his knowledge bearing on the guilt of the plaintiff; and that he was in good faith guided by the advice of counsel in causing the arrest of the plaintiff. *Jones v. Morris*, 97 Va. 43, 33 S. E. 277.

When the detective went to confer with counsel as to the propriety of the arrest, he told him that he had found shoes which corresponded with the mark and the number of the shoes which had been shipped by Nettleton & Co. to Bullock & Fleming over the Atlantic Coast Line road; that he had found them at Wilkins' barroom; that Evans had a room there; that he was a watchman for the Atlantic Coast Line, and that he had a room there in which to sleep in the daytime, or the nighttime, when he was off duty; that the shoes were not found in Evans' room, but in Wilkins' barroom, but they had been

left there by Evans for safekeeping; that he had not taken them upstairs to his room as a mere matter of convenience, saying that he would call for them. The attorney "inquired who would testify to that, or who would say that they were brought there by Evans, and the reply was that Wilkins or his man in the store had given him that information; that the shoes were not the only bundle that was left there at the same time, but there were two other bundles, one an old pair of trousers and the other an old pair of shoes; that they had all been left at the same time, and the trousers and old shoes and the new shoes had all been brought there at the same time and left by Evans." The attorney then made inquiry as to "whether it was certain that Wilkins, or Wilkins' people, would testify to the fact that the shoes had been brought there by Evans, if there was any doubt about that fact, and he was informed that there was not, and that these witnesses would testify to that fact." And thereupon the attorney said: "Why, you have got a case that the law itself makes a case of prima facie guilt. Here the goods are stolen, and they are found in the possession recently of a party who has no title to them, and, as we lawyers call it, it is the recent possession of stolen goods which makes it a prima facie case"—and that the men should be arrested." In order to impress the importance of the fact upon the detective, the attorney told him that "it was a vital question that there would be testimony of Wilkins or his clerk that the shoes had been left there by Evans"; and he was assured that such testimony would be adduced.

The facts, as they appear in the record, upon that point are as follows: That, when the detective went to Wilkins, he was told that Wilkins knew nothing upon the subject, except what he had been told by Thomas. The detective in his testimony states that he went to Wilkins' barroom and asked if Evans had left any parcels there, and Wilkins replied that Thomas had told him that Evans had left some parcels there. These parcels were examined, and among them were found the shoes which had been stolen. He told Wilkins to keep the new shoes subject to his order and not to surrender them to Evans; and his testimony then proceeds:

"Was that the time you saw the negro Peter?

"I saw the negro that evening.

"You saw the negro after you left Wilkins?

"I waited there for him, and saw him that evening. I waited around there until I saw him. I had a talk with Thomas, and Thomas told me Peter was the one that brought them there, and I saw Peter, and he told me he went to Mr. Evans' boarding house and brought them there."

That is the only conversation which the detective claims to have had with Thomas. In a former part of his testimony he was asked with respect to the same occasion:

"Did you question Thomas?

"No, sir; I did not.

"Do you know, or did you inquire, when Evans had brought any shoes to Wilkins' barroom?

"Yes, sir.

"From whom did you inquire, and what answers did you receive?

"I got the message there that Peter had brought the shoes there. Mr. Evans had got Peter to go after these things, I think from County street, and bring them down to the bar, and then Peter stated to me that he carried the shoes there and that Mr. Evans got him to carry the carton boxes out in the back yard and burn them; but, as I told you before, that is hearsay evidence. I don't know whether Mr. Evans did that, but that is the information that Peter gave me after I got the shoes."

Thomas denies that he was ever questioned upon the subject by the detective, the detective both affirms and denies, and the jury, we think, may well have believed the statement of Thomas. Upon this vital question, therefore, as to who left the shoes at the barroom, the only evidence is that Wilkins told the detective that he had been told by Thomas that the shoes had been left there by Evans. Now, if the detective had made careful inquiry of Thomas, he would have learned that the packages to which Thomas referred had been left there not later than the 12th of October, and that the shoes which were charged as the subject of theft did not leave Syracuse until the 13th day of October. The detective says that he talked with Thomas, but Thomas denies this; and, if the detective ever examined him at all upon the subject, he must have done so in a very perfunctory manner, for he failed to elicit the important fact as to the date at which the packages had been left by Evans. Wilkins knew nothing except what he had heard from Thomas, and so informed the detective. The whole case, then, turns upon the statement of Thomas, who, as we have seen, denies that he was questioned by the detective, or that he made to him any statement whatever.

Upon this state of facts the jury found that there was no probable cause for suing out the warrant, and that there had not been a full, correct, and honest disclosure made to counsel of the material facts within the knowledge of the detective, or which should have been within his knowledge had he made a reasonably careful investigation bearing on the guilt of the plaintiff. It was solely upon the information of the detective that the warrant was sworn out, and he is, therefore, to be regarded as the agent of the railroad company.

The instructions given to the jury at the trial correctly stated the law, and the facts were sufficient to support the verdict. We are therefore of opinion that the court erred in setting it aside, and this court will proceed

to enter such judgment as the circuit court ought to have entered.

BUCHANAN, J. (dissenting). I cannot concur in the opinion of the majority of the court. It seems to me the trial court properly set aside the verdict of the jury on the first trial, and that the judgment complained of should be affirmed.

Independently of the advice of counsel and of the fact that the plaintiff was convicted by the justice before whom he was tried, it seems to me the uncontradicted evidence in this case shows that, when the railway company instituted the prosecution complained of, it had knowledge of such a state of facts and circumstances as would excite the belief in a reasonable mind acting on such facts and circumstances that the plaintiff was guilty of the crime for which he was prosecuted. This being so, it had probable cause for its action, and is not liable in this case for damages, although it subsequently appeared that the plaintiff was not guilty.

If the facts and circumstances disclosed by this record are not sufficient to defeat a recovery in a suit for malicious prosecution, the public interests will suffer, for few persons will be willing to run the risk of being mulcted in heavy damages because of honest mistakes made in instituting criminal prosecutions.

It does seem hard that a man may be prosecuted for a supposed crime, and yet have no redress against the prosecutor, and yet this must frequently be so, for the preservation of the peace and order of society requires that even the innocent may be compelled to submit to such inconvenience and hardship rather than citizens should be deterred from instituting prosecutions where there is reasonable or probable cause to believe the accused guilty. Good faith on the part of the prosecutor is always an important, if not a vital, element of inquiry, and is always a sufficient justification, except where an unreasonable credulity is manifested in inducing the prosecutor to draw conclusions of guilt which persons of ordinary prudence and judgment would not have drawn. Newell on Malicious Pros. 269.

The prosecution complained of was, in my judgment, instituted in good faith and with probable cause, and the prosecutor should not be held liable for damages in this action.

(105 Va. 155)

REDWOOD et al. v. ROGERS et al.*
(Supreme Court of Appeals of Virginia. March 1, 1906.)

L. FRAUD—EVIDENCE—CHARACTER OF PROOF.

Fraud, while provable either by positive and direct evidence or by facts and circumstances affording a conclusion of fraud, must be affirmatively proved by clear and satisfactory evidence.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 55-59.]

2. CORPORATIONS—CONTRACTS—ULTRA VIRES.

Where a corporation was authorized by its charter to borrow money and to issue bonds secured by mortgage therefor, and it accordingly executed a mortgage deed of trust to secure an authorized issue of bonds of the value of \$1,000,000, but it was stipulated in the resolution authorizing the mortgage and bonds that not more than \$500,000 worth of bonds should be issued except on the written consent of two-thirds of the stockholders and of the trustee, and more than \$500,000 worth of bonds were issued without any objection being made, a subsequent issue of bonds within the \$1,000,000 limit, upon the written request of two-thirds of the stockholders and of the substituted trustee in the mortgage, for the purpose of paying debts of the company and otherwise promoting its interests, was not ultra vires.

Appeal from Hustings Court of City of Petersburg.

Bill in equity by Philip Rogers and others against John Redwood and others. From a decree in favor of complainants, respondents appeal. Affirmed.

Rehearing denied.

Munford, Hunton, Williams & Anderson, and A. B. Gulgon, for appellants. Alexander Hamilton and Leake & Carter, for appellees.

HARRISON, J. This litigation involves the right of the appellants to have canceled by a court of equity certain bonds issued by the Southside Railway & Development Company, and now held by the appellees.

The Southside Railway & Development Company was incorporated by an act of the General Assembly of Virginia in 1898, with power to establish and maintain the business of a general electric and railway company. By its charter the company was authorized to borrow money and to issue bonds therefor, secured by mortgage upon any or all of its property; to dispose of its property by sale, lease, or otherwise; and to consolidate with any other company or companies incorporated for the purpose of manufacturing or purchasing electricity, or having the power so to do.

For the purpose of raising money with which to pay for certain property acquired by it, and for other purposes of the corporation, as therein set forth, the Southside Railway & Development Company, on July 1, 1899, executed to the Richmond Trust & Safe Deposit Company, as trustee, a mortgage deed of trust, conveying all of its property and franchises then owned or thereafter acquired during the existence of such mortgage, to secure an authorized issue of \$1,000,000 face value of its first mortgage coupon bonds, bearing interest at the rate of 5 per cent. per annum; the principal being payable 50 years after date. By the terms of the resolution authorizing this mortgage and the bonds issued thereunder, it was provided that not more than \$500,000 of these bonds should be issued, except on the vote or assent in writing therefor of two-thirds of the stockholders of the company, and also upon the written assent of the Richmond Trust & Safe Deposit Company, trustee.

*Rehearing denied March 27, 1906.

It appears that \$500,000 face value of these bonds were immediately issued, and that thereafter additional bonds were issued to the amount of \$140,000, making the total outstanding bonds, as of August 1, 1901, of the aggregate face value of \$640,000. These bonds, thus issued, are held by the appellants, and their validity is not questioned.

Subsequently the company made a further issue of \$360,000, face value, of bonds, thus completing the \$1,000,000 of bonds authorized by the mortgage. These last-mentioned bonds, aggregating \$360,000, are held by the appellees, and their validity is called in question by this controversy.

The contention of appellants, in brief, is that they are the holders of \$640,000 of the bonds of the Southside Railway & Development Company, which were legally issued; and their effort is to require the cancellation of the \$360,000 of bonds of the same company held by appellees, which, it is claimed, were illegally issued, to the injury and waste of the security for the bonds of appellants.

The grounds for this contention are (1) that the issue of the bonds held by the appellees was induced by the fraud of George E. Fisher, who owned a controlling interest in the stock of the company, and that such bonds are therefore void in the hands of Fisher or any other party having knowledge of the facts with relation to such transaction; and (2) that, irrespective of the question of actual fraud, the issue of the bonds by the company, under the facts and circumstances of the case, was an ultra vires act, and that therefore such bonds are subject to cancellation in the hands of any party having knowledge of the facts.

The charge of fraud is one easily made, and the burden is upon the party alleging it to establish its existence, not by doubtful and inconclusive evidence, but clearly and conclusively. Fraud cannot be presumed. It must be proved by clear and satisfactory evidence. It is true that fraud need not be proved by positive and direct evidence, but may be established by facts and circumstances sufficient to support the conclusion of fraud. But whether it be shown by direct and positive evidence, or established by circumstances, the proof must be clear and convincing, and such as to satisfy the conscience of the chancellor, who should be cautious not to lend too ready an ear to the charge. Story's Eq. vol. 1, § 190a; Herring v. Wickham, 29 Grat. 628, 28 Am. Rep. 405; Moore v. Ullman, 80 Va. 307; Gregory v. Peoples, 80 Va. 355; Engleby v. Harvey, 93 Va. 440, 25 S. E. 225; Jordan v. Liggan, 95 Va. 616, 29 S. E. 330; Alsop v. Catlett, 97 Va. 364, 34 S. E. 48.

It would serve no good purpose, and would, indeed, be impossible to review in detail within the limits of an opinion of reasonable length, facts and circumstances which are covered by a record of more than 700 printed pages. It must suffice, therefore, to say that, having in view the rules governing this class

of cases, which are so well established by the authorities cited, we have, with due regard to the rights of all the parties concerned, after a careful consideration of the record, reached the conclusion that the charge of fraud is not sustained with such clearness as to justify a court of equity in canceling the bonds held by the appellees, on the ground that their issuance was the result of bad faith.

We are further of opinion that, in issuing the bonds now held by the appellees, the Southside Railway & Development Company was not guilty of an ultra vires act. The company certainly had the power, both under its charter and under the terms of the mortgage, to issue these bonds for a lawful purpose. They were issued, as provided by the mortgage, upon the written request of two-thirds of the stockholders, and upon the written consent of the substituted trustee in such mortgage; and were issued, as expressed in the resolutions adopted by the board of directors, for the purpose of paying debt already created, and otherwise promoting the interests of the company.

The contention that the bonds were issued in an unlawful manner rests chiefly upon the same facts and circumstances which were relied on to support the charge of fraud. The same consideration of the record which led to the conclusion that the alleged fraud was not established constrains us to hold that there is no sufficient ground for the position that the bonds were issued in an unlawful manner.

In the view we have taken of the case, it is unnecessary to consider the demurrer filed by the appellees to the cross-bill of appellants.

Upon the whole case, we are of opinion that there is no error in the decree appealed from, and it must be affirmed.

(60 W. Va. 434)

HARVEY v. RYAN.

(Supreme Court of Appeals of West Virginia.
Feb. 27, 1906.)

1. INJUNCTION—SALE OF LAND—COLLECTION OF PRICE—DEFECTIVE TITLE.

Equity will enjoin the collection of purchase money on land where the vendee is in possession under conveyance with covenants of general warranty, where the title to the land is questioned by suit, prosecuted, or threatened, or where it is clearly shown to be defective.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 42.]

2. SAME.

Such injunction will not be granted unless the bill alleges facts showing a clear outstanding title in a stranger, and the burden will be on the plaintiff to prove the existence of that title. Allegations of defect of title, which do not show in what respect such defect exists, or facts which establish nothing more than that the title is doubtful or unmarketable, will not support the application for an injunction.

3. SAME—EVICTION OF VENDEE.

Where a vendee has entered into possession of land, under deed with covenants of general warranty, and in an action of ejectment a stranger asserts title to and recovers the land, and the vendee is evicted, equity will enjoin

the collection of the purchase money due the vendor therefor, upon proper bill filed for that purpose.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 43.]

4. SAME—REMEDY AT LAW.

At common law, the defense of failure of consideration could not be interposed, nor damages for a breach of warranty of title claimed by way of recoupment, against a sealed instrument. But while, under our statute, these defenses can be made at law, yet where, but for the statute, equity would have jurisdiction, such equitable remedy is not taken away, because the remedy at law is given by statute.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill by H. C. Harvey, executor, against M. B. Ryan and others. Decree for defendants, and plaintiff appeals. Reversed.

Wyatt & Graham, for appellant. Simms & Enslow, for appellees.

SANDERS, J. On the 21st day of June, 1883, M. B. Ryan, by deed with covenants of general warranty of title, conveyed to Robert T. Harvey a certain lot in the city of Huntington, in consideration of which Harvey executed his bond for \$450, payable to Ryan. Ryan's grantor was one Andrew Griffith, who bought the lot of the Central Land Company. Harvey placed a dwelling upon this lot shortly after his purchase, and on the 23d day of December, 1885, John B. Laidley, claimant of the lot, instituted, in the circuit court of Cabell county, an action of ejectment for the recovery thereof, against Harvey's tenant, and, by an order of court, Harvey was substituted as defendant in the action. After the institution of the action of ejectment, Griffith, as assignee of Ryan, brought an action of assumpsit in the circuit court of Cabell county, on the note executed by Harvey to Ryan, whereupon Harvey filed his bill, setting up the facts of the purchase, the execution of the note, the pendency of the action of ejectment, and further alleging that some time in the year 1882, John B. Laidley instituted an action of ejectment against the Central Land Company to recover possession of a certain tract of land in the city of Huntington, within which tract was included the whole of the lot in question and that in said action the Supreme Court of this state decided that the acknowledgment of the grantor, in the deed to the Central Land Company, was defective, and that, in all probability, Laidley would be adjudged the lawful owner of the lot in question. The bill, after alleging that Ryan and Griffith were nonresidents, and insolvent, prayed that an injunction might be awarded, restraining the prosecution of the action of assumpsit until the matter respecting the title to the lot was adjudicated, which injunction was granted. The action of ejectment brought by Laidley against Harvey was determined in September, 1900, it being ascertained by the final judgment entered therein that the

plaintiff had an estate in fee simple in the lot, and that the value thereof, without improvements, was \$450, and the value of the improvements made thereon by Harvey was \$1,000. Laidley elected to relinquish his estate in the lot to Harvey, at the value ascertained. The parties to this suit having all departed this life, the same was revived in the name of and against the personal representatives of such respective deceased parties. On the 23d day of July, 1904, the executor of R. T. Harvey, deceased, filed an amended and supplemental bill, which, after adopting the allegations of the original bill, and stating the result of the determination of the action of ejectment, alleged that Ryan and Griffith, though often requested, had failed, and refused to protect Harvey's title to the lot, and especially the improvements thereon, and that Harvey was compelled to and did pay the judgment, interest, and costs, which exceeded any sum which might be due on the purchase-money note; that Harvey paid said purchase money, interest, and costs through his attorney, Z. T. Vinson, who procured an assignment of the judgment from Laidley to himself; that after the death of Harvey, without the knowledge of his executor, the lot was advertised for sale under the order of sale entered in the action of ejectment, and sold, and purchased by Rufus Switzer, to whom Vinson had transferred the assignment from Laidley; that the Central Land Company, through its attorneys, had promised to save harmless all of its grantees in the property claimed by Laidley, but the company failing to do so, as to this lot, the executor of Harvey, at the March term, 1904, of the circuit court, procured an order to be entered, showing that the judgment and costs in the action of ejectment had been paid, and the sale was thereupon set aside, and the action dismissed. The amended and supplemental bill averred that Ryan and Griffith were both nonresidents, and died, insolvent, in the state of Ohio, and prayed that the injunction awarded R. T. Harvey be made perpetual, that the action of assumpsit be ordered dismissed, the bond canceled, and surrendered, and for general relief. The administrator of Griffith and Ryan appeared and demurred to the original, and amended and supplemental bills, and moved to dissolve the injunction and dismiss the suit, which motions the court sustained, and entered an order to that effect. From this order the executor has appealed.

The single question presented by the bill is whether or not equity has jurisdiction to grant the relief sought, or whether the plaintiff should be relegated to his remedy at law. To determine this question it will be necessary to know when equity will enjoin the collection of purchase money due the vendor, when the contract has been fully executed by a conveyance to the vendee, with covenants of general warranty of title. When

we have determined this question, the facts will be found to be of easy application. The authorities in the different states are clearly at variance as to when a court of equity will intervene and grant such relief. "It is exceedingly difficult, if not impossible, by any process of generalization, to deduce from the decided cases principles of general application which shall serve as rules for the guidance of courts and practitioners." High on Injunctions, § 382. While such conflict exists, yet it is the well-established, if not the universal rule, that a court of equity will grant such relief in cases of fraud or mutual mistake, or where the covenantor is insolvent, or a nonresident, or where to permit the collection of the purchase money will result in irreparable injury to the vendee. In this state, and in Virginia, injunctions have been granted against proceedings to collect purchase money, when there is a complete failure of title, though the vendee is in the undisturbed possession of the property, and the vendor is neither insolvent nor a nonresident, and though no suit by the real owner against the vendee has been prosecuted or threatened. Maupin on Marketable Land Titles, 795, says: "The doctrine that the covenantee may retain the purchase money without suit prosecuted or threatened by the real owner, and with a solvent covenantor to make good the damages when a substantial breach of the covenants has occurred, has received little, if any, recognition without the states of Virginia and West Virginia, where it prevails. It is there rested upon the ground that the covenantee has no adequate remedy at law, there being no right of action on the covenant affirmatively or negatively by way of recoupment or equitable set-off, until eviction. Hence, it appears that in those states there may be a condition of the title, which would justify an injunction against the collection of the purchase money, and yet would not support the defense of recoupment or set-off at law." The doctrine is now well settled, both in this state and in Virginia, by a long line of well-considered decisions, beginning early in the jurisprudence of the state of Virginia, and followed in this state, that the collection of the purchase money will be enjoined, when the vendee is in possession under deed with covenants of general warranty of title, and when the title is questioned by suit prosecuted or threatened, or where the title is clearly shown to be defective; but this doctrine has been extended farther in these states than in any other jurisdiction. It is said by Judge Green, in *Ralston v. Miller*, 3 Rand. (Va.) 49, 15 Am. Dec. 704: "This court has, in favor of a purchaser, gone far beyond anything which has been sanctioned by the courts of chancery in England or elsewhere, in enjoining the payment of the purchase money after the purchaser has taken possession under a conveyance, especially with general war-

ranty. Yet, it has never gone so far as to interfere unless the title was questioned by a suit either prosecuted or threatened, or unless the purchaser could show, clearly that the title was defective." And this was quoted with approval by Judge Green, of this state, in *Wamsley v. Stalnaker*, 24 W. Va. 223, and continuing, he said: "This is the view, which, according to my understanding of the case, has been followed in Virginia and West Virginia, when the vendee was protected by a warranty of title, and had not been evicted."

The case of *Wamsley v. Stalnaker*, is a leading case, giving a review of several of the Virginia decisions upon this subject, which proceed upon the theory that the purchaser should not be required to pay the purchase money where he is in great danger of losing the property. He is not required to take the hazard of the future insolvency of his vendor. No right of action would exist in favor of the vendee until a breach of the covenant, and it being a covenant of general warranty of title, the breach would not occur until actual or constructive eviction. In discussing the question, Judge Green says that Judge Tucker, in *Koger v. Kane's Adm'r*, 5 Leigh (Va.) 608, questions the right to the remedy where there is a covenant of good title, because such a covenant would be broken the instant it is entered into, if the title should be defective. And Judge Green also says: "Judge Tucker bases this right of a court of equity to enjoin the purchase money, though there is a general warranty deed held by the purchaser, if the title is clearly shown to be defective, partly on the ground that on the general warranty the vendee could not sue at law till he was evicted, and seemed to regard it as doubtful whether such relief in equity would be given; if in the deed there were other covenants, which could be sued upon at law before eviction, as, for instance, a covenant for good title; but this point was not decided, nor do I know of its decision in any case in Virginia or in West Virginia. It would seem, therefore, that the extension of the right of a court of equity to enjoin the collection of the purchase money by the vendor because of defect of title, however clear, might perhaps be confined to the case, when there was no other covenant, but the covenant of warranty, and might not be recognized, when there were also covenants, on which the vendee could sue at any time at law, such as covenants of good title." But in reviewing what Judge Tucker said, in *Koger v. Kane's Adm'r*, supra, we find that he used this language: "The jurisdiction thus confessedly exercised by the courts of equity with us, results from what may be called the preventive justice of those tribunals. It arrests the compulsory payment of the purchase money, when the purchaser can show that there is either a certainty, or a strong probability, that he must lose

that for which he is paying his money. It gives him the relief, too, though his demand may be in the nature of unliquidated damages, because he has no other means of ascertaining them. Thus, if the purchaser can show that he has received a deed with general warranty, and that the title is bad, yet if he has not been evicted, he cannot maintain covenant at law and ascertain his damages before that tribunal, in order then to set them off against the demand. If, indeed, there are covenants of good title, etc., it may be otherwise; and so it may often happen, that an action may be brought where there are such covenants of good title, etc., upon which the validity of the title may be tested, and the damages of the party ascertained. Whether in these cases, relief could be given in equity, it is not necessary here to say." It will be observed that Judge Tucker says it is not necessary to decide this question; and from his language it would seem to be susceptible of the construction given by Judge Green, if this were all Judge Tucker said on the subject, but, continuing, he said: "But where there is only a covenant of warranty, this cannot be done; and hence, I conceive, the party would be entitled to the assistance of a court of equity, where he is full handed with proof that his title is defective, although he has not yet been evicted." This would seem to indicate that he thought, after eviction there would be stronger grounds for equity jurisdiction. And then, in *Beale v. Selveley*, 8 Leigh (Va.) 675, Judge Tucker says: "With us it cannot be denied that the practice has been more lax. But even with us, relief is only given to a purchaser who had obtained his deed, where there had been an actual eviction, or where a suit is depending or threatened, or where the vendee, placing himself in the attitude of the superior claimant, can show a clear outstanding title or incumbrance."

But even if that decision, in dealing with this question, did place it partly upon the ground that there is no breach of the covenant of general warranty until eviction, and, therefore, no right of action accrues to the vendee, still there is an additional reason why this remedy should be extended; that is, the remedy of the vendee, at law, is not adequate and complete. If the purchaser should be required to pay the purchase money, and the suit, prosecuted or threatened, should result in a total loss to him of the property, it would then be necessary for him to bring an action for breach of the covenant, while, in the meantime, the covenantor might have become insolvent. And this would also be true as to a vendee who had been evicted by reason of a superior title before the purchase money had been collected, because, while a right of action for damages would exist to the vendee, upon the covenant, yet the defense would not be available to him in an action brought against him upon

a writing obligatory, given for the purchase money. The writing being under seal, it imports consideration, and a defense of failure of consideration or want of consideration cannot be interposed to a writing under seal, at common law. Neither could the damages resulting from a breach of the covenant of warranty be relied on as a common-law counterclaim in the nature of recoupment, since the writing sued on is under seal. The Supreme Court of Virginia, in *Columbia Accident Ass'n v. Rockey*, 93 Va. 684, 25 S. E. 1010, says: "But while a defendant, under the plea of nonassumpsit, might give evidence of matter by way of recoupment, or in diminution of the damages claimed by the plaintiff, even to the entire defeat of his action, yet it was not competent for the defendant to recover in that suit any damages he may have shown in excess of the damages of the plaintiff. If he wished to recover such excess, he could only do so in an independent action against the plaintiff. 4 Minor's Inst. pt. 1, 793, 798. Nor was it competent at common law, as against sealed contracts, to prove a failure in the consideration of the contract, or fraud in its procurement, or breach of warranty of title or soundness of personal property; but the defendant was driven, as when he proposed to recover against the plaintiff any excess of damages, to his independent action at law to recover the damages he had sustained. 4 Minor's Inst. pt. 1, 792; *Taylor v. King*, 6 Munf. (Va.) 358; 8 Am. Dec. 746; *Burners v. Keran*, 24 Grat. (Va.) 42; and *Hayes and wife v. Va. M. P. Ass'n*, 76 Va. 225. The object of the act of 1831 was to remedy these defects, and to enable a defendant both to make such defenses to a suit at law on specialties, and also to recover against the plaintiff any excess of damages he may have sustained, in order to settle in one suit all the rights of the parties arising under the contract, and to prevent circuitry of action and a multiplicity of suits. Its object was to enlarge the right of the defense, and not to impair any previous right, or to take away such defenses where the law previously permitted them to be made." And in *Kinzie v. Riely's Ex'rs*, 100 Va. 709, 42 S. E. 872, it is held that damages for breach of warranty could not be claimed at common law by way of recoupment, against a sealed instrument. *Sterling Organ Co. v. House*, 25 W. Va. 83; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Watkins' Ex'r*, 13 Grat. (Va.) 743. It will therefore be seen that although there is a breach of the covenant of warranty in the deed from Ryan to Harvey, yet he cannot set this up as a defense in the action brought against him upon the purchase-money bond, but must rely upon his separate action for damages for a breach of the covenant, and not being able to make this defense to the action of assumpsit, a court of equity will not require him to pay the money to the vendor, and compel

him to resort to his action upon the covenant, and take the hazard of his vendor's insolvency. We fail to see the reason for such course. The title to the land has been adjudicated to be in Laidley, and Harvey has been ousted. The property for which the purchase-money bond was given has been totally lost to him, and there is no reason why a court of equity should not enjoin its collection. His legal remedy is wholly inadequate. He may pay the money, and then sue at law upon the covenant to recover it back, but this could not be a complete and adequate remedy. The vendor, in the meantime, may have become totally insolvent. This risk the vendee will not be compelled to accept, but equity will extend its aid and prevent the collection of the purchase money.

What we have said as to the defenses to a sealed instrument, applies to the common-law doctrine, for, under our statute, section 5, c. 126, Code 1899, a defendant may plead failure of consideration, fraud in the procurement of the contract, or breach of warranty of title; but this is only concurrent with the equitable remedy, and by section 6 of the same chapter, it is provided that such defense need not be interposed at law, and if not so interposed, it can be availed of in equity. By this statute, it was not intended that the equitable remedy be taken away, but, on the other hand, it is expressly reserved. It was only intended to permit such defense to be made at law, at the election of the defendant. Therefore, if equity, before the enactment of this statute, had jurisdiction, it still has jurisdiction, notwithstanding a remedy by defense at law is given by statute. *Knott v. Seamands*, 25 W. Va. 99; *Bias v. Vickers*, 27 W. Va. 456; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; *Kinzie v. Riely's Ex'r*, supra. While some cases have been referred to to support the views herein expressed, yet, to demonstrate more conclusively that the rule is firmly fixed, and has been followed in this state since the question was first presented, it may be well to review other cases on this subject. In *Womelsdorf v. O'Connor*, 53 W. Va. 314, 44 S. E. 191, it was held that where land was conveyed by deed with general warranty, and the vendee lost the land, that equity will enjoin the collection of the purchase money. Judge Brannon, in delivering the opinion of the court in this case, on page 316 of 53 W. Va., and page 192 of 44 S. E., says: "Counsel for O'Connor would impress upon us the law of actions upon a covenant of warranty; would treat this as if it were a suit by Womelsdorf to recover back money paid upon the land under a breach of warranty. It is not such a suit. It is a suit to enable Womelsdorf to keep in his hands purchase money for his indemnity; I should rather say, not for his indemnity, should he lose the land, but to be relieved from paying money for land already irrevocably lost to him." And in *Bennett v. Pierce*, 50 W. Va. 604, 40

S. E. 395, the same doctrine is announced, citing with approval *Wamsley v. Stalnaker*, supra. And in the case of *Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. 85, we have: "Equity will enjoin the collection of purchase money on land on the ground of defect of title after the vendee has taken possession under conveyance from the vendor with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly, that the title is defective." It is said in this case to show that the title is questioned by a suit, either prosecuted or threatened; that the bill, on its face, must allege the ground on which the threatened suit is based, which must be such as will put a reasonable man in just apprehension of a loss of his land; that the mere fact that some one has asserted claim to the land is insufficient to justify a court of equity in restraining the collection of the purchase money. And in *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. 406, 8 Am. St. Rep. 55, it was held that equity will not require a vendee, who has purchased land and taken a deed with covenants of general warranty, to pay the purchase money, when a part of the land sold is claimed by others, and the title is defective; but that if the purchaser can show clearly that the title is defective, equity will not require him to pay the purchase money until such defect is removed, or a proper abatement decreed, and citing with approval *Yancey v. Lewis*, 4 Hen. & M. (Va.) 390; *Ralston v. Miller*, 3 Rand. (Va.) 44, 15 Am. Dec. 704; *Koger v. Kane's Adm'r*, 5 Leigh (Va.) 606; *Clarke v. Hardgrove*, 7 Grat. (Va.) 399; *Lovell v. Chilton*, 2 W. Va. 410; *Wamsley v. Stalnaker*, supra; and *Kinports v. Rawson*, supra. Also see the following authorities: *Renick v. Renick*, 5 W. Va. 285; *Thompson's Adm'r v. Catlett*, 24 W. Va. 524; *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Morgan v. Glendy*, 92 Va. 86, 22 S. E. 854; *Gay v. Hancock*, 1 Rand. (Va.) 72; *Beale v. Selveley*, 8 Leigh (Va.) 658; *Grantland v. Wight*, 5 Munf. (Va.) 295; *Richards v. Mercer*, 1 Leigh (Va.) 125.

It is argued by counsel that there is no averment of irreparable injury; that while it is averred that Ryan, the immediate grantor of Harvey, is insolvent, yet it is not averred that the Central Land Company, Harvey's remote grantor, is insolvent. The allegation of insolvency has never been one of the requisites for extending relief of this character, and even if it were so, it is averred in the bill that Ryan, the immediate grantor is a nonresident, having died, in the state of Ohio, insolvent, and the vendee would not be required to pay the purchase money and then resort to his action against a remote vendor. While it is true the Central Land Company conveyed with covenants of general warranty of title, which covenant runs with the land, and of which the vendee could avail himself, yet equity will not permit the collection of the purchase money from him,

and compel him to resort to this remedy; and not only that, but the remote grantor would only be liable upon his covenant for the amount of the purchase money paid him, which might, in many instances, be wholly inadequate, even if such remedy should be resorted to. While it is true, in this case the consideration paid to the Central Land Company is the same as that paid by Harvey, yet this cannot alter the case, because the rule must be one of general application, and not one which may be applicable to some cases, and not to others. We deduce from the authorities that it is clear, from the allegations of the bill, that equity has jurisdiction to enjoin the collection of the purchase money. The original bill shows that the action of ejectment was instituted for the recovery of the land conveyed to Harvey for which the bond was executed. The amended and supplemental bill shows that the suit was prosecuted to a final termination, which resulted in a judgment in favor of Laidley. Harvey, having made improvements upon the property, the question of the value of the improvements, and the value of the lot, without improvements, was submitted to the jury, and the lot, having been found to be of the value of \$450, and the value of the improvements, \$1,000, Laidley elected to relinquish his title to the lot, and accept its value, and the lot was ordered sold unless the amount at which it was valued was paid by Harvey. Subsequently, the lot was sold, but the sale was not confirmed, and Harvey satisfied the judgment. This being so, a court of equity will not require the payment of the purchase money by Harvey, and force him to his action upon the covenant contained in his deed from Ryan, even if he were solvent, but the fact of his insolvency is an additional reason for equitable interference. It is claimed that at the time Harvey purchased the lot, the ejectment suit was pending, and that this is an additional reason why a court of equity should not entertain him. The deed to Harvey is with covenants of general warranty of title, and although the action of ejectment was pending, yet this will not prevent him from enjoining the collection of the purchase money.

Care should be taken, however, to distinguish the case here from that class of cases in which injunctions to prevent a sale under a deed of trust, whether executed to secure deferred payments of purchase money, or to secure general indebtedness, have been freely granted in this state and in Virginia, upon the allegation that there is a cloud upon the title to the land about to be sold. In such cases, the injunction is granted until the cloud on the title is removed. This is done in the interest of all parties, that there may be no sacrifice of the property, and that the title of the purchaser may be assured.

For the reasons given, we reverse the decree of the circuit court, dissolving the injunction and dismissing the bill, and remand the cause.

(59 W. Va. 145)

ROBINSON v. GOLDMAN'S ADM'R et al.
(Supreme Court of Appeals of West Virginia.
Feb. 27, 1908.)

1. APPEAL—PROCEDURE—REVIEW.

This court exercises its appellate jurisdiction by appellate process only, and where no such process has been allowed, this court is without power to review for error.

2. SAME—DEFECTIVE—DISMISSAL.

A case in which the appeal allowed must be dismissed as improvidently awarded because not allowed from any order or decree in the cause.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County.

Bill by Samuel I. Robinson against B. B. Postlethwaite and others. Decree for defendants, and plaintiff appeals. Dismissed.

T. P. Jacobs and B. T. Bowers, for appellant. Hall & Hall, for appellees.

COX, J. This suit in chancery was brought in the circuit court of Wetzel county on the 29th day of May, 1903, by Samuel I. Robinson against B. B. Postlethwaite, administrator of the estate of Benjamin Goldman, deceased, Frances Goldman in her own right and as widow of Benjamin Goldman, and his children and heirs. The petition of Samuel I. Robinson for the appeal recites this fact, and further states: "Such proceedings were thereafter had in said cause, as the record of said cause shows, that on the 10th day of March, 1903, the said cause came on for a final hearing. The record of the said cause and of the final decree therein, of which your petitioner complains, is herewith exhibited. Your petitioner is advised and believes and so represents unto your honors that the judgment and ruling of the said circuit court made and shown by said final decree is erroneous, and that he is aggrieved thereby, and he here makes the following assignment as the error complained of: After the recovery of \$2,792.39, as recited in said decree, the said circuit court further says: '*But the court doth refuse to hold that the same is a charge or lien against the undivided half interest of the defendant, Frances Goldman, in and to the real estate involved in this cause, being lots 94 and 95 of the town of New Martinsville, West Virginia, and doth refuse to enter any decree as to that matter.*' This, your petitioner claims, should have been done. For this error your petitioner humbly prays that an appeal be granted and allowed him from said decree of March 10, 1903, and that the same be reversed, and such decree entered, as is right and proper." The appeal was allowed as prayed for.

It will be observed that the date of the decree from which an appeal was asked and allowed precedes the date of the bringing of the suit more than two months. By examining this record, we find that the final and only decree entered in this cause was a decree quashing the attachment and sustaining the demurrer to, and dismissing, the plain-

tiff's bill, entered on the 8th day of October, 1903, from which no appeal has been asked or allowed. We might consider that the statement, contained in the petition, of the date of the decree from which the appellant intended to ask an appeal, was a clerical error or mistake, if it were not for the further statement therein of the substance of the decree complained of, and the error therein assigned, both wholly foreign to any matter contained in or adjudicated by the decree of the 8th day of October, 1903, in this suit. It appears by the plaintiff's bill in this suit that there had been a former suit instituted by the appellant against Benjamin Goldman in his lifetime, Frances Goldman, his wife, and Max Goldsmith, and that such proceedings were had therein that a decree was entered on March 10th, 1903, a copy of which is made an exhibit with the bill in this suit. This decree in the former suit, according to the purport of such copy, gave a recovery in favor of appellant against the administrator of Benjamin Goldman for \$2,792.39, Goldman having previously died. This decree also contained the language in italics quoted above from the petition, and which, by the petition, is claimed to constitute error. Therefore we have to abandon the idea of clerical error or mistake in stating the date of the decree intended to be appealed from by the appellant. It is claimed that the bill in this suit is a bill of review, filed for the purpose of reviewing the decree in the former suit; but if so, no appeal from any order or decree in this suit has been asked or allowed.

We have then this state of facts: A petition filed in this suit, accompanied by the record of this suit, which petition did not ask an appeal, and no appeal has been allowed, from any decree or order in this suit; but the petition prayed for an appeal from a decree in another suit, and assigned an error therein, and from that decree an appeal was apparently allowed without a transcript of the record of that suit. We have no record upon which to review the decree in the former suit. We have a record in this suit, but no appeal upon which to review it. How this confusion arose we are unable to say. This court exercises its appellate jurisdiction by appellate process only, and where no such process has been allowed, this court is without appellate power to review for error. The statute, in substance, provides that with a petition for an appeal, writ of error or supersedeas, there shall be a transcript of the record of so much of the case wherein the judgment, decree, or order is, as will enable the court or judge to whom the petition is to be presented, properly to decide on such petition, and as will enable the court, if the petition be granted, properly to decide the questions that may arise before it. Code 1899, c. 135, § 5. A case will be dismissed by the appellate court when it does not appear from the record that an appeal was

taken. 2 Cyc. 1025; *Plummer v. People's Bank*, 73 Iowa, 752, 33 N. W. 150; *Beard v. Arbuckle*, 13 W. Va. 782.

Under the facts here appearing, we have nothing further to consider. The appeal granted must be dismissed as improvidently awarded.

(59 W. Va. 165)

AMMONS v. TOOTHMAN et al.

(Supreme Court of Appeals of West Virginia.
Feb. 27, 1906.)

MINES AND MINERALS—DEED OF OIL—CONSTRUCTION.

A deed conveys oil in land "except a well now producing oil." That well, ceasing to produce oil, is deepened by the lessee to a different sand rock, and produces oil from it. The exception excepts from the operation of the deed the oil produced from the lower sand rock.

(Syllabus by the Court.)

Appeal from Circuit Court, Monongalia County.

Bill by Corbly A. Ammons against Charlotte Toothman and others. Decree for defendants, and plaintiff appeals. Affirmed.

Geo. C. Baker, for appellant. Moreland & Glasscock and Chas. Powell, for appellees.

BRANNON, J. William Shuman and wife, owning a tract of land, made a lease of it for the production of oil and gas, which lease came by assignment to the South Penn Oil Company. The lease provided for payment to Shuman of one-eighth of the oil as royalty. Shuman sold half of this eighth of the oil and died owning the other half of the eighth. Under this lease the South Penn Company drilled two wells on the land, one unproductive, the other productive out of what is called the Big Indian sand. This well was 1,900 feet deep, and produced oil in paying quantity. This well was called Well No. 1. On the death of William Shuman and Minerva Shuman, his wife, said half of said eighth oil royalty payable to them under said lease went to three heirs; one of them being Charlotte Toothman. The said tract of land was divided between the three heirs, Charlotte Toothman getting for her share a tract of 57 acres and a fraction; but the oil was not divided, but left in common for the three heirs, the three heirs owning the said half of one-eighth royalty in common. The said producing well was on Charlotte Toothman's separate tract, though the oil therefrom belonged to all three heirs. Charlotte Toothman and her husband made a deed, 6th December, 1897, to Corbly Ammons and Isaac Ammons, conveying the said tract of 57 acres in fee, and also conveying one-half of the oil and gas owned by Charlotte Toothman in the entire lands which had been owned by her father and mother, William R. and Minerva Shuman, "except the well that is now producing oil on said land." The language of the deed as to this is as follows: "The second party is to have one-half of the oil and

gas that may hereafter be produced under the land that belonged to Minerva Shuman and William R. Shuman, and the first party reserves the one-half of said oil & gas. This deed means $\frac{1}{2}$ half of the first party interest in said oil and gas, except the well that is now producing oil, on said land." At the time that deed was made said Well No. 1 was producing oil from the Big Indian sand in paying quantity, but later it ceased to produce oil in paying quantity, and the lessee, the South Penn Company, drilled said well from 1,000 to 1,100 feet deeper, down to a lower and different sand rock stratum from the Big Indian, abandoning the latter sand rock. The deeper sand rock or stratum being known as the Fifth sand rock, not known to be an oil producing stratum at the date of the deed, as no wells in that section of the country had then been drilled to that sand or stratum. Said well on reaching that deeper stratum found oil in paying quantity. The South Penn Oil Company produced oil from this lower stratum and recognized Charlotte Toothman as owning her full share in the oil produced from said lower stratum and delivered it to her credit to the Eureka Pipe Line Company for transportation, and did not recognize Ammons as having any interest in the oil from that well. Isaac Ammons having sold his interest to Corbly Ammons, the latter brought a suit in equity in Monongalia county against Charlotte Toothman and said two companies for discovery and account for the oil produced from said Fifth sand through Well No. 1, and to have a decree against those liable therefor, and to have a decree declaring him entitled to half the share of oil of Charlotte Toothman produced, or to be produced, through said well from said Fifth sand; the bill thus claiming that the deed from Toothman to Ammons reserved only the Toothman share produced from the Big Indian sand and excepted no oil in the lower sand, but that Ammons was entitled to half of that oil. The court sustained a demurrer to the bill as to this claim of Ammons, and he appealed.

The question is: Does that deed convey to Ammons the half of Mrs. Toothman's share of oil coming from the lower sand rock, or does it except the oil produced from that rock through said well, and exclude Ammons from any interest in that oil? The main argument for the position that the deed confers half of Toothman's interest in the oil from the lower sand rock is that, when the well ceased to produce oil it was an abandoned well, it became a dry hole, and that Toothman's estate in it ceased, and she no longer had any estate in it. For this position the case of *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, is relied upon, because of its holding: "The completion of a nonproductive well, though at great expense, vests no title in the lessee." That case refers to the lease. It means that if, under the usual oil lease, a nonproductive

well is drilled and abandoned, no estate vests in the lessee. That is not the question or test here. No one can claim that under such lease, if the lessee go on in further exploration, his right is lost. He may go on in a reasonable time. But that is not the question here, because when that well produced oil in paying quantity from the upper sand, an estate vested in the South Penn Company and remained vested in it. The bill admits that that well produced oil in paying quantity. Therefore an actual estate vested in the lessee, and, though that well ceased to produce oil from the upper sand, the lessee had an estate still under which it had right to go on lower with the well, and did so. The lessee's right was not lost or abandoned, and neither was Mrs. Toothman's right gone. The lessee chose to retain its estate and well by sinking that well deeper, and its right continued, and so did the right of Mrs. Toothman. Her right depended on the right of the South Penn Oil Company, followed it, and was measured by it. As long as that Well No. 1 was a well for the lessee, it was also a well for Mrs. Toothman. That well was not abandoned by the company. But the argument is, not that the lease failed, but that the company abandoned the upper sand; it did not abandon the lease or lose its estate under the lease, but the claim is that the company abandoned that well so far as the upper sand was concerned. In other words, it claimed that it abandoned that well. This is a very refined argument—very technical. It is argued that when sunk to a lower sand, a quick change was wrought in that well, and it became a new well, another and different well from what it had been. This is a very refined and technical argument. It is not a new well, not a different well, in any sense; it is only a deeper well. The 1,900 feet which had been bored remained still a part of that well—its greater part. The hole was the same hole in the ground; its identity was not gone. The mouth of the well from which the oil issued was the same. The oil from the lower sand came through that 1,900 feet and issued from the mouth of the well, from the Fifth sand, just as it had from the Big Indian sand. The 1,900 foot depth and the mouth of the well were used and utilized in the production of the oil from the lower sand. What if the oil came from the lower sand? It came through the 1,900 feet, and issued from the old orifice. I cannot see that the identity of the well was lost. A well remains the same well though continued down into the earth deeper. To say that Toothman was tied down by the exception in the deed to oil coming from the Big Indian sand is unreasonable. Where is the language in the deed that does this? The sinking of the well lower was an eventuality or a contingency not unlikely to occur, and we may say might be regarded as probable. Oil wells are often sunk deeper. The claim is that Mrs. Tooth-

man in that exception in her deed had her mind only on oil produced from the upper sand, and intended to except only that. Where are the words to speak that intent? The exception is of that well, meaning all oil produced through it, and Ammons was excluded from ownership in that well. The plain intent was to exclude him from any interest in oil produced from that well, come from where it might in the future. Mrs. Toothman may fairly be said to have intended to retain her interest in all oil coming through that well so long as the lessee should operate it by producing oil through it, in whatever manner the lessee might operate that well. There was the lessee actually operating the well at the date of the deed, and, to whatever depth the lessee might sink that well, to that depth also the exception in the deed must go. Did the parties mean anything else? In the first place, here is a broad exception of that well, excluding Ammons from oil produced in it. It is an exception, not merely a reservation. Strictly speaking an exception keeps the deed from passing the thing excepted, a reservation reserves something out of the thing granted. Mrs. Toothman never granted oil in, or to come through, that well. That exception means that the deed was not intended to confer on Ammons any right at all as to that well or its product. I say there is that broad language. Such are the words of the deed speaking the intent under all circumstances. But suppose we seek probable intent outside the words. Suppose Mrs. Toothman had been told that the deed would except only the oil from the upper sand. Do you think she would have agreed to it? Suppose she had been told that, if the lessee should bore lower and get a rich stream of oil from a rich sand rock, she would have no interest in it. Think you she would have agreed to it? Did either side mean it? And yet great stress is laid in argument upon a supposed intent to limit the exception to the Big Indian sand, and to make the deed pass to Ammons oil from the Fifth sand. I say the inference is very strong against any such intent. If we grope about for intent outside the words of the deed, it is much more reasonable to say that Mrs. Toothman intended to retain all her oil in that well, come from what depth it might, than to limit herself to one sand rock and give to Ammons all oil below it. The deed does not mention any sand rock. To say that it refers to only one is going outside the deed and making the deed do what its words do not do. I would emphasize the fact as important that when that deed was made the well was in actual operation producing oil, with a vested estate in the lessee to continue that well to a lower depth, and as Mrs. Toothman excepted that well her right was coequal with that of the lessee and followed the lessee's right as long as it existed. It was not a new well to the lessee, neither was it a new

well as between Mrs. Toothman and Ammons. A lease in 1831 was made to mine coal in lands. Under it two seams were opened and mined. In 1834 a will gave the widow of the lessor "rents, issues and yearly proceeds for life" in the lands. In 1856, the lease being nearly expired and the coal in the two seams which had been worked becoming exhausted, a new lease was made, and under it the mine was sunk to another seam of coal, the Brockwell seam, at a depth of 118 fathoms below the seam which had been opened. That seam was utterly unknown until 1846. The question was, did the widow have right, as life tenant, in that lower seam of coal under the rule that a life tenant can work to exhaustion a coal mine opened when the life estate vests? It was claimed, as in this case, that this different seam of coal far below the upper ones was a new mine, not one opened at the date of the commencement of the life estate. The widow was held entitled to the rents of the lower vein, because the deeper excavation was only a continuance of the old mine. The opinion says: "I am clear that this is the old mine. *Clavering v. Clavering* did not confine the right to one seam. If there be one shaft by which you can work five seams, and which are all let, but only one is worked at first, I am of opinion that when the lease begins to work the other seams it cannot be said to be opening a new mine. I have no doubt that it is substantially and practically the old mine. I agree that, if a man has opened a shaft for mining coal, and he finds in another part of his estate mines of lead or ironstone, which could not be got by means of the old shaft or opening, this would be opening a new mine; but here the lessees were at liberty to open other shafts, and to work all coal and ironstone, and I think that this is only a repetition of the working of the old mine." *Spencer v. Scurr*, 31 Beavan's Rep. 337. Just so in this case. Here the South Penn had bored to a certain stratum or seam at the date of this exception. It went on down to another stratum, and the rights of Mrs. Toothman went with the South Penn's rights into the lower oil stratum. Mrs. Toothman intended to keep to herself all her share of the oil produced in that well then being worked by the lessee, and neither of the parties contemplated that her right should stop at the Big Indian sand. No such idea was in their heads. The deed does not do so.

I cite *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528, not as conclusive, but as leaning in favor of the position above taken. The syllabus says the life tenant may sink new shafts into the same veins of coal, and that he may go through a seam already opened, and dig into a seam that lies under the first. The seams were separated by slate. How thick does the slate have to be to make it another vein? Certainly the case goes that far. But the answer set up right under the life tenant "to sink new shafts

and pursue the coal in every direction, and to every extent they may think proper to obtain the coal." The answer claimed that all the coal in the land was part of the same mine. The attorneys argued that the word "mine" included "the whole mass or vein of coal contained within the land." The court simply dissolved the injunction, specifying no reason. So, we may say the court took this view. The syllabus was not prepared by the court. If there be a shaft into a vein of coal, and the life tenant exhaust it, must he do without coal when by extending his shaft to a lower vein he can get it? The words "the well now producing oil" are not descriptive of the oil; they do not merely mean the oil now being produced; they do not describe the oil to be produced from any particular sand; but they were used to describe and identify the well. They were intended to exclude Ammons from a particular well.

Decree affirmed.

(59 W. Va. 173)

BROWN et al. v. CLICK et al.

(Supreme Court of Appeals of West Virginia.
Feb. 27, 1906.)

1. CANCELLATION OF INSTRUMENTS—EVIDENCE.
To cancel a note and deed of trust to secure it on the claim that they were given for a contemplated loan, and that the loan was never made, the oral proof must be very full, clear, and convincing.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 102.]

2. WITNESS—TRANSACTIONS WITH DECEDENT.
An agent contracting in behalf of his principal with a person since deceased is a competent witness in behalf of his principal against the estate of the deceased party to prove the transaction.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 576-579.]

(Syllabus by the Court.)

Appeal from Circuit Court, Putnam County.

Bill by H. C. Brown and others against George Click and others. Decree for plaintiffs, and defendant Click appeals. Reversed.

Rankin Wiley and W. R. Gunn, for appellant. J. W. English and Chas. E. Hogg, for appellees.

BRANNON, J. H. C. Brown and his wife, E. R. Brown, made a note to C. Click for \$400 and a deed of trust on a house and lot to secure it, and when the trustee gave notice of sale under the trust they filed a bill of injunction in the circuit court of Putnam county to enjoin the sale and cancel said note and deed of trust, and a decree was entered annulling said deed of trust, from which decree an appeal has come to this court.

The statement of the bill is that both Brown and his wife owned separate real estate, and that a suit was brought by a creditor of Brown to subject the real estate of both him and his wife to his indebtedness, and that an agreement was made with Click

to obtain a loan from him of \$400, in case the result of the suit should render it necessary, and that the note and deed of trust were made and delivered to one Wartenburg, who took them to Click and left them with him to raise money upon, should it become necessary to pay such indebtedness; but that, while the result of the suit was to subject H. C. Brown's property, it did not subject his wife's property, and he concluded to let his property go, and not incur his wife's house and lot, and so Click never furnished any money at all.

The heavy burden of proof to defeat these evidences of debt rests on the plaintiffs. If we do not call for full proof in such cases, what do solemn writings proving debts amount to, especially when their owner's lips are closed in death? This plain principle of justice stares us in the face at the outset of the case. Click held these papers five years and a half, and not until his death do we hear of their defense. Is it not most remarkable that both Brown and his wife would let those papers lie so long in Click's hands? Strange that the wife would so long let them hang over her little home, even if her husband would be so negligent. Counsel for Brown says that it counts against Click's estate that he let the debt stand so long and did not collect interest. He was a money lender and would prefer the debt to stand. I think the fact argues more strongly against Brown. Why leave these dangerous papers so long in Click's hands, when it was a deep concern on the part of the Browns to demand them? The possession of these papers is a controlling factor in the case. The evidence of Brown and wife that they received no money counts for naught against a dead man's estate. Wartenburg's evidence sustains the bill; he saying that the Browns got no money of Click. Wartenburg is a brother-in-law of Brown, and displays active interest in the matter. He is contradicted by Jacob Eyler, who swears that he saw Click count out \$400 to Wartenburg to be delivered to the Browns, and saw Wartenburg deliver note and deed of trust to Click. After Click's death, when his property was being listed, this note was found, and a question arose as to its solvency, and a witness said to Wartenburg that he had written it and ought to know about it, and Wartenburg said the note was good and bound the property of Mrs. Brown. Two other witnesses swear to this. Reiber's evidence is that he heard Wartenburg say that he thought Brown had paid the note, and that it must have been four or five years since they got the money. The fact that the note dates 17th January, and the deed of trust the 27th is a circumstance against Browns, indicating that Click would not take the personal note, and then later the trust was made. And early in the case it strikes any one as highly improbable that Wartenburg, a business man of capacity, an attorney, would leave these papers in Click's

hands, he living 60 miles distant, before any money was got. Stranger still that Brown and his wife would consent to it. People are not often so negligent in a matter so important. Strange too that Wartenburg would, as the friend of Mrs. Brown, make a trip of that distance before any suit was brought to charge her property. The debt that was to come on Mrs. Brown's property was only \$180. Why arrange to borrow \$400? This is an answer to that pretense. It speaks strongly against Wartenburg's evidence that, when he was present at the inspection of Click's papers after his death, he did not declare that the Browns had got no money of Click. Why did he not, then and there, say that that note and that deed of trust were not valid? If he knew that he had taken them to Click to be effective only in case money should be borrowed of him, if he had not gotten any money from Click, why did he not, on the spot, protect his sister-in-law from an unjust demand? He does not pretend that he made any such declaration. But he said the debt was good. He said the trust was solvent, treating it as a just debt.

The question is raised whether Wartenburg, being an agent of the Browns, is competent to give evidence against Click's estate. We think that his evidence is competent. Section 23, c. 180, Code 1899, declares that no person shall be excluded as a witness by reason of interest, thus abrogating the common-law rule. The section states specific exception to competency, and does not disable on account of agency. To be incompetent the witness must fall within an exception. It is held that an agent contracting with a party since dead is competent in behalf of his principal to prove the contract. *Clark v. Thias*, 173 Mo. 628, 78 S. W. 616; *Dawson v. Wombles* (Mo. App.) 78 S. W. 823.

We reverse the decree, dissolve the injunction, and dismiss the bill.

(59 W. Va. 175)

STATE v. TRAIL.

(Supreme Court of Appeals of West Virginia.
Feb. 27, 1906.)

1. HOMICIDE — EVIDENCE — DECLARATIONS OF DECEDENT.

In a trial for murder, the uncommunicated declaration of the deceased of his purpose to have illicit intercourse with the daughter of the defendant, which he declared he could do "if he could get the old man drunk," is not admissible in evidence.

2. SAME—DEFENSES—BURDEN OF PROOF.

In the trial of an indictment for murder, if the homicide is proven to have been committed by the defendant, then the presumption of murder in the second degree arises against the defendant, and the burden of proof rests upon him to make such defense as will reduce the crime below such degree, or as will justify the act, and such defense may be found in the evidence adduced by the state and that of the defendant and all the circumstances of the case.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 280, 283.]

53 S.E.—2

3. WITNESSES—CREDIBILITY—INSTRUCTIONS.

Where a witness in a trial of a case makes statements in material matters touching the issue inconsistent with former statements made by him concerning the same matters, the party against whom such witness testifies is entitled to have the jury instructed that, if they believe from the evidence in the case that the witness made inconsistent and contrary statements concerning such matters, then the jury has the right to disregard the whole testimony of such witness, or give it such weight as to which they think it is entitled.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1265, 1266.]

4. CRIMINAL LAW — CIRCUMSTANTIAL EVIDENCE.

Syllabus, points 3, 4, and 5, *State v. Flanagan*, 26 W. Va. 116, approved and applied.

Brannon and Sanders, JJ., dissenting in part. (Syllabus by the Court.)

Error from Circuit Court, Putnam County.

Thomas C. Trail was convicted of murder, and brings error. Reversed.

J. L. Stevens, John L. Whitten, A. P. Farley, and Chas. E. Hogg, for plaintiff in error. C. W. May, Atty. Gen., and Frank Lively, for the State.

McWHORTER, P. Thomas C. Trail was indicted in the circuit court of Putnam county for the murder of Peter Bowles and convicted of murder in the second degree and sentenced to the penitentiary for the period of six years.

Upon the trial defendant by counsel took five bills of exceptions numbered 1 to 5, respectively. Bill of exceptions No. 1 includes all the evidence taken in the case; No. 2 calls in question the instructions given for the state; No. 3 goes to the refusal of the instructions offered by the defendant; and No. 4, which is made the subject of the first assignment of error in the petition for writ of error, relates to the rejection of evidence offered on behalf of the defendant. The evidence sought to be introduced was that of witness C. E. Rogers giving a statement made to him by the deceased. Witness says: "It was some days before this occurrence, probably two or three weeks, I could not be positive about that." The statement which was excluded from the jury was: "Mr. Bowles told me that he were going down to Mr. Trail's to f—k Lona; he said he knowed he could, if he could get the old man drunk. That is about all I remember that Mr. Bowles said directly in that." It is not contended that this statement was ever communicated to the defendant, but, on the other hand, it is admitted that it was not communicated to him. In *State v. Evans*, 33 W. Va. 417, 10 S. E. 792, it is held: "Evidence of communicated threats is calculated to shed light upon the mental attitude of the prisoner towards the deceased when the homicide occurred; uncommunicated threats are evidence of the mental attitude of the deceased towards the prisoner. Both are admissible." The words attributed to Bowles were not a threat against, nor to do violence to,

the defendant, but a statement of what he proposed to do with defendant's daughter, first getting the defendant drunk. It is shown by the record that the defendant and the deceased were good friends; the prisoner himself spoke of him as his friend, and said he had always taken him to be his friend. Counsel for defendant do not cite any authority for the admission of declarations of this character but only as to threats of violence, and I find no such authority. In *Newland's Case*, 27 Kan. 764, it is held: "In a criminal prosecution for assault and battery the defendant has no right to put in evidence the declaration of the party assaulted made before or after the affray in reference thereto." In *State v. Zellers*, 7 N. J. Law, 220, it is held: "A conversation of the deceased with a third person, or acts of the deceased which never came to the knowledge of the prisoner, cannot be received in evidence." I am unable to see how the defendant is prejudiced by excluding this declaration of the deceased, which was not communicated to the defendant and of which he had no knowledge, and consequently could in no way be affected by it. The only effect its introduction could have had, if any, would be to lower the character of the deceased in the estimation of the jury, and have a tendency to lead the jury to believe the purpose of the visit of the deceased to the home of the defendant was to debauch his daughter, when they should consider this declaration in connection with the evidence of deceased's conduct towards the daughter on the night of the killing; but it in no way tended to prove enmity in the mind of, or malice of the deceased towards, the defendant himself. It was properly excluded.

The second assignment of error is the giving of instructions for the state as set out in bill of exceptions No. 2; exceptions going to each and every one of said instructions. The first instruction is defining the reasonable doubt. The second instruction as modified and given is as follows: "The court further instructs the jury that the credibility of witnesses is a question exclusively for the jury; and the law is that, where a number of witnesses testify directly opposite to each other, the jury is not bound to regard the number of witnesses who may have testified on one side as against the number who testified on the other side; the jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, and their apparent candor and fairness, their apparent intelligence or lack of intelligence, the interest of the witnesses in the result, and from all other surrounding circumstances appearing on the trial determine which witnesses are more worthy of credit and what is relative weight of any such testimony, and to give credit accordingly." While these two instructions are included in the bill of exceptions, they are not relied upon as being erroneous in the briefs of coun-

sel for the defendant and are deemed fair and proper. Instruction No. 3 is objected to because it is claimed that it clearly deals with the weight and value jurors should give to certain testimony. The instruction reads as follows: "The court further instructs the jury that, in determining the weight to be given the testimony of different witnesses in this case, the jury are authorized to consider the relationship of the witnesses to the parties, if the same is proved, their interest, if any, in the results of this case, their temper, feeling, or bias, if any, has been shown, their demeanor whilst testifying, their apparent intelligence, and their means of information, and to give such credit to the testimony of such witnesses as under all the circumstances such witnesses seems to be entitled to." The instruction does not convey to the minds of the jury any indication of the weight given to the testimony by the court of any witness, but simply instructs the jury what matters may be taken into consideration by them in considering the testimony of witnesses who are proven to be within certain relationship to the parties, and to consider the interest of such witnesses in the result of the case "their temper, feeling, or bias, if any, has been shown, their demeanor whilst testifying, their apparent intelligence and their means of information," and in view of all these things to give such credit to the testimony of such witnesses as they might seem to be entitled to. Nothing can be drawn from this instruction to indicate the bias of the court as touching the weight of the evidence of such witnesses. Counsel for defendant cite in support of their position in regard to instruction No. 3, point 20, Syl., in *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488: "The giving of erroneous instructions bearing upon the weight and value of certain testimony when the evidence is contradictory is cause for reversal." This raises the question, what is an erroneous instruction bearing upon the weight and value of certain testimony? I take it that it is an instruction not leaving the whole question of the weight of the evidence with the jury, as in this case, but one which conveys to the mind of the jury the opinion of the court in relation to the weight of such testimony, or an instruction which leads the jury to the conclusion that the mind of the court is that the weight of such testimony preponderates the one way or the other; but there can be no objection to the court instructing the jury in relation to all the elements which are proper to be taken into consideration by the jury in weighing the testimony.

It is contended that instruction No. 4 should not have been given, at least without giving No. 10 asked for by the defendant in connection therewith. Instruction No. 10 is as follows: "The jury are further instructed that, if they believe from the evidence that Thomas C. Trall was not attempting to take the life of Peter Bowles at the

time of the cutting, but was defending himself from the assault made upon him by Alfred Maynard, or Peter Bowles, or both of them, then this would be substantial denial of criminal intent upon the part of the said defendant, and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony, and the jury should find the defendant not guilty." Instruction No. 4 is point 2 in the syllabus of the case of *State v. Cain*, 20 W. Va. 679, and given in *Hill's Case*, 2 Grat. (Va.) 595. And No. 10 is misleading. The burden of proof was already on the state to prove criminal intent beyond a reasonable doubt, the criminal intent is the gist of the offense, and without such proof full and clear no indictment for crime could be sustained. If the homicide is proven to have been committed by the defendant, then the presumption of murder in the second degree arises against him, and the burden then falls on him to make such defense as will reduce the crime below such degree, or as will justify the act, and such defense may be found in the consideration of the evidence and case made by the state in connection with that adduced by the defendant. This is a binding instruction, not as to the degree of crime, but that, if the jury should believe that defendant was defending himself from the assault of Maynard, or Bowles, or both of them, it would necessarily amount to justifiable homicide. Defendant might have been defending himself against an assault, and yet not justified in killing his assailant; that depends upon all the evidence and the circumstances. No. 4 was properly given and No. 10 was properly refused.

Instruction No. 5 given for the state is in the following words: "The court further instructs the jury that to convict one of murder it is not necessary that malice should exist in the heart of the accused against the deceased. If the accused was guilty of striking with a deadly weapon another, and of killing him, the intent and malice may both be inferred from such act; and such malice may not be directed against any particular person, but may be such as shows a 'heart regardless of social duty and fatally bent on mischief.'" It is contended by counsel for defendant that the words of this instruction tended to mislead the jury; that "an instruction of this sort is designed for a case in which the party has killed one whom he did not intend to kill, in an effort to take the life of another whom he did intend to kill. It is founded upon the very nature of the case itself and upon public policy; the law embodied in such an instruction having for its end the safety and protection of society. * * * This law as embodied in instruction No. 5 is intended to meet that class of cases where the killing of

the particular person was not intended by the defendant, and to show that express malice need not be affirmatively shown against the very party that is killed." And it is contended that in the case at bar there was no third party which the defendant intended to kill and in an effort to do so took the life of Bowles. The defendant in his testimony describing his fight with Albert Maynard says: "He punched or knocked me, or something, and I got down, and if I did any harm at all was while I was down, or hurt anybody. I hit something. I was doing what I could. Ques. Who was you trying to hit? Ans. I was fighting Albert Maynard all the time, or I thought I was." Here, according to the testimony of the defendant, he was in a fight with Maynard, and if he ever struck the blow that hurt and killed Bowles it was while down and in the fight with Maynard. So that, if the object of the instruction is as contended by defendant's counsel, it is entirely adapted to this case, in harmony with the evidence of the defendant himself.

It is contended that instruction No. 7 given for the state, in the following words: "The court further instructs the jury that, if they find from all the evidence that the homicide is proven, the presumption is that it is murder of the second degree, and the burden is on the state of showing that it is murder of the first degree, and upon the accused of showing that it is without malice and is therefore only manslaughter, or, that he has acted lawfully, and is therefore not guilty"—is "ambiguous, indefinite, uncertain, misleading, and liable to be misunderstood and misconstrued by the jury to the prejudice of the prisoner and contrary to well-established law"; that the presumption of the innocence of the prisoner follows him in every stage of the trial until the state has proven every element of guilt as charged in the indictment against him beyond a reasonable doubt. Counsel admit that to the mind of a person trained in the law the instruction could be easily explained and the meaning of the court understood, but to a jury composed of tillers of the soil it could not be so well comprehended; to such men the instruction as given must have meant "that when a homicide has been proven the presumption is that the prisoner at the bar is guilty of murder in the second degree," etc. This is a reflection upon the intelligence of any jury that might be gathered up in any community in this state. The defendant is on trial for committing the homicide; the homicide is an admitted fact, and a fact within the knowledge of all the people connected with the trial; and the instruction could not mean that, if the jury should find from all the evidence that a homicide had been proven, the presumption would follow that the defendant had committed it, regardless of evidence connecting

the defendant with it, simply from the fact that the indictment charged him with the crime. The instruction could only mean that, if the homicide had been proven to have been committed by the defendant, then the presumption followed as to the degree of murder when it has been proven that a homicide has been committed by the accused, then the presumption arises that the accused is guilty of murder in the second degree, and to elevate it to first degree murder the burden is upon the state, and to reduce it below the presumed degree the burden is upon the defendant; and the instruction further says that, if he would justify the homicide, it was for him to show that he had acted lawfully and was therefore not guilty. It is further contended that instruction No. 7 is not in harmony with instruction No. 1 given on behalf of the defendant, where the jury is instructed that the defendant is presumed to be innocent of the charge until he is proven guilty beyond all reasonable doubt; and that this presumption follows him in every stage of the trial until the state has fully proven every element of guilt as charged, to the exclusion of every reasonable doubt; and that, unless the jury believe from the evidence that the state had so proven every element of guilt, then they should find the prisoner not guilty. The instructions are not out of harmony; No. 7, only instructs upon the presumption of murder in the second degree, when the homicide has been proven and only instructs as to one point of the law. It is not required that every instruction should cover all the points of the law in the case. Instruction No. 7 is good for the purpose for which it was given, and is entirely in harmony with defendant's instruction No. 1.

Bill of exceptions No. 3 goes to the refusal of the court to give the instructions Nos. 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15. No. 3 is in the following words: "The court instructs the jury that when one without fault himself is attacked by another, in such a manner, or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable grounds for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable grounds to believe, and does believe, such danger is imminent, he may act upon such appearances and without retreating kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him some serious injury, nor danger that it would be done. But of all this, the jury must judge from all

the evidence and circumstances in the case"—and is, under the evidence and circumstances of this case, unobjectionable and should have been given.

Instruction No. 4, offered by counsel for defendant: "The court further instructs the jury that a witness may be impeached and discredited by prior inconsistent statements, and, if the jury believe from the evidence in the case that the witness Albert Maynard made inconsistent and contrary statements concerning the killing of the deceased, Peter Bowles, then the jury has the right to disregard his whole testimony, or give it such weight to which they think it is entitled"—was intended to meet the testimony in the case by which the witness Albert Maynard was contradicted in a material part of his testimony by several witnesses. In his testimony in chief upon the trial he says, when Trall struck Bowles with the knife, witness was standing behind a chair: "I took the chair and went around Mr. Trall and carried the chair between him and me and went out of the house to the drawbars where the road was; I looked back to see if I could see Mr. Trall and did not see him." That he then set the chair down and crossed over the drawbars and went to his brother's. Being recalled he was asked about the conversation that he had had with Wm. Hicks at a time and place mentioned, and was asked if Hicks did not say to him "that if you were not careful you would swear a damned lie, and that you replied that in a case like this you had to swear. Ans. No, sir; I never said any such a thing." And was asked if he did not at the time of the inquest, in the presence of James F. Pullin, one of the jurors, "say that you aimed to strike him with a chair, and that the chair hit the joists, and the joists was so low you could not make the lick, and that you punched him with the chair, and punched him much, and then you carried the chair out with you out of doors." Which statement he denied making. William Hicks being recalled stated that he had the conversation with Maynard about three weeks ago near Colonel Burnside's store in which he stated that in a case like this he had to swear. James F. Pullin, member of the coroner's jury on the 31st of October, testified that: "Albert Maynard stated in the presence of the jury upon that occasion that he struck at Thomas C. Trall with a chair, and, the joists being low, the chair struck the joists, and that he could not make the lick, and that he then punched him with the chair and punched him much." These statements are in direct contradiction of Albert Maynard's account of the affray at the time of the killing of Bowles. The instruction tells the jury that, if they believe from the evidence that he made inconsistent and contradictory statements relating to the killing or concerning the killing, then the jury had the right to disregard his

whole testimony, or give it such weight as they should think it entitled to. Hughes on Instructions to Juries, §§ 367, 368. Instruction No. 4 should have been given.

Defendant's instruction No. 6 is as follows; "The court further instructs the jury that, before they can convict the prisoner, Thomas Trail, they must believe beyond a reasonable doubt that every fact necessary to show the prisoner's guilt has been established by full proof, and, if the jury have a reasonable doubt upon any fact necessary to show the guilt of the prisoner, then they should give the benefit of that doubt, and find him not guilty." It may be presumed that No. 6 was refused because No. 1, given for defendant, covered the same point; but the defendant is entitled to have instructions given in his own language when they correctly propound the law, and it is contended that No. 1 given on behalf of the defendant simply relates to the general doctrine or principle that they must believe him guilty beyond a reasonable doubt before they can find him guilty. Instruction No. 6 directs the attention of the jury particularly to the principle which requires proof beyond a reasonable doubt of every fact necessary to show the prisoner guilty, and that, if they have such doubt upon any fact necessary to show his guilt, then they must find him not guilty. See *State v. Flanagan* 26 W. Va. 116, Syl., points 3, 4, and 5.

As to instructions Nos. 7, 8, 9, 13 and 15, refused by the circuit court, counsel for defendant say nothing about them in their briefs, and do not rely upon them, and they appear to be properly refused by the court.

Instruction No. 11 offered by defendant is point 5 in syllabus, *State v. Zeigler*, 40 W. Va. 593, 21 S. E. 763, which has been overruled in *State v. Staley*, 45 W. Va. 792, 32 S. E. 198, Syl., point 5.

As to instruction No. 12, which reads as follows: "The jury are further instructed that, if they are satisfied from the evidence that Alfred Maynard was armed with a chair and attacked the defendant, and that the defendant had reason to believe, or reasonable cause to believe and fear, and that he did believe and fear, that great bodily harm was to be inflicted upon him, and that under the influence of such belief and fear he struck the blow with the intent to defend or protect himself against Alfred Maynard or Peter Bowles acting together, then the defendant is not guilty." Under the evidence and circumstances of this case this instruction should have been given. The testimony of the defendant is that he was attacked by Maynard with a chair, and that he (defendant) was defending himself as best he could. From defendant's testimony he was in great danger and had reason to believe he was in danger of great bodily harm—witness says Maynard was a very powerful man, says that he struck at him with a chair, and "if it had not been for the

chair striking the joists I don't know what he would have done for me."

It is insisted by counsel for defendant that No. 14 should have been given without modification as it was offered, as follows: "The jury are hereby instructed that a man's house is sacred and his own castle to himself, and if the jury believe from the evidence that Thomas C. Trail was attacked in his own house by Alfred Maynard, armed with a chair or other dangerous weapon, and the said Thomas C. Trail had reason to believe and did believe that he was in danger of losing his life, or in danger of suffering great bodily harm at the hands of his assailant, he is not required to retreat, but may defend his life or person by taking the life of his assailant without retreating; and, if the jury further believe from the evidence that Peter Bowles joined Alfred Maynard in the assault on Thomas C. Trail, and in that affray lost his life at the hands of Thomas C. Trail, then you shall find the defendant not guilty." This lacked one essential element, in that it left out the fact that he had reasonable grounds to believe and did believe such killing was necessary to defend his own life or prevent great bodily harm. No. 14 as modified, which reads as follows: "The jury are further instructed that, if they believe from the evidence that Thomas C. Trail without fault was attacked in his own home by Alfred Maynard, armed with a chair or other dangerous weapon, in such a manner and under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and that the said Thomas C. Trail had reasons to believe and did believe that he was in danger of losing his life, or danger of suffering a great bodily harm at the hands of his assailant, he was not required to retreat, but had the right to defend his life or person, by using force for force in resisting such attacks and by taking the life of his assailant, if necessary to protect himself from great bodily injury or to save his life from the threatened injury; and, if the jury further believe from the evidence that Peter Bowles joined Alfred Maynard in the assault on Thomas C. Trail, and in that affray lost his life at the hands of Thomas C. Trail, then you should find the defendant not guilty; but all of this the jury must decide from all the evidence in the case"—is bad for the reason that it says the defendant "had the right to defend his life or person by using force for force in resisting such attacks and by taking the life of his assailant, if necessary to protect himself from great bodily injury or to save his life from the threatened injury." Under this instruction the defendant would have to prove that the killing was absolutely necessary, and not that he had ground to believe, and did believe, it necessary to protect himself from great bodily harm, or to save his own life. So that neither No. 14 as offered by defend-

ant nor as modified and given was correct.

The fourth assignment of error goes to the misconduct of the jury in separating, etc., as set out in bill of exceptions No. 5, and the fifth assignment of error, that the court erred in refusing to set aside the verdict and award defendant a new trial on the grounds that the verdict was contrary to the law and the evidence. As the case must be retried, it is deemed unnecessary to discuss these last-mentioned assignments of error.

For the reasons herein stated, the judgment of the circuit court is reversed, the verdict of the jury set aside, and the case remanded to the circuit court for a new trial.

BRANNON, J. If it is intended to decide that defendant's instruction 6 should have been given, I do not agree to it. If the question of the homicide were involved, it would be good; but that is conceded, not a question of contest. This instruction is capable of being construed to say that, unless the state disproves self-defense beyond reasonable doubt, the defendant must be acquitted. It misleads. The only question was, is the prisoner entitled to acquittal on the plea of self-defense? The Flanagan Case has no import in this matter. It was whether the accused was guilty of the corpus delicti on circumstantial evidence, not self-defense.

Instruction 14, as modified, is likely ground for reversal; and yet I realize that its defect may have extended little influence taken with other instructions.

SANDERS, J. (dissenting in part). I concur in the conclusion reached, to reverse the judgment and grant the prisoner a new trial. But I cannot consent that the evidence of the witness Rogers, wherein he relates a statement made to him by the deceased, to the effect that the deceased told him that he was going to Trail's home to debauch his daughter, and that he knew he could do so if he could get the old man drunk, is inadmissible. I think this evidence admissible, as corroborative of the testimony of the defendant, if for no other purpose. It is true this statement was not communicated to Trail, yet, at the same time, if the statement was made, it goes to show the previously formed intention of the deceased to go to the home of Trail and attempt to debauch his daughter. There is a conflict in the evidence as to the circumstances under which the killing was done. The state endeavors to show that, while Bowles was standing with his back to the fire, Trail came into the room, walked up to him, and stabbed him, without any provocation or justification; while, on the other hand, Trail claims that it was in defense of his home and the virtue of a member of his family. He claims that shortly before the killing he was told to go home, that Bowles was making improper advances toward his daughter, and on his arrival Bowles assured him that he had the highest regard

for him and his family, and that he did not intend anything by what he had done; and Trail says he became angry at that time, but with these assurances the matter rested in abeyance for a short while; that he went into the house and sat down by the fire and dropped off to sleep, and shortly afterwards was awakened by a noise, and found Bowles making improper and indecent advances to his daughter, who was at that time lying upon the bed in the room where they were. This theory of the case the prisoner had the right to present to the jury, if not for the purpose of justification, certainly to negative malice, and to show that the killing was done in the heat of passion. Then if I am correct in asserting that this could be given in evidence for the purpose of showing hot blood, then it seems to me clear that any evidence which goes to corroborate or to sustain this theory is admissible. The prisoner not only had the right to give his own version of it to the jury, but he should have been permitted to introduce any other evidence which would tend in any degree to strengthen or corroborate his testimony in this regard. Having this right, and relating these facts to the jury himself, it became a question for the consideration of the jury, and it may be very material that his evidence should have corroboration. Therefore, if he could show that the deceased, shortly before the killing, stated that he intended to do the very thing which Trail charges that he did do, and on account of which he says he was provoked and angered until, in the difficulty which followed, the life of the deceased was taken, he certainly should have had the right to do so. Trail says that the deceased did it, and, if this evidence had been permitted to go to the jury, they would have had before them evidence that the deceased said he intended so to do, and that evidence, taken in connection with the evidence of Trail that he did do it, would be strongly corroborative of the evidence of the defendant. There can be no question but what, if the deceased had been charged with an assault upon the daughter, this evidence would have been admissible. If so, I fail to see why it is not admissible in favor of the father upon the charge of slaying the assailant of his daughter. For these reasons, I think the evidence should have been admitted.

(59 W. Va. 130)

LILLY v. CLAYPOOL et al.

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1906.)

1. INFANTS — LANDS — SALE OF TIMBER — DECREE — PLEADING TO SUSTAIN.

In a summary proceeding, under chapter 83 of the Code of 1899, for the sale of the timber on the land of an infant and sale thereof made upon a written proposition for purchase and under direction and decree of the court and duly confirmed, decrees entered therein granting abatement to the assignee of the purchaser of a part of the purchase money, and extending the

time beyond that fixed in the contract of sale for the removal of the timber from the land, which decrees are based upon no pleadings in writing, but alone upon the mere oral representations and motion of the assignee of the purchaser of the timber, are void.

2. JUDGMENT—PLEADING TO SUSTAIN.

A decree not supported by any pleading in writing is void.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 34.]

(Syllabus by the Court.)

Appeal from Circuit Court, Logan County.

Bill by W. R. Lilly, guardian, against John W. Claypool and others. From the decree, the guardian and infant appeal. Reversed.

Atkinson & Jackson and Lilly & Shrewsberry, for appellants. Ragland & Green, for appellees.

McWHORTER, P. W. R. Lilly, guardian of John W. Claypool, an infant, instituted in the circuit court of Logan county summary proceedings, under chapter 83 of the Code of 1899, to sell the timber on two tracts of land, the property of said infant, containing 229 and 310 acres, respectively, in said county, devised to him by the will of his father, Robert Claypool; said guardian representing in his petition that a creditor's suit was pending to enforce the collection of debts due the creditors of said testator, and that the said creditors were willing that the timber should be sold to satisfy their debts and thus relieve the said land so devised to the infant, and for the payment of taxes in arrears against the property and to pay the taxes for the subsequent years. Notice was given the infant, who was over 14 years of age, of such proceeding and a guardian ad litem was appointed to defend his interests and assert his rights therein, and the infant and his said guardian ad litem filed their joint and separate answer to the petition; and, it being shown to the satisfaction of the court, by evidence adduced and taken in open court in the presence of the said guardian ad litem, that a sale of all the merchantable timber on the said two tracts of land mentioned and described in the petition would promote the interest of the said infant, John W. Claypool, and that the rights and interests of no person would be prejudiced by a sale of said timber, the court decreed that the same be sold either at public or private sale, whichever in the opinion of the guardian would be to the best interest of said infant, the decree fixing the terms of sale, which decree was entered November 6, 1903.

John Claypool made a proposition in writing to purchase the timber at prices named therein for the various kinds of timber on the terms mentioned in the decree, the bidder to have two years to remove from said tracts of land said timber, and to give bond with approved security for the deferred payments of purchase money. This proposition was reported to the court by W. R. Lilly, the guard-

ian, together with a bond of the purchaser in the penalty of \$3,000, with Millard McDonald and J. M. Vance sureties therein, payable to said guardian and conditioned for the payment of all the purchase money for said timber according to the terms of sale. And on the 7th of November, 1903, the court upon a further hearing of the matter and taking evidence as to the adequacy of the price paid, etc., confirmed the sale as being one that would promote the interests of the said infant and approved the security offered by the purchaser, and the court appointed Dick Perry and J. M. Vance commissioners, to count said timber and report to the guardian and to the court the amount, kinds, and sizes of the timber on said two tracts. Said commissioners filed their report showing that the timber of said two tracts of land at the prices named made a total of \$2,606.25, which report, not being excepted to, was confirmed. Afterwards, on the 4th day of May, 1905, Millard McDonald appeared in court and presented a deed from John Claypool to himself assigning to him the contract for the purchase of said timber, and by oral representation showed to the court that by reason of the purchaser, John Claypool, having been proceeded against in the federal court in bankruptcy, he had been prevented from marketing the timber within the time prescribed in the contract, and that the said McDonald was now the owner of the interest of said purchaser, John Claypool, as shown by said deed filed by him, and asked for an extension of one year for the removal of said timber, "and the court, deeming the request reasonable," extended the time for one year. In the same manner said McDonald "further brought to the attention of the court that a large quantity of said timber so sold to said Claypool and marked for cutting is on lands other than that owned by said John W. Claypool, and the said guardian had no authority to sell the same, and prayed the court to have a survey made of the disputed lines between John W. Claypool and the other claimants and ascertain the amount of timber so sold which did not belong to said John W. Claypool, and to ascertain the size of the same that a proper adjudication might be had of the matter, and the court, being of the opinion that the true amount of said timber should be ascertained and that a proper survey should be made of said line in order to ascertain the same, doth hereby order E. A. McDonald, county surveyor of Logan county, to make said survey and to ascertain what timber and the size thereof has been cut and marked for cutting outside the lines of the said John W. Claypool, to all of which W. R. Lilly guardian for John W. Claypool objects, which objection is overruled by the court."

Afterwards W. H. File was substituted for the said E. A. McDonald to make said survey. File filed his report, to which the guardian, W. R. Lilly, and the guardian ad

litem excepted: First. Because none of the timber reported in said report as being out of the boundary of the land upon which the timber was sold was in fact off of said land and all of the timber sold by the decree was upon the land owned by the infant defendant John W. Claypool. Second. Because there were no facts before the court at the time the order of survey was directed which warranted the directing of the survey; "no evidence being introduced and only the statements of counsel as to the supposed fact that some of the timber was not on the land." Third. That if any, or all, of the timber should be found to be off the land of the infant defendant the said purchaser, John Claypool, and Millard McDonald, his assignee, were, by their purchase in the proceedings, the count of the timber by the commissioners and the confirmation of their report by the court, estopped from claiming in this cause any credits against the purchase money by reason of any timber being off said land, that said purchaser had the land surveyed before said timber was counted and had cut and removed a large portion thereof and were present in court when the report of the commissioners counting the timber was confirmed and did not then make any objections or exceptions to the confirmation of said report and purchased at their peril. By decree entered on the 11th of December the court overruled the exceptions of the guardian and guardian ad litem to the report of File, and decreed a rebate or credit on the purchase money "of \$624.00, being the purchase price for the timber both cut and branded outside of the lines of said land as run by W. H. File, which the court finds to be the correct line of said survey." From these decrees, the guardian, W. R. Lilly, and the infant, John W. Claypool, appealed.

This proceeding was for the purpose of selling the said timber, the property of the infant, John W. Claypool, and the decrees extending the time for getting the timber off, which is in effect making a new contract or changing the terms of the contract between the parties, and granting the rebate of the purchase money, are based upon no pleadings whatever, but upon the mere oral suggestion or representation of said McDonald, who was in no wise a party to the proceedings, and, though interested as the assignee of the purchaser, filed no petition setting forth any grounds for relief in the premises. There is no principle better settled than that a judgment or decree cannot be entered in the absence of pleadings upon which to found the same. *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328; *Pickens v. Love's Adm'r*, 44 W. Va. 725, 29 S. E. 1018; *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215; *Renick v. Ludington*, 20 W. Va. 511, 536; *Chapman v. Railroad Co.*, 18 W. Va. 184; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *McCoy v. Allen*, 16 W. Va. 724; *Moseley v. Cocke*, 7 Leigh (Va.) 224. The decrees ex-

tending the time for getting the timber off in the contract, and making rebate of \$624 on the purchase money, are void and of no effect.

For the reasons stated, the said decrees are reversed and set aside.

(59 W. Va. 490)

GRIFFIN v. FAIRMONT COAL CO.

(Supreme Court of Appeals of West Virginia. Nov. 14, 1905.)

1. MINES AND MINERALS—DEEDS TO COAL—CONSTRUCTION.

Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern.

2. SAME—RIGHTS OF PURCHASER—INJURY TO SURFACE.

The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate, and remove all the coal purchased and paid for by him, and, if the removal of the coal necessarily causes the surface to subside or break, the grantor cannot be heard to complain thereof.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 153, 243.]

3. SAME—RESERVATION IN DEED.

Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land and to mine, excavate, and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 153, 243.]

4. CONTRACTS—CONSTRUCTION.

It is the duty of the court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple, and unambiguous.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 723, 732-738.]

5. SAME.

It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 723, 732-738.]

Poffenbarger, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Harrison County.

Action by Leander Griffin against the Fairmont Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. W. Harmer, H. W. Williams, W. P. Hubbard, and Thos. P. Jacobs, for plaintiff in error. John Bassell, Z. T. Vinson, and E. A. Brannon, for defendant in error.

McWHORTER, J. This is a writ of error to a judgment of the circuit court of Harrison county, rendered in the case of Leander Griffin v. Fairmont Coal Company, by the Honorable John W. Mason, then judge of that court. The learned judge in rendering the judgment filed in the case an opinion in writing, which opinion is copied into one of the

briefs filed in the case, and so ably discusses most of the questions arising in the case that I have quoted and adopted as part of the opinion in this case a large part thereof, which accords in the main with the views of the majority of this court:

"The declaration alleges that the plaintiff on — day of —, 1902, was the owner in fee of a certain tract of land, situated in Harrison county, and fully described by metes and bounds, containing about 68 acres, and that underlying the surface of said land there is a vein of coal, which coal (except about three acres) the plaintiff and his grantors on the 1st day of November, 1889, sold and conveyed to Johnson N. Camden, with the following mining rights and privileges: 'The party of the second part and his assigns is to have the right of way through said reservation for a road, air course and drainway, necessary or convenient for the mining and removal of said coal and the coal under coterminous and neighboring lands, together with the right to enter upon and under said land, and to mine, excavate and remove all of said coal and remove upon and under said land the coal from under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described, and make all necessary structures, roads, ways, excavations, air shafts, drains, drainways and openings necessary and convenient for the mining and removal of said coal and the coal from coterminous and neighboring lands to market.' The declaration further alleges that said coal and mining rights were, by various deeds, conveyed to the Fairmont Coal Company, and that it was on the — day of —, 1902, the owner of said coal and mining rights and privileges; that the said farm or tract of land was owned in fee and used and occupied by the plaintiff on the day and year last aforesaid, and for a long time prior thereto, as a home and farm; that the defendant on the day and year last aforesaid, and prior thereto, mined and removed the coal under the said tract of land, as it had a right to do, leaving, however, large blocks or pillars of coal as a means of support to the overlying surface of said tract of land; that on the — day of —, 1902, the defendant, well knowing the premises, by its agents and servants, wholly ignoring the right of the plaintiff in that behalf, did willfully and negligently and without any compensation therefor, or from the damages arising therefrom, mined and removed all of the said blocks or pillars of coal left as aforesaid, and that by reason of the mining or removal of said blocks or pillars of coal, and by reason of the failure of the defendant to provide in any way proper or sufficient support for the overlying surface of said land, the said land, or a large portion thereof, was caused to fall; that the strata of rock overlying said coal and forming a part of the said land were cracked, broken, and

rent, and that large bodies of it, with the overlying surface, fell, leaving the said surface with holes and sunken places of such great size and depth as to render it unsafe and of little value for grazing stock or cattle or other farming purposes; that fissures of great depth, and running at great length, were made at different places on said land, some of which were near to the dwelling house of plaintiff, passing through that part of said land most valuable for cultivation, and all the water percolating said land above the said coal removed as aforesaid, and all the springs and other courses supplying said farm were diverted, sunken, and wholly destroyed. There is also a second count in the declaration, alleging that defendant, through its agents, servants, and employes, entered said mine under the said premises and wrongfully and willfully, and without any compensation therefor, did quarry large quantities of valuable building stone and remove the same off of the said premises, which stone were of the value of \$200. The damages claimed in the conclusion of the declaration are \$5,000. The defendant has entered a general demurrer to the declaration and each count. The questions arising upon this demurrer are the only ones now before the court.

"No defects in the second count have been suggested by counsel and none are observed by the court, unless it be that it should be averred that the stone removed belonged to the plaintiff. It is possible that by a liberal construction this may be inferred from the general averment of ownership of the land (with the exceptions named) contained in the first part of the declaration. It was probably unnecessary to repeat this in this court. The demurrer to the second count may therefore be overruled.

"The serious, and, in fact, only important, question in this case arises upon consideration of the first count. No objections have been pointed out to the form of this count. The objection insisted upon by defendant goes to the right of action. If the defendant's contention be correct, the facts stated in the first count do not constitute a cause of action, even if formally pleaded. I may add, in passing upon this count, that the declaration should, in addition to the formal commencement and conclusion, contain four parts, to wit: First, a statement of the interests and relative rights of the parties; second, the duties which the defendant owed the plaintiff; third, a breach of duty on the part of the defendant; and fourth, the damages which resulted to the plaintiff by reason of this breach of duty. This declaration does contain a very full statement of the rights of the parties. It avers that the plaintiff owned the land, except the coal and mining rights and privileges named; that this coal and mining rights belonged to defendant; that plaintiff was in possession, using and occupying the land as a home and a farm; that the defendant

mined and removed coal under said land, as it had the right to do. The declaration does not, however, in specific terms, declare what are the duties as claimed by the plaintiff imposed upon the defendant in the premises. The pleader simply avers that the defendant mined and removed coal under the land, leaving, however, large blocks or pillars of coal as a means of support to the overlying surface, and then alleges that the defendant, by its agents and servants, wholly ignoring the rights of the plaintiff in the behalf, did willfully and negligently, and without any compensation therefor, or for the damages arising therefrom, mine and remove all of the said blocks or pillars of coal left as aforesaid, and that by reason of the mining and removal of said blocks or pillars of coal, and the failure of defendant to provide in any way proper or sufficient support for the overlying surface, the land was caused to fall, etc. Now, it will not be contended, I apprehend, that these blocks and pillars of coal did not belong to the defendant, nor that it did not have the right to remove them. All that can be claimed is that, if all the coal be removed, some sufficient support would have to be provided in its stead. At most, all that could be required of the defendant in this respect would be to furnish a sufficient support for the overlying surface. The declaration is somewhat confusing and uncertain on this point. But, if I am correct in the views hereinafter stated, this is immaterial. The demurrer is to the whole count, and the court must consider whether or not the count contains any matter which will sustain the action.

"In investigating this subject, the character of the transaction should be kept in mind. The plaintiff of his own will sold and conveyed this coal, with the express privilege of removing all of it. The plaintiff knew, when he sold the coal, that its removal was contemplated, and consented thereto in language which admits of no doubtful meaning. He also knew that, when all the coal should be removed, the overlying surface would sink unless supported. He, by clear and unequivocal language, granted a privilege which would necessarily injure him. Why did he grant this privilege? Was the contemplated injury to the surface a part of the consideration of the grant? Or was there an implied contract that compensation would be made for the injury? The deed itself is silent on this subject. Which is the more reasonable theory? Why shall not the defendant have, without additional compensation, what the plaintiff has sold and conveyed and agreed it shall have? There being no ambiguity in this contract, why should the court look beyond it for a meaning? Why shall it not be permitted to speak for itself? A person who owns the entire estate may sell and convey any part of it. It may be divided horizontally, perpendicularly, or in any manner according to the will of the owner. It is a mere matter of

contract. The plaintiff, owning the entire estate, had the unquestioned right to sell and convey this coal with necessary and convenient mining rights. He did this. Why is not the transaction closed? It certainly is unless there is an additional implied contract, or the courts shall extend and add burdens not included in the deed. It is insisted by the plaintiff that the owner of the coal must bear this additional burden because it proposed to remove the coal, and that its removal will injure the overlying surface unless supported. Was not this as well understood before the deed was made as afterwards? The plaintiff parted with his title to the coal and granted the right to have it removed upon terms satisfactory to himself. He could easily have required the grantee to furnish support for the surface when the coal should be removed. He owned the natural support of the surface, and sold it and granted the right to remove it, and now asks that before this natural support is removed some other must be provided by the purchaser. It is conceded that the defendant takes under its deed all the coal, and has the right to remove it—that is, it is the owner of all—but it is said it cannot use it (for it is of no possible use to defendant without being removed) without providing some means by which the overlying surface will not be disturbed. On the other hand, it is insisted by the defendant that when the plaintiff sold this coal, including the right of removal, he must have known that its removal would injure the surface unless supported, and that as a man of ordinary prudence and business capacity he protected himself and received ample remuneration for this injury in the purchase price; that the consideration paid included the value of the coal and the injury which would be done to the residue of the estate by its removal. Of course, the mere fact that a person is the vendee of another does not get him a license to wantonly injure his vendor. It is simply a question whether the injury complained of was anticipated before the conveyance, and taken into consideration and compensated for in the consideration paid by the purchaser. When the contract is silent upon this point, is there any reason why a contract for the sale of minerals should be construed by rules entirely different from the rules of construction applicable to other contracts? It is a rule without any exception (unless the class of contracts under consideration constitutes exceptions) that when a person sells a thing with the right to remove it, or the right to occupy and use it, he is conclusively presumed, in the absence of a contract to the contrary, to have included in the consideration not only the value of the thing sold, but compensation for the inconvenience and injuries which will necessarily result by its removal or occupation. Many illustrations might be given—such as the sale of growing crops; fruit on the trees; wool on the

back of the sheep; trees standing in the forest. Many logs of timber are sold from the standing trees with the right to cut and remove, and no one would think of asking compensation for the residue of the trees before removing the logs, although the removal of the logs would destroy the trees. In such case, evidently the person selling the logs would take this into consideration when fixing the price of the logs. A farmer may sell that part of his farm most useful to him in furnishing an outlet to the public road, making access to the highway inconvenient. He may sell the portion containing water and seriously lessen the value of the residue, but these things are all presumed to be taken into consideration when the sales are made. The building of a railroad through a piece of land may damage the part not taken. This is always considered when fixing the price of the right of way, whether by private sale or condemnation. Why should a different rule prevail when a contract is for the sale of mineral below the surface?

"The English rule is tersely stated by Baron Parke in the case of *Harris v. Ryding*, 5 M. & W. 59, in the following language: 'I do not mean to say that all the coal does not belong to the defendants; but they cannot get it without leaving sufficient support.' This rule thus suggested, when carried to its ultimate and logical conclusion, means that a sufficient support must be left, even if it take all the coal. The Supreme Court of Pennsylvania has frankly stated the rule to be: 'Where there has been a horizontal division of land, the owner of the subjacent estate, coal or mineral, owes to the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility. What the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land.' *Noonan v. Pardee*, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722.

"The reason given by the English courts for the rule under consideration is that there are two separate estates, one belonging to the owner of the mineral, and the other to the owner of the surface; that each has the right to use his own—the owner of the surface to occupy the surface, and the owner of the minerals to mine them—but each must so use his property as not to interfere with the other, in accordance with the well-recognized maxim of the law: 'Enjoy your own property in such a manner as not to injure that of another person.' Truly this is a just and equitable maxim. It is the Golden Rule of the law. But no one should be permitted to use it as a cloak to cover wrong. Certainly the person who owns the entire estate may sell a part of it, and also a privilege to be exercised in connection with the part sold which will injure the part retained

by him. It would be manifestly unjust for the person who has made a contract of this kind, and received the compensation for the injury, to be permitted to invoke this righteous maxim to aid him in committing a fraud. I understand this maxim can only be properly applied to 'restrict the enjoyment of property, and to regulate in some measure the conduct of individuals by enforcing compensation for injuries wrongfully occasioned by a violation of the principles which it involves, a principle which is obviously based in justice, and essential to the peace, order and well-being of the community.' *Broom on Legal Maxims*, 289. I do not understand that it applies to injuries done to property by authority of the owner for a compensation. The compensation for the injury is a proper matter of contract between the parties, and there is no reason why the injured party may not receive satisfaction by contract as well as by the verdict of a jury. In order to avoid the force of this reasoning, it has been held that in such conveyances all the estate is not granted with the minerals—that *prima facie* enough is reserved by implication for support of the overlying surface. Baron Parke admits that the title to minerals passes by the deed, but says that grantee cannot take them without providing support for the surface, but Chief Justice Campbell lays down the rule in *Humphreys v. Brogden*, 12 Q. B. 730, that the presumption is, in the absence of express words waiving or qualifying the right, that the surface must be protected with the natural support which it possessed before the demise. Which means, I take it, that enough of the minerals are reserved for that purpose. I cannot assent to this proposition. This rule, taken in connection with the other one propounded by the same court, that sufficient of the materials must be left, no matter how much, to support the surface, involves the absurd proposition that a person who owns the entire estate may convey without limitation or qualification all the coal, with the right to remove it, and yet the deed contain the presumption that a portion of the coal is reserved, and, further, that the coal reserved may amount to the whole of the estate, granted that the purchaser in fact takes nothing. It seems to me that this is a *reductio ad absurdum*. Why not assume, at least *prima facie*, that the deed is correct; that it means just what it says when there is no ambiguity? When a deed on its face by plain and apt words conveys all the coal, why should the courts say there is an implied reservation of a part, or perhaps of all, of it, and that less than the whole, or in some cases nothing, is conveyed? The owner of property about to part with the title is at liberty to prescribe the terms and conditions on which he will do it. The intention of the parties is presumed to be expressed by the language of the deed itself. If no reservations or exceptions are found in the deed, none should be presumed. The deed, as the

witness to the contract between the parties, should speak the truth, the whole truth, and nothing but the truth.

"The rule for the construction of deeds prescribed by our statute is: 'Every such deed conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest, whatever, both at law and in equity of the grantor in such lands.' Code 1899, c. 72, § 2. Again, some of the courts uphold the rule on the principles applied in the cases prohibiting one owner of land from making an excavation so near the adjoining lands of another that the soil of the latter breaks away. This illustration is not an apt one. Ordinarily, in the cases where lateral support is required, there are no contractual relations between the parties. Even when they sustain the relation of vendor and vendee toward each other, the excavations are not contemplated by the nature of the transaction. But in the sale of coal the removal is not only contemplated, but expressly authorized. Lord Campbell, in delivering the opinion in the case of *Humphries v. Brogdon*, 12 Q. B. 739, cites, as authority supporting his opinion, the case when a person purchases one story of a building containing two or more stories. He says: 'Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property that it may be capable of bearing that weight. The proprietor of the ground story is obliged to uphold for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower.' *Yandes v. Wright* (Ind.) 32 Am. Rep. 112. The conclusion reached by the learned chief justice is erroneous because his premises are wrong. He assumes that the cases are similar. A moment's reflection will convince any one that they are dissimilar in a very material point. The story of the building, whether the lower or top one, is sold and bought to be used in place. This is apparent from the very nature of the transaction; but in the case of the sale of coal the opposite is true. It cannot be used in place. In the case at bar nothing is left to presumptions. The deed expressly grants the right to remove it.

"It is conceded that the grantor might waive the right to support of the surface, and where that is done there can be no recovery for injuries caused by the subsidence of the soil. It is insisted by the defendant that the language used in the deed in controversy is equivalent to a waiver. It is true that in this deed there is not only a grant of the coal, but also an express grant of the right to remove 'all of it.' It may be that this grant of the right of removal adds nothing to the legal effect of the deed, except to

make the general grant more emphatic. Taking the entire granting clause of the deed together, there can be no doubt as to the intention of the parties. I rest the case on the fact that plaintiff by his deed conveyed the coal with the right to remove all of it. There is no limitation to or qualification of the estate granted, nor is there anything in the deed to indicate an intention to limit or restrict the right to remove the coal. Then the plaintiff was the owner of the entire estate, and, when parting with the title to the whole or any part of it, could do so on terms and conditions to be agreed to by him. He was fully aware of the injury that might naturally and reasonably be expected to result from the removal of the coal, and yet he expressly authorized its removal. Under these circumstances it is proper to assume that the price paid for the coal and the mining rights granted was fixed with reference to the nature, extent, and effects of the rights conveyed. There is no ambiguity in the terms of the grant, and there is no reason to believe that the grantor did not fully understand them, or what was the effect of the deed deliberately made by him. It may be that it was an improvident contract; but courts cannot make contracts for people. They can only construe the contract made by the parties. I cannot construe this contract to mean that the parties intended that the plaintiff should sell his coal, receive the pay for it, and keep both the coal and the money. This would certainly be a perversion of the homely old proverb that you 'cannot eat your cake and keep it.' Nor can I reach the conclusion, by any fair construction of the language employed by parties in the deed, that any additional burden was to be placed on the grantee before enjoying his property than those named in the deed. This would be inserting in the deed new conditions. I am clearly of opinion that the courts hereinbefore referred to have wholly disregarded the well-established rules of construction applied in construing all other contracts. It is a rule, as I understand the law of universal application, that, where there is no ambiguity in the language of a deed, it should be construed according to its legal effect, to be gathered from its face. *Pasley v. English*, 5 Grat. 141. But, if these cases are to be followed, a different rule is to prevail in construing deeds conveying minerals. We must, according to these decisions, presume that a part of the thing conveyed was intended to be reserved, notwithstanding the conveyance is without qualification or limitation, or any expressions in any part of the deed indicating that the parties intended anything but an absolute grant.

"I wish to be clearly understood, and hence, at the risk of becoming tiresome by unnecessary repetitions, will add that I do not mean to intimate that the person who owns the entire estate and sells the subjacent strata of any kind should give away the

surface or waive damages thereto without compensation. What I mean is that all such questions should be settled at the time these strata are sold, and that courts should presume they were so settled unless a contrary intention appears on the face of the deed. The removal of substrata is a matter of too much importance, and affects too largely the residue of the estate, not to enter into the contract or to be left to doubtful and uncertain implications of law. Of course, the rule of law which applies to coal must apply to fire clay, potter's clay, iron ore, and all subjacent minerals. The thing sold and to be removed may be of very small value as compared with the overlying surface, and as a consequence the owner would want to sell only so much as could be removed or taken away without disturbing the surface. On the other hand, the thing sold may be of so much more value than the surface that the owner would be willing to sell and authorize the removal of all without reference to the soil. He might not wish to retain coal which he could sell at \$100 per acre to support surface worth \$5 per acre. Many examples may be found—coal removed from the same opening, and when the coal is of the same value, yet there may be immense difference in the value of the overlying surface. Then, again, in many places are found several veins of coal overlying each other. When the owner of all of them sells the lower vein and retains the others, he is interested, not only in protecting the soil, but the intervening strata as well. Many other illustrations might be given, but these are sufficient to illustrate my idea and to show that in all sales of minerals the question of injury to the lands not conveyed is of so much importance that courts should not assume that it was not considered and made part of the consideration of the deed. In mining coal perhaps from 35 to 50 per cent. of the entire vein would have to be left in the land, by way of ribs and pillars, unused, to form surface support. This would depend to some extent upon the depth of the coal below the surface and the nature and condition of the intervening rocks, if any. These pillars and ribs would be of no possible use to any one except to the owner of the overlying surface. Now, whether all this coal is to be bought and removed, or only a part of it, and the residue to be kept by the owner for the benefit of his other estate, are proper subjects of contract, and the contract must be expressed in the deed. When the deed shows clearly on its face that all the coal was sold, and especially where there is a clause giving the right to remove all of it, I cannot think the courts have any right to say that the deed does not *prima facie* mean what it says. This would be to construe out of the deed, after it was made and delivered, from 35 to 50 per cent. of what clearly passes by its express terms; for it is a matter of common information, known to all who have

paid any attention to mining, that in coal mines the coal will have to remain in place as a support or the surface be permitted to subside. Permanent artificial support would cost more than the coal is worth in most cases. So it is a question of leaving something like one-half the coal in the mine or removing all and permitting the overlying surface to adjust itself to a new bed. And this, I again repeat, should be left for the parties to determine by their contract. If the owner of the coal wishes to keep half of it as a support for the surface, he has a perfect right to do so; and if he wishes to sell all, and permit all to be removed, he may also do that. When he has made his contract in accordance with his own will and reduced it to writing, the courts may declare the legal effect of the writing, but cannot change it."

In 9 Cyc. 577 it is said: "The law furnishes certain rules for the construction of written contracts for the purpose of ascertaining from the language the manner and extent to which the parties intended to be bound, and that rule ought to be applied with consistency and uniformity; and it is not proper for a court to vary, change, or withhold their application"—citing *Johnson County v. Wood*, 84 Mo. 489; *Heady v. Building Association* (Tex. Civ. App.) 28 S. W. 468. It is further said on the same page of 9 Cyc.: "The first and main rule of construction is that the intent of the parties as expressed in the words they have used must govern. Greater regard should be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. If the words clearly show the intention, there is no need for applying any technical rules of construction, for where there is no doubt there is no room for construction." See cases there cited. And same volume, p. 587: "It is not the province of a court to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one. Nor will the dictates of equity be followed if by doing so the terms of a contract are ignored; for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must be enforced if such is the clear meaning of the language used and intention of the parties using that language"—citing *Larguer v. White*, 29 La. Ann. 156, where it is held: "The stipulations made by the parties in their contract are the law to them, and to their assigns under the contracts, except when such stipulations are in contravention of the public law or good morals." The deed set out in plaintiff's declaration gives to the grantee and his assigns, in as clear and distinct terms as the English language could well express, the "right to enter upon and under said land and to mine, excavate, and remove all said coal." In *Carrington v. Goddin*, 13 Grat. (Va.) 587, it is held: "If it is doubtful on the

face of the deed whether one or both of the parcels were intended to be conveyed, the deed will be construed most strictly against the grantor and so as to give it effect rather than that it should be void for uncertainty." And in *Allemong v. Gray's Adm'r*, 92 Va. 216, 23 S. E. 298, it is held that where, "if the words and provisions are doubtful, they are to be taken most strictly against the grantor." And in *Lagorio v. Dozier*, 91 Va. 492, 22 S. E. 239, it is held: "A deed should be so construed as to give effect to the true intent of the parties, as expressed in the deed, considered in all its parts, and construing the language used according to its common and usual acceptance." And in *Gibney v. Fitzsimmons*, 45 W. Va. 334, 32 S. E. 189, Syl., point 1: "The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same, and, when this is determined, effect will be given thereto unless to do so will violate some established rule of property." And in *Hurst v. Hurst*, 7 W. Va. 341, it is held that parol evidence as to the actions or declarations of the parties at the time of the execution of the deed or afterwards are inadmissible and incompetent to enlarge, restrain, explain, or alter the intention of the grantor or grantee "as expressed in the deed, or to vary the legal effect thereof as clearly manifested by the deed itself. *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281, and in *Long v. Perline*, 41 W. Va. 314, 23 S. E. 611, Syl., point 2, it is held, "where there is no ambiguity in a written contract, oral evidence is not admissible to explain it, as it speaks for itself." And in 9 Cyc. 590, treating of the construction of a deed by the parties thereto being adopted by the court in giving effect to its provisions, says: "The rule above stated does not apply, however, where the meaning of the terms used is clear. In such a case the fact that the parties have themselves, by their subsequent conduct or other wise, placed an erroneous construction upon them, will not prevent the court from giving the true construction." And cases there cited.

We agree with the conclusion reached by the learned judge in what we have above quoted from his opinion, and with much of the reasoning upon which it is based. We do not, however, fully agree with all that is said in his opinion. We do not agree that the additional grant contained in the deed of the right to enter upon and under said land, and to mine, excavate, and remove all of said coal, adds nothing to the legal effect of the deed, or that it is merely emphasis to the general grant, as intimated by him. It seems to us that this additional grant has a distinct and material office to perform, and that force and effect must be given thereto in the construction of this deed. In the construction of a deed, effect must be given to every part and every word therein contained, if possible to do so.

We in no sense question the doctrine or right of subjacent support in a case where the surface and subjacent estate are owned by different persons and the right of support has in no way been parted with or waived by the surface owner. In case at bar there is no ambiguity in the language of the deed, and taking the words used in their common acceptance they have but one meaning, and therefore there is no room for construction. The reservation of the three acres in the deed is in such language as to emphasize the intention of the parties that all, and not a part only, of the coal should be removed from the land not so reserved, as it plainly provides for the protection of the three acres, only granting "the right of way through said reservation for a road, air course and drain-way, necessary or convenient for the mining and removal of said coal, and the coal under coterminous and neighboring lands."

It is contended by counsel for plaintiff in error that it is a question of public policy, and says that "West Virginia is not altogether silent on this question." Citing section 7, c. 79, Code 1899, which provides: "no owner or tenant of any land containing coal shall open, or sink, or dig, excavate or work in any coal mine or shaft, on such land, within five feet of the line dividing said land from that of another person or persons, without the consent, in writing, of every person interested in, or having title to, such adjoining lands, in possession, reversion or remainder, or of the guardians of any such persons as may be infants"—with a penalty attached for any violation thereof, to be recovered by the party injured. This is a provision for the protection of lateral support of coterminous owners between whom there are no contractual relations, and the statute cited recognizes on its face that it is a matter of contract between the parties interested; but the lawmakers did not presume to legislate concerning subjacent support, recognizing the well-established fact that the owner of the whole estate in fee has unlimited control thereof, from the center of the earth to the surface, and if he could himself by mining or other means cause the subsidence of the whole or any part of the surface not within five feet of his exterior line he could by contract grant that right to another, and this is a fact conceded, as well in the English and American states cases cited, as by counsel for plaintiff in error.

It appears from the record that the plaintiff waived his second count and declined to amend the first count, the demurrer to which was sustained by the court because "it seeks to recover damages from the defendant for having done what the deed upon which the action is based, clearly and unequivocally authorized the defendant to do." The reasons for our decision in this case are more elaborately set out in an opinion filed by Judge COX, which appears below, and in which all the members of the court concur,

except Judge POFFENBARGER, who dissents from the decision.

There is no error in the judgment, and the same is affirmed.

OOX, J. (concurring). I concur in the conclusion reached by this court in this case. I have no quarrel with the doctrine or right of subjacent support, when it has not been parted with, applicable where the surface and subjacent estate in the same land are owned by different persons. I do not condemn or question what I deem the best-considered cases and text-books expounding this doctrine. Owing to these facts, and to the very great importance of this case, I have concluded to prepare this opinion.

This case is on a writ of error to the judgment of the circuit court, sustaining a demurrer to the declaration and dismissing the action. It appears from the averments of the declaration, which for the purposes of demurrer must be taken as true, that plaintiff, Griffin, being the owner in fee of 68.89 acres of land in Harrison county, underlaid with coal, sold and conveyed the coal (except three acres thereof) to Camden, with the following mining rights and privileges: "The party of the second part and his assigns is to have the right of way through said reservation for a road, air-course, and drainway necessary or convenient for the mining and removal of said coal and the coal under coterminous and neighboring lands, together with the right to enter upon and under said land and to mine, excavate and remove, all of said coal and remove upon and under said land the coal from under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described, and make all necessary structures, roads, ways, excavations, air-shafts, drains, drainways and openings necessary or convenient for the mining and removal of said coal, and the coal from coterminous and neighboring lands, to market." The defendant company became the owner of said coal and mining rights and privileges conveyed to Camden. The defendant, having removed a part of said coal, leaving blocks or pillars thereof, afterwards removed the blocks or pillars, completing the removal of all the coal, without leaving support for the surface, thus causing subsidence of the surface, as plaintiff avers, to his injury and damage. Plaintiff brings his action of trespass on the case for damages, not relying upon any express covenant or provision of the deed of conveyance, which constitutes the contract between the parties, but relying upon what is termed the "doctrine or right of subjacent support." The only act complained of is the act of removing all the coal conveyed without leaving support. The manner of the removal is not complained of, and no negligence in the manner of removal is averred. The act of removal itself, and not the manner of doing the act, is averred to be negligent.

This being the case, there is for determination the single question: Was the removal of all the coal conveyed, without leaving support, in violation of plaintiff's right?

This leads us to a consideration of the doctrine or right of subjacent support. We are cited to no previous decisions in point in this state, or in the state of Virginia before the formation of this state. We are cited to many decisions and text-books, both English and American, which are not said to be binding authority upon this court, but which may be termed persuasive reasoning. They appeal to us, and should govern us so far, and only so far, as they appear to us to be founded upon correct principles. We are seeking the right, the truth, and should accept them wherever found. In this investigation, we turn naturally to England, which I think may be termed the parent of the doctrine of subjacent support. The first cases were decided there. No case or text-book, either English or American, will be found which rests this doctrine or right of subjacent support upon more than two grounds, or, rather, which holds that the doctrine or right is composed of more than two ingredient propositions. They are, first, a presumptive or implied reservation to the surface owner of sufficient of the subjacent strata or estate to support the surface *modo et forma*; second, the principle of law expressed in the Latin maxim, "*Sic utere tuo ut alienum non laedas*," liberally construed, "So use your own property as not to injure the property of another." Many authorities rest the whole doctrine upon the last proposition only. The principle contained in the first proposition, when applied to a case where the fee owner has granted the surface and reserved the underlying strata or estate, would necessitate an implied additional grant of so much of the subjacent strata or estate as was necessary to support the surface; but we are not dealing with that case here.

The first proposition was announced by Lord Campbell in *Humphreys v. Brogden*, 12 Q. B. 739, decided in 1850, in which he used this language: "If the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all of the minerals without leaving a support for the surface; and if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed." This was not the first case in England upon the subject of subjacent support, as thought

by some. Lord Campbell in that case also recognized the second proposition above mentioned, but reached his conclusion by analogy to the severance of the ownership of the different stories of a house, quoting Erskine's Ins. as follows: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing the weight. The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." Lord Campbell in that case was very guarded in his holding that the law there laid down only applied where the surface belonged to one man and the minerals to another, and no evidence of title appeared to regulate or qualify their rights of enjoyment. The last clause of the opinion contains the following language: "I need hardly say that we do not mean to lay down any rule applicable to a case where the *prima facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title deeds, or by other evidence."

The earlier English case of *Harris v. Ryding*, 5 M. & W. Rep. 59, decided in 1839, held that the mining rights in the deed in question applied to acts to be done upon the surface of the land, and did not enlarge the rights of the owner of the minerals under the ground beyond what they were without the mining rights. Baron Parke there reached this conclusion in this language: "I do not mean to say that all the coal does not belong to the defendants; but that they cannot get it without leaving sufficient support." Some English and American cases have followed the two English cases cited, resting their decisions, at least in part, upon the theory of a presumptive or implied reservation of so much of the subjacent strata or estate as is necessary to support the surface. The case of *Noonan v. Pardee*, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722, carried that theory to its logical conclusion by holding: "What the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land." In *Blanchard & Weeks'* note to the case of *Jones v. Wagner*, in *Leading Cases on Mines*, etc., at page 617, it is said: "There is a *prima facie* inference at common law, upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified

his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise."

The theory of implied reservation or implied grant has been couched in different language in different cases. Some cases have said that the subjacent estate owes a servitude to the superincumbent surface. Others have said that the surface owner is entitled to an easement. Others have called the right of subjacent support *ex jure naturæ*; and still others have said that the right is a part of the surface, and as such may not pass except by express words. In whatever language the decisions referred to may be couched, in the last analysis they rest upon the authority of *Humphreys v. Brogden*, holding that there is a presumptive or implied reservation or an implied grant. The theory of an implied reservation is earnestly relied on by the learned attorneys for the plaintiff in their original brief. I quote therefrom as follows: "In a grant like the one at bar, a reserve of the right of surface support is implied." This proposition of the early English cases, of an implied reservation in the face of an express grant, has been much questioned and criticised in England, and, it seems to me, with great reason. I do not think that in a case where the owner of the fee granted or conveyed the underlying strata or estate the theory of an implied reservation, amounting, if necessary, to the whole of the thing granted, could ever have been maintained upon sound reason. It seems to me that the first part of the statement above quoted from Lord Campbell in *Humphreys v. Brogden*, viz., that the grantor in case of the reservation of the minerals cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface, furnishes a conclusive reason for overthrowing the second part of his statement quoted, viz., that in case the owner of the entirety is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. The latter part of the statement necessarily implies a reservation in derogation of the grant—the very thing condemned in the first part of the statement. I cannot see how, against every rule of construction, where a deed has been made by the owner of the fee, granting in express terms all the subjacent strata or estate, that the right of subjacent support may be based upon the ground that there is a presumptive or implied reservation by such a deed, in which there is no express limitation, reservation, or exception, and in derogation of the express terms of the grant, of so much of the subjacent strata or estate, to the extent of all, if necessary, to support the overlying surface. Such a proposition seems to me to be contrary to all principles of law. I am not, however,

saying that the doctrine or right of subjacent support does not exist where it has not been parted with; but I do say that I cannot assent to the proposition that it emanates from a presumptive or implied reservation of so much of the estate granted as is necessary to support the surface.

An inconsistency running through most of the cases holding to the theory of an implied reservation is that they concede that after the grant the grantee is the owner of the thing granted. In the later English case of *Eadon v. Jeffcock*, L. R. 7 Ex. 379, decided in 1872, the provisions of a lease of a bed of coal were involved; and the court held that the intention of the parties was that all the coal should be removed, other than certain pillars specified by the terms of the lease, and that the lessees were not otherwise liable for failure to leave support for the surface. There is no difference in principle between a lease and a deed of conveyance. *Davis v. Treharne*, 6 App. Cas. 460. I do not find that this case of *Eadon v. Jeffcock* has been overruled. On the contrary, it is cited as late as 1902, as one of the leading English cases. It is true that in the case of *Davis v. Treharne*, supra, Lord Blackburn alone, of the three Lords delivering opinions, including the Lord Chancellor, said: "I cannot agree with what seems to have been said by Baron Cleasby in the case of *Eadon v. Jeffcock*." The other Lords delivering opinions did not question that case; and it was not there overruled. In the case of *Eadon v. Jeffcock* Baron Cleasby said in part: "It appears to us that, outside of this contract, there is no reservation of any right to support, whatever the exact nature of that right may be, but that we must look at the contract itself, and by a proper construction of it, having regard, of course, as in all cases, to the subject-matter, arrive at the extent to which the owner authorizes the minerals to be removed." He also quotes from Lord Wensleydale in *Rowbotham v. Wilson*, 8 H. L. C. 359, as follows: "Whether the right to support given by the land below to the land of owner of the surface, when the strata belong to different persons, properly is to be called an easement, as it is by Mr. Gale in his excellent *Treatise on Easements*, 'a natural easement,' or whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition with a right of action against the owner of the land adjoining or subjacent when the act of his neighbor does him an injury, are questions immaterial to the decision of this case, though the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in *Bononi v. Backhouse*," 9 H. L. C. 508.

Baron Bramwell, delivering an opinion in the case of *Eadon v. Jeffcock*, said, in part: "In this case the defendants have a lease of a seam of coal. It may not appear of much consequence by what name their interest is

called, but the word 'lease' may in such cases have helped to a particular conclusion. For by that word we commonly understand a temporary estate granted in something which, at the end of the term, is to be restored to the lessor in the condition in which it was delivered to the lessee, fair wear and tear excepted, as in a lease of land, house, or a movable chattel. But that is not the intention of a lease of a seam of coal. That is more a sale of the coal, or grant of a right to take and remove it within a certain time, and it is not to be restored at the end of that time to the grantor. Treat it as a sale of the coal, provided the vendee get it all within a certain time, and why should the grantor be at liberty to say, 'Though in terms I sold the whole of it, yet by implication I reserved as much as was necessary to support the surface in its natural condition'? Why should not the argument be good, 'If you meant that exception, you should have said so in words'? Suppose a sale of brick, earth, or gravel by metes and bounds, and suppose the vendee took it all, and suppose then the soil of the vendor outside the boundary crumbled in for want of lateral support; would the vendee be liable to a claim in respect thereof by his vendor? and, if he would, why? With great respect, such a dealing with a seam of coal is more like selling the materials of an intermediate floor than letting or selling the floor. Suppose a man with a three-story house sold the materials of the second floor; would he have a right to say, 'But you must leave enough to support my third story, or you must prop it up'? It is true a lessee of a mine may take all the coal and artificially prop the surface, but practically this is impossible, owing to the expense; and the same argument applies, viz., why did not the grantor stipulate for it? It may be said that if this argument is true of a lease or grant of coal, to be taken in a certain time, it would be equally so of a grant to be taken whenever the grantee thought fit; if so, of all cases where the ownership of mines and surface was severed, and that the authorities are overwhelming the other way. But, in the first place, the argument is not so strongly applicable where the grant allows the grantee to take at any time, because the grantor may well allow his land to be let down, provided it is to be down within a certain time, where he would object if he could not tell for all futurity when it might happen. In the next place, where the terms of the severance are not known, but only that there is a severance, then it may as well be presumed one way as the other. That is a case of ownership, not contract, as this is. Here the terms of the contract that gives the right to take the coal are known, and the question is, why does not the general principle apply, viz., look at what is said in the deed, and add nothing except from a necessity for doing so?" Yet Baron Bramwell felt bound by the previous decisions

of his own country, and doubted as to his decision.

It is obvious that the English courts are no longer in sympathy with the theory of presumptive or implied reservation of so much of the thing granted as is necessary for support, as a basis for the right of support. *Rowbotham v. Wilson*, supra; *Bononi v. Backhouse*, supra. Our statute (section 2, c. 72, Code 1899) provides: "Every such deed, conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest whatever, both at law and in equity, of the grantor, in or to such lands." Shall we still say that there is an implied reservation, in derogation of the express grant? The answer is apparent.

What we have said does not dispose of the whole doctrine of subjacent support. What is the doctrine or right in this state, and upon what does it rest? It rests upon, and consists solely of, the second proposition above stated—the principle of law, "*Sic utere tuo ut alienum non lædas*." This rule of law expresses all that there is of the doctrine. This position seems to be fully recognized by plaintiff's petition for a rehearing. It may be asked, what is the difference upon what ground the doctrine or right of subjacent support rests, so that it exists? The reply is that the difference is not so much in the existence as in the manner in which it may be parted with by the surface owner. If the right of support is a reservation of the subjacent estate, or a servitude upon it, or an easement in favor of the surface owner, or a part of the surface estate, there is more show of reason in saying that the right of support may not be parted with by implication or without express words, than there is when the right is considered to consist only of a rule of law commanding that you shall not use your own so as to injure that of another. This rule of law relates to the use and enjoyment of property, and not to the ownership of property. As a rule of law, it is negative in its application, forbidding the use so as to injure that of another. It is not a servitude when applied between the owner of the surface and the owner of the subjacent strata of land, in the strict sense of that term, any more than it is a servitude upon all property. Likewise, it is not, strictly speaking, an easement in favor of one owner of property against another. It is no more a part of the surface than of the subjacent estate in land, although applicable to both. It has no more force, when applied between the different owners of the surface and subjacent estates in land, than when applied as between the different owners of property everywhere and of all kinds. As a rule of law, it must be always the same—constant, invariable, and immutable.

By the side of this principle of law, and to be applied in harmony with it, there is

another which must be considered. It is the proprietary right of the owner of property—the principle of absolute dominion where there is absolute ownership. Under the principle of law, "*Sic utere*," etc., I think it is incontrovertible that where the surface and subjacent strata or estate in the same land are owned by different persons, and the right of support has not been parted with by the surface owner, the surface owner is entitled to subjacent support; or, as many of the authorities put it, that the surface owner is entitled *prima facie* to support. All the authorities agree upon that proposition. Also, all of the authorities recognize the principle, "*Sic utere*," etc., as one ground of the doctrine of support. Why? Because, when the ownership is severed, two separate estates are formed, and neither may be used by the owner to the injury of the other. The owner of the subjacent estate may not so use his own by removing all of it, as to injure the surface estate; but, so long as the removal does not injure the surface estate, he may remove.

Considering this rule of law as the doctrine of subjacent support in this state, how may the surface owner waive or exclude the right of support? Which is simply another form of asking how he may waive or exclude the benefit of the rule of law mentioned. I would answer that he may waive or exclude the benefit of this rule of law in precisely the same way that he may waive or exclude it in relation to any other property owned by him, or any other rule of law the violation of which has caused or will cause him injury. It is now fully settled by the authorities, no matter upon what ground they base the right of support, that the surface owner may waive or exclude it by contract. "The right to remove all the minerals in a certain strata, though the support of the superincumbent strata is destroyed thereby, may be created by apt words." 6 Am. & Eng. Dec. Eq. 643; and English and American cases there cited. Great difficulty has been experienced by the courts, upon consideration of the several instruments before them, as to what words, or whether the particular words involved, evinced an intent to part with the right of support. It seems now to be fully settled that the right of subjacent support may be waived or excluded by plain implication.

The principal controversy in this case resolves itself to this: Has the plaintiff waived or excluded the right of support by the deed of conveyance mentioned in the declaration? Let us look at the cases claimed to construe instruments similar in language to that used in this contract. Let me say that none of them interpret language exactly like the contract here presented. The case chiefly relied upon by plaintiff is the English case of *Harris v. Ryding*, supra. As we have said, in that case it was expressly held that the mining rights related to acts to be exercised upon the surface of the land, and that

they did not give additional rights to the owner of the minerals reserved, under the ground. Certain American cases are cited, such as *Carlin & Co. v. Chappel*, 101 Pa. 348, 47 Am. Rep. 722; *Burgner v. Humphrey*, 41 Ohio St. 340. *Livingston v. Coal Co.*, 49 Iowa, 369, 31 Am. Rep. 150; *Williams v. Hay*, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719, and others. An examination of these cases will show that they adhere, in some form of expression, to the theory of implied reservation or implied grant as a ground of support, following in the footsteps of *Humphreys v. Brogden*. So following, they in effect refuse to admit that the owner may waive the right of subjacent support by implication. I cannot pass this subject, however, without saying that I can in no sense agree with the two cases cited of *Livingston v. Coal Co.* and *Williams v. Hay*, upon the question of construction. The language of the instruments construed in those cases will be found in the reports thereof. It seems to me that the language used in those instruments was sufficient to waive and exclude the right of support, without considering whether that right rests upon one or both of the propositions first above mentioned. It was Judge Story who said: "Where the language of an instrument is neither uncertain nor ambiguous, it is to be expounded according to its apparent import, and is not to be warped from the ordinary meaning of its terms in order to harmonize it with uncertain suppositions, in regard either to the probable intention of the parties contracting or to the probable changes which they would have made in their contract had they foreseen certain contingencies." Those cases seem to me to do violence to the principle of law stated. In the Ohio case referred to the agreement or lease was of the coal, with the right to remove the same. We are not construing that language here. It will be observed that the extent to which the coal might be removed, or the manner of its removal, are not expressed in that instrument. The mining right may not have amounted to more than the grantee or lessee would otherwise have been entitled to as a right of way of necessity, without words. As to that, I do not decide.

In the work on *Mines* by Robert Forster MacSwiney, of London, issued in 1884, all previous English cases are reviewed, and the rules governing the interpretation of instruments and contracts in relation to support obtaining in England are laid down. I quote from that work (page 304) as follows: "If apt words are used, whether in the instrument of severance itself, or in a contemporaneous, or a subsequent instrument, and whether in affirmative or negative terms, and whether in express terms, or by plain implication, and whether the underlying mines are granted or excepted, and whether the instrument is voluntary or statutory, the right of support for land in its natural

state may be effectually excluded"—citing *Rowbotham v. Wilson*, 6 E. & B. 593; *Shafto v. Johnson*, 8 B. & S. 252; *Taylor v. Shafto*, Id. 228; *Murchie v. Black*, 19 C. B. N. S. 207; *Williams v. Bagnall*, 15 W. R. 272; *Buccleuch v. Wakefield*, L. R. 4 H. L. 377; *Smith v. Darby*, L. R. 7 Q. B. 716; *Eadon v. Jeffcock*, L. R. 7 Exch. 379; *Buchanan v. Andrew*, L. R. 2 Sc. & D. 288; *Aspden v. Seddon*, 10 Ch. 396; *Gill v. Dickinson*, 5 Q. B. D. 159; *Davis v. Treharne*, 6 App. Cas. 466; *Dalton v. Angus*, Id. 809; *Chapman v. Day*, 47 L. T. 709; *Mundy v. Rutland*, 23 Ch. D. 81; *Bell v. Love*, 10 Q. B. D. 558. A number of cases are there cited in which the right of support was held to have been waived or excluded, either by the express terms of the contract or by plain implication.

In *Smith v. Darby*, supra, decided in 1872, Lord Blackburn said: "But does not this deed say, 'You may take them absolutely, only making compensation afterward'? I cannot agree that there is any argument to be derived from the use of affirmative words only, without any negative words. The question is: What was the intention of the parties to the deed, when there is an affirmative promise to pay money to the tenants, and what was the bargain as to the sale of the property? If the owner of a horse said, 'You may take the horse,' and the person to whom this was said had promised to give £20 for it, there is no question that he could not be sued in an action of trespass for taking the horse, because the intention of the parties was that the one was to buy and the other sell the horse. So here, the question is whether it appears upon the clauses in the deed that the intention of the parties was that the minerals should go absolutely, without any restriction as to the right of support." In *Aspden v. Seddon*, supra, decided in 1875, Sir G. Mellish, L. J., in the opinion said: "If it appears from any express words in the deed, or by necessary intendment from anything contained in the deed, that it was not the intention of the parties that there should be any right to support, the court is bound to hold that the plaintiffs have failed to make out their case." Also: "If liberty is reserved to do the act complained of, that reservation, as between the parties and those claiming under them, makes the act rightful." In *Buchanan v. Andrew*, supra, decided in 1873, the Lord Chancellor said: "My Lords, generally speaking, when a man grants the surface of land, retaining the minerals, he is guilty of a wrongful act if he so uses his own right to obtain the minerals as to injure the surface, or the things upon it; and, as prevention is better than cure, the court would be justified in granting an interdict to prevent him from doing so. But, on the other hand, I apprehend it is the clear law of England, and also of Scotland, that, when two persons meet and deliberately settle a contract, they are at liberty to enter into such terms (not being contrary to the public

law) as they may think fit, and if a fear of surface lands is willing to take the risk of any injury which may be done by the working of the subjacent minerals it is perfectly lawful for him to do so; the person who was previously the owner of the entirety being under no antecedent obligation to part with any portion previously his own, except upon such terms as are mutually agreed upon. In such a case, therefore, the whole matter resolves itself into a mere question of construction. No views of a conjectural kind as to what is or what is not reasonable can be admitted, if the contract itself is plain and free from ambiguity." In *Davis v. Treharne*, supra, Lord Blackburn said, in relation to the exclusion of the right of support: "If Mr. Treharne, when he let the land, had by express words or by necessary implication said, 'You may take away all the minerals,' or, 'You must take away all the minerals, letting down the surface,' he had a perfect right, at least before he had made the two building leases, to do so." Other English cases might be cited on the question of the interpretation of instruments as to waiver or exclusion of the right of support. From them it is simply a question of intention, in the usual way, from the words used in the instrument.

In *MacSwinney on Mines* this subject is treated under certain divisions. Under the division "d" the first case reviewed is *Harris v. Ryding*, supra. I quote from that work (on page 339) as follows: "With respect generally to the various cases referred to in divisions 'b,' 'g,' 'd,' and 'e' of the present subject, the following observations may be made: In the earlier cases the courts, in construing the instruments before them, apparently adopted the curious mode, both in the case of land in its natural state and of land in its unnatural state, of assuming, in the first instance, the existence of an intention that the right of support should not be disturbed; and of then proceeding to consider whether the provisions used could not be reconciled with that intention. In the later cases, on the other hand, the courts seem to have assumed nothing; but to have proceeded at once to construe the instruments before them according to their literal and natural meaning. It is, in many respects, difficult to reconcile the earlier with the later cases; and on these grounds the difficulty seems capable of explanation. It need hardly be added that the later cases must, at the present day, be considered authoritative. Having regard to these circumstances, the following propositions may, as the result of the cases, in which the instrument of severance is producible, and in which some contract has been made, or is said to have been made, with respect to support, be considered as established: (1) Instruments of severance are, at the present day, construed according to their literal and natural meaning, rather than ac-

cording to preconceived assumptions of the existence of an intention in the parties, or in the Legislature, that the right of support should not be disturbed. (2) Where it appears from the express words of such instruments, or by clear intendment therefrom, that it was the intention to exclude the right, effect will be given to such intention. (3) Where the mine owner is relieved from liability for damage, the surface owner may often be presumed to have been compensated by anticipation. But in other cases the presence of a clause for compensating the surface owner, at all events if it refers to underground working, are material elements in ascertaining an intention to exclude the right. * * * (7) The common covenants to work in the usual and most approved mode, or the common clause in an inclosure act under which mines are reserved to the lord, of holding and enjoying them in as full, ample, and beneficial a manner as if the act had not been made, or the common clauses giving full liberty of working and winning are not, of themselves, sufficient to exclude the right."

Other propositions are deduced by the author which I deem it unnecessary to repeat. From this it appears that the early English cases, such as *Harris v. Ryding*, are discredited in their own land upon the question of the construction of instruments relating to the waiver, or exclusion of support, and are no longer considered as authority at home on that question. They are, however, relied on here as conclusive on that question. It seems to me that those early English cases would come with more force, as persuasive argument, if they had not been discredited in the land from which they come. It is hardly necessary to say that American cases which adhere to, and follow implicitly in the footsteps of, those early English cases on the question of the construction of instruments of severance, adopting the same "curious mode" of construction, would be discredited in England, and it seems to me in reason should not be followed by us. In argument, much stress is laid upon the ability and learning of the English judges. I concede it all. I would detract nothing from their world-wide reputation for ability and learning in the law; but I do say that the trend of the English courts, with all their greatness, is toward, if, indeed, they have not already come to, the position, to which every other court it seems to me must finally come, of construing an instrument conveying coal or minerals under the ground in identically the same manner in which other written instruments are construed, and in the same manner as instruments conveying any other species of property, free from presumptions or implied reservations not applicable to other instruments of conveyance.

This being the true rule, we seek the intention of the parties to the instrument involved in this case as the paramount end to

be attained. Certain rules of law applicable to contracts are referred to, all of which will simply aid us in ascertaining the intention of the parties. All the provisions of the contract must be considered together. Then resort must first be had to the language used by the parties therein. As has been said, the contract of the parties is the law to them. The words are to be given their plain, ordinary, and popular meaning, unless they have acquired a peculiar sense in respect to the particular subject-matter, as by the known usage of trade or the like, or unless the context shows that the parties used them in some other and peculiar sense. 17 Am. & Eng. Enc. L. 11; Railroad v. Schutte, 103 U. S. 118, 26 L. Ed. 327. When the contract is thus considered, and it appears to be free from uncertainty and ambiguity, and the intention of the parties is apparent, the task is at an end. Uhl v. Ohio R. Co., 51 W. Va. 106, 41 S. E. 340; Story on Contracts, § 780; 9 Cyc. 587; Gibney v. Fitzsimmons, 45 W. Va. 334, 32 S. E. 189; Devlin on Deeds, § 837; Salt Co. v. Campbell, 89 Va. 396, 16 S. E. 274. Before the deed in question was made the plaintiff was the owner of the fee and everything in the land in question. He might have removed the subjacent estate and permitted the surface to subside. He might have destroyed both, or used them at his pleasure, so long as he did not injure another. What he might have done himself, he might grant to another the right to do. For a valuable consideration the plaintiff granted the coal under the land in question, which means all the coal, and he granted certain mining rights and privileges, among which was the following: "Together with the right to enter upon and under said land and to mine, excavate, and remove all of said coal." It will be observed that these words are not "the common covenants of working in the usual and most approved mode," or "the common clauses giving full liberties of working and winning." It cannot be said that the minds of the parties did not meet upon the removal of all the coal, when they so expressed it in the deed. If the right to support may be waived or excluded by contract, what kind of a contract is necessary for that purpose? The plaintiff granted all the coal, and the ownership of the surface and of the underlying coal was severed, creating a separate estate in each. If the deed said nothing more, the owner of each would be bound by the rule "*Sic utere*," etc. If the deed said nothing more, I would without hesitation hold that the owner of the surface would be entitled to support, and that the owner of the coal could not so use it by removing all of it as to injure the surface. The deed does not stop with the grant of all the coal. It contains the express additional grant, on the part of the plaintiff, to the grantee, of the right to enter upon and under said land and to mine, excavate, and remove all of said coal.

It is contended that the conclusion reached in this case overlooks the fact that the law is a part of the contract so far as the parties have not otherwise contracted. I think it does not. I go further, and say that the parties to this contract are presumed to have known the law at the time they entered into it, and to have known that, if the deed rested with the simple grant of all the coal and nothing more, the grantor would then be entitled to support for his surface. Knowing the law, the parties undertook to further contract. The grantor being willing to give further privileges, and the grantee desiring further privileges, they placed in the deed a further provision granting the right to enter upon and under the land and to remove all the coal conveyed. This intent gives effect to the additional grant. Otherwise it would seem to be meaningless, and not to grant more than a way of necessity, which the law would give without it. In fact, that is the position taken by the learned attorneys for the plaintiff. It is true that other mining rights are also granted, and the provisions granting them are not without meaning. But the particular grant of the right to enter upon and under the land, and mine and remove all of the coal, is virtually without meaning if it does not give to the grantee the right to remove all of the coal. I think there is a vast difference between a grant of all the coal simply and a grant of all the coal together with the right to enter upon and under the land and remove all of it. Without a right to remove all, the owner of the coal may not do so, if to do so would injure the surface.

As to the waiver or exclusion of the benefit of the rule "*Sic utere*," etc., upon which alone the right to support rests, I ask in what more effective way may it be waived or excluded by the surface owner than by positively agreeing or consenting, for a valuable consideration, to the specific use complained of? The plaintiff complains of the use by the removal of all. He has by express, positive words, not by implication, agreed to the specific use of which he complains. No claim is made that the words used have any technical meaning as applied to the subject-matter of the deed. The words are intelligible to all. They mean the same to the linguist and the unlettered. If the English language were searched for words of consent or agreement to the removal of all the coal conveyed, I apprehend that none more appropriate could be found. Then, has the defendant so used its property as to damage the plaintiff? According to the averments of the declaration, it has; but we cannot stop there. Has not the plaintiff consented and agreed to that specific use by his solemn deed, and thus been barred of his right to complain? If the plaintiff is injured by the performance of the contract, is it not *damnum absque injuria*? I must answer in the affirmative. So long as the constitutional guaranty of the

right to contract exists, a man may so contract, and the contract must be respected by the court. If a party chooses by binding contract to agree to an act resulting in damage to his property, he has the right to do so. It is a proper subject of contract. Can the plaintiff say, "I have agreed in unequivocal terms to the specific use of the defendant's property of which I now complain, but 'Sic utere tuo ut alienum non laedas.'" I have agreed to the act, anticipated the injury, and received the compensation therefor. May I not sue and recover the compensation again? I answer, most certainly not. To answer in the affirmative would be to say that the principle, "Sic utere," etc., may be invoked to impair the obligation of a binding contract. No such application of this principle is authorized by law. It may not be used to perpetrate a fraud, neither may it be used against express terms of a contract, or to impair or destroy its obligation. "It is a general rule of law that no one can maintain an action for a wrong, where he has consented to the act which occasions his loss." 8 Am. & Eng. Enc. L. 698; 1 Broom's Legal Maxims, 268; quoting Tindale, C. J. In other like cases, where a party has so contracted or consented, it would hardly be contended that he might, notwithstanding the contract, recover damages. If the owner of a building sell and convey the materials in a story of the building, together with the right to remove all of them, may he afterwards complain of the removal of what he sold? If one sitting on a chair in his own home sells that chair, together with the right to remove all of it, and it is removed under the contract, may he afterwards complain because he has not the support of the chair as he had before the sale and removal? If one agrees that another may do a particular act which otherwise would constitute a trespass to the former's property, and that act is done pursuant to the agreement, may he complain? It is hardly necessary to say that in such cases damages may not be recovered produced alone by the specific act agreed to, if there be no negligence or malice in the manner of doing the act. Illustrations might be multiplied indefinitely. The intention of the parties to the deed is apparent, certain, and unambiguous, from the language used. The language of the deed gives the grantee the right to remove all the coal. It may be claimed that, although the grantee is given the right to remove all the coal, if he does so, he should provide artificial support. As said by Baron Bramwell, this is impossible, owing to the expense. I doubt if it is possible to support a whole tract of land *modo et forma* by artificial means. It seems to me that there must be some subsidence, some settling, of the surface, if artificial support alone be resorted to. What has been said in relation to agreeing and consenting to the specific use disposes of the question of artificial support as effectually as the question

of natural support. Taking the deed as it is averred to be, we find no express covenant for artificial support. I do not think that artificial support was within the contemplation or intention of either of the parties when the deed was made. No language was used from which such intent may be implied. The court cannot make a contract for the parties, and cannot extend or enlarge one already made.

Many of the English cases lay stress upon the fact that under the particular instruments before them the mining rights applied to acts to be done upon the surface of the land only. If anything were needed to show the contrary intent here, the word "under," when read with the rest of the deed, certainly performs that function. It cannot be said, if the word "under" is to have effect, that it does not clearly mean that the rights granted may be exercised under the land, and that the right of removal relates to the coal conveyed under the land. It may be claimed that the word "under" should be excluded as repugnant. Why should it be excluded? The claim is that it is in conflict with the dominant and primary intent of the deed. Is this true? What is the primary or dominant intent of the deed? The primary or dominant intent is to convey the coal under the ground, and the right to remove all of it under the ground is not in conflict, but consistent, with this dominant intent. It is argued that the dominant intent of the deed is to reserve the surface. I cannot agree with that. The plaintiff does not own the surface by virtue of this deed. He was the owner of it before this deed was made. He derived title to it, as well as to the coal conveyed, from some other source. He simply did not part with the surface by this deed farther than therein specified. No reservation of surface is expressed in the deed. It was not necessary to do so. I must give meaning and effect to the word "under," because I believe it is rational and consistent with the residue of the deed to do so. "Rules of construction are adopted with a view of ascertaining the intention of the parties, and are founded in experience and reason, and are not arbitrarily adopted. They are not intended to make terms for the contracting parties, but simply to ascertain what the language means which they have employed in their contracts." 2 Devlin on Deeds, § 837. If, however, there were a doubt (which I do not concede), then the rule that the deed must be construed most strongly against the grantor is applicable. "Where the grant shows the intention, even though ambiguously stated, following the rule that it is construed most strongly against the grantor, the right to surface support will be held not to exist." Snyder on Mines, § 1032, and cases there cited.

It is said that this rule, that a deed must be construed most strongly against the grantor, is the last rule to be resorted to, after every-

thing else has failed, and for that reason it is inveighed against in argument. If it be the last, and there remains ambiguity after the others have been applied, it must certainly be applied before reaching a decision in favor of the grantor. It hardly seems fair to treat this rule so harshly, when we remember that we have a statute (section 2, c. 72, Code 1899) designed at least to emphasize and carry it into effect. Mr. Minor, in his *Institutes* (volume 2, p. 918), speaking of the like statute in Virginia, says that it "seems to be designed to carry this principle of the common law yet further, although there has been as yet with us no judicial determination as to its construction. The enactment is that every deed conveying lands shall, unless an exception be made therein, be construed to include all the estate, right, title, and interest whatever, both at law and in equity, of the grantor, in or to such lands." I think the language used in the deed under consideration, no matter what may be the ground upon which the right to subjacent support is thought to be based, is sufficient to exclude the right to support. I would apply here the same rules of construction applicable to other instruments of like character conveying other property; no stronger, no weaker, but with the same effect upon all. This is the trend of many of the late cases and authorities, and I feel that it is the true rule. Section 7, c. 79, Code 1899, is cited as bearing upon this case. In my judgment it has no application.

It is contended that the court should look at the hardship of a decision in favor of the defendant. If the contract is binding, the court cannot relieve against it because of hardship alone. It is claimed by each side that great hardship will result in case of an adverse decision. This may be true; but, if true, it is a hardship of their own making. According to the declaration, the plaintiff's surface has subsided, and damage resulted. If the plaintiff was required to leave of the coal conveyed to it enough to support the surface, which is estimated at from one-fourth to one-half of the whole, then the part so left would be of no value in place to the defendant. Under our law, the defendant, being the owner thereof, must pay taxes on the portion left, through all the years to come. It is persistently urged that the modern and best methods of mining require the removal of all the coal for the benefit of the surface, and that to do so permits the surface to reform and the remaining strata to reunite, thus preventing the continuous draining of the water from the surface. This may or may not be true. I do not know. If true, the damage to plaintiff's surface may not be so great as it otherwise would be.

My only apology for the length of this opinion is the importance of the questions involved. For the reasons stated, I concur in the decision.

POFFENBARGER, J. (dissenting). I am unable to concur in the view of my associates in this case, because I do not think it has been, or can be, reached without violating sound and well-settled principles, and especially rules governing the interpretation and construction of deeds and contracts. The opinion avowedly disapproves and repudiates vital principles of the law of subjacent and lateral support, declared by every American court that has ever applied that law to a deed or contract by which the surface of land has been separated in title from the underlying coal, as well as the decisions of the English courts. It expressly condemns, by name, the decisions of Alabama, Illinois, Indiana, Iowa, New York, and Pennsylvania, and those of Ohio, and perhaps other states, without express reference to them. It demolishes at one fell blow the entire system of English and American law on the subject. This the opinion fully and expressly concedes. An effort is made, however, to free the case from the operation of the principles declared by the numerous decisions thus repudiated and disapproved by this court, but uniformly recognized and rigidly enforced by all others in the English-speaking world, because of an alleged variance in the language of this deed from that of the ordinary deed conveying coal without the surface. After conveying all the coal in the tract of land, except about three acres, the deed further stipulates, among other things, that "the party of the second part [grantee of the coal] and his assigns is to have the right of way through said reservation for a road, air-course and tramway necessary or convenient for the mining and removal of said coal and the coal under coterminus and neighboring lands, together with the right to enter upon and under said land and to mine, excavate, and remove all of said coal." Immediately connected with this there is further language to be noticed later. Conceding, for the purposes of illustration and argument, that a mere grant of all the coal would not confer, by implication, the right to deprive the surface of subjacent support by removing all the coal, the opinion asserts that the clause above quoted confers, by express grant, the right to remove every particle of the coal, and that the grant of such right of removal is an express grant of the right to take away the support of the surface, because the destruction of the support is the necessary and inevitable result of such removal from under the surface, provided no artificial support be substituted. This is the theory advanced by counsel for the defendant in error and adopted by the court as a means of escape from the effect of the general principles declared by all other courts in cases involving the interpretation of deeds, severing minerals from the surface by grant, or reservation thereof. If it is untenable and unwarranted by the language of the deed, this decision is squarely contrary to said

principles, and in legal effect, as well as declaration of opinion, denies that they obtain in the law of this state, although universally approved as sound in all other jurisdictions. In determining whether this deed may be so distinguished, for the reasons aforesaid, it is certainly not improper to ascertain what reply other courts have made to the same contention, based upon similar, if not identical, clauses in deeds of this class. If they have held such clause, taken in connection with a previous clause granting the coal, insufficient to authorize the destruction of support of the surface and to distinguish the deed from one granting title to the coal without saying more, then this decision ignores and repudiates the application of rules of construction and interpretation made by courts of the highest credit and repute, and without showing wherein they have erred in doing so.

One of the earliest cases on the subject, *Harris v. Ryding*, 5 M. & W. 60, decided in 1839, by the English Court of Exchequer, presided over by some of the most distinguished jurists whose names are recorded in the annals of our jurisprudence, including the great Sir James Parke, construed a deed, which, in all material respects, was like the one now under consideration here. By it, A., being seised in fee of certain lands, granted it to P., his heirs, and assigns, reserving to himself, his heirs, and assigns "all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals and metals which then were, or at any time, and from time to time thereafter, should be discovered in or upon the said premises." By this language he retained the title to all the coal. Then follows an additional reservation, which, it was claimed, conferred right to remove all the coal and destroy the support of the surface. It was in these words grammatically annexed to the words of grant: "With free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get, the said mines and every part thereof, and to sell, dispose of, take and convey away the same, at their free will and pleasure." In that case, as in this, it was urged that this last clause must have effect; that the words thereof must be deemed to have been used in their usual and ordinary sense and meaning; and, given such effect, that they authorized a removal of all the coal, and so necessarily carried the right to injure the surface by destroying its support. Counsel in the argument of that case said: "The defendant was entitled to work out all the mines, but he could not do so if he was obliged to leave props, which would be of coal to support the surface." But the court, after mature consideration, replied thus: "Under this reservation, A. was not entitled to take all the mines, but only so much as he could get, leaving a reasonable support to the surface." The clause of the deed giving the right to

enter upon the land to seek for, get, and to sell, dispose of, take and convey away all the said mines and every part thereof, was not overlooked by the court in reaching its conclusion. In respect to it, Lord Abinger said: "The defendants' counsel, therefore, seeks to carry the right of the defendants a step further by the operation of the words in the exception, giving a right of ingress upon the land. Now, the meaning of that exception was to meet the difficulty the defendants labored under, of not being able to enter upon the land to sink shafts, and make use of those shafts for the purpose of getting their mines. I think there is no new right reserved thereby more than the right to use the surface, for the purpose of getting the mines; but it does not enable them to get them to a greater extent, or in a manner unusual and improper, so as to prejudice the surface of the land. I cannot, therefore, see how the exception relied upon by the defendants at all assists their argument. That exception was rendered necessary by parting with the surface of the land. It applies to the liberty the grantor has of going upon the surface, and does not apply to the right he has below." Maule, B., said: "I think the covenant or stipulation, giving them the power to go upon the plaintiff's land, and providing that they are to make compensation for it, applies merely to acts done upon the surface of the land—that is, disturbing the surface by digging, sinking shafts, and so on—all those things they are authorized to do, but not absolutely, only conditionally upon making compensation, and that liberty has nothing to do with the right of getting the mines, which may be taken to be done on this occasion without breaking the plaintiff's soil; but their right to get the mines is the right of the mine owners, as against the owner of the land which is above it." Parke, B., after setting out the terms of the reservation and the power to enter upon the land and take away the coal, said: "It is clearly the meaning and intention of the grantor that the surface shall be fully and beneficially held and enjoyed by the grantee; he reserving to himself all the mines and veins of coal and iron ore below. * * *

This is the true construction of this deed, in order to make it operate according to the intention of the parties. * * * If that is the true construction of the reservation and power, the defendant ought to have stated in his plea that he took the coal he did take, leaving a reasonable support for the surface in the state it was at the time of the grant."

Another parallel case is *Carlin & Co. v. Chappel*, 101 Pa. 348, 47 Am. Rep. 722. One Brown conveyed to Lewis certain lands by deed containing the following clause: "Excepting and reserving to John Brown all the coal underlying said lots of ground, the right and full and free privilege of ingress, egress and regress for digging, mining and excavating said coal (for the purpose of mining, dig-

ging, excavating and conveying away said coal)." By sundry conveyances, the title to part of the land came to Chappel, and the last deed contained this clause: "All the coal underlying the same, together with the full and free privilege and right of ingress, egress and regress, so far as may be required for digging, mining, excavating and conveying away said coal, being vested in John Brown." Counsel for the defendant in error said in the argument that as the grantor had expressly excepted and reserved all the coal underneath the lots conveyed, with the right to mine and take it away, he and his assigns of the coal were not liable for damages to the grantees of the surface, or their assigns, for any result following the removal of all the coal. But the court unanimously resolved as follows: "Where the owner of land conveyed it in fee simple, excepting and reserving all the underlying coal, with the right of mining, excavating, and conveying away the same, and subsequently conveyed to another party the coal and privileges so excepted and reserved, held that the grantor's assigns of the coal were liable for damages occasioned to the owner of the surface by subsidence caused by mining the underlying coal." In *Williams v. Hay*, 120 Pa. 485, 14 Atl. 879, 6 Am. St. Rep. 719, the deed conveying away the land expressly reserved to the grantor the right to take all the coal and afterwards the necessary rights of way for the full exercise of the privileges reserved. It is much stronger than the language used in the deed now under consideration. It reads as follows: "Reserving, however, to the use of the said W. J. Baer, his heirs and assigns forever, the full and perfect right and privilege of searching for, mining, procuring and taking away by such ways and means as to the said W. J. Baer, his heirs and assigns, may seem fit and practicable, all the coal, iron ore, metals, limestone, fire clay, and all other mineral substances, whatsoever, whether solid or liquid, lying and being upon, under, and contained within the surface of the land hereinbefore mentioned and described (exclusive of the three [3] acres around the buildings), and the necessary right of way for the full exercise of privileges as aforesaid: Provided, however, that the said W. J. Baer, his heirs and assigns, in mining and removing the coals, iron ore and minerals aforesaid shall do as little damage to the surface as possible." In view of the decision in *Carlin & Co. v. Chappel*, cited, it does not seem to have been urged in this last case that the right to remove all the coal carried with it the right to destroy the support to the surface, but it was insisted that this grant, together with the clause recognizing the right to damage the surface, disclosed upon the face of the deed intent to permit the support to be destroyed and the surface thereby damaged. But the court said: "Where one person owns the surface and another the underlying coal or other minerals, the absolute right of the former to

surface support is not to be taken away by a mere implication from language not necessarily importing such result. Such right is not affected by a clause in the deed conveying the surface but reserving the coal, which provides that the grantor, his heirs, or assigns, in mining and removing the coal 'shall do as little damage to the surface as possible.'"

In *Burgner v. Humphrey*, 41 Ohio St. 340, the court held as follows: "If the owner of land grants a lease whereby he conveys all the underlying mineral coal, with the right to mine and remove the same, the lessee will not be entitled to remove the whole of the coal without leaving support sufficient to maintain the surface in its natural state, unless the language of the instrument clearly imports that it was the intention of the lessor to part with the right of subjacent support." In that case the grantor owning a tract of land bargained, sold, transferred, aliened, and conveyed to another "all the mineral, coal, iron ore, limestone and all the other minerals" under or upon said tract of land, and further gave, granted, and conveyed to said other parties "the right, privilege and license to enter upon the above described land at any and all times hereafter and search and explore thereon for said mineral, coal, iron ore, limestone, clay and other minerals, oil and salines, or for any of them, and when found to exist on said land, to dig, mine and remove the same therefrom." The deed then went on and granted all the rights, privileges, licenses, and easements necessary or incident to the proper prosecution of the business of mining, and removing any or all minerals or substances aforesaid. It is to be observed here that this deed gave expressly the right to remove all that had been granted. It granted all the coal and granted the right to search for it and remove the same. "Same," in that connection, could mean nothing other than all the coal, but the court said the deed conferred no right upon the grantee to disturb the surface by withdrawing its support. No doubt the clause giving the right to remove the coal was strongly urged as a relinquishment of the right of support, for counsel for plaintiff in error conceded that the lease of coal carried with it the right to open the mines and explore, and if coal was found to dig and remove it, but they insisted that the mine owner had no right to remove all of it, including props and pillars, in the absence of an express relinquishment of the right of support by the owner of the surface, and the court, as above shown, sustained that view. In *Liv- ington v. Coal Co.*, 49 Iowa, 369, 31 Am. Rep. 150, the clause conferring the title to the coal was in this language: "And reserving also to said first party, his heirs, successors and assigns, all coal, coal mines, mineral products and oil beneath the surface of, and belonging to, said premises, with full and sole right to mine, and obtain and remove the same, by such means as they deem proper,

without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of the land in working coal, coal mines, minerals, mineral products and oil, and removing the same, provided the said first party shall not enter on the surface of said lands." Upon this deed the court held that support for the surface could not be destroyed. Here it is to be observed that all the coal, together with the right to remove the same, was reserved, which meant the right to remove all the coal, if the language is to have the effect the terms used import.

In all the above-mentioned cases the deeds contained clauses giving the right to remove all that was granted. How the deed from Griffin to Camden can be distinguished from them is not perceived. It granted all the coal under the tract of land and gave the right to enter upon the land and remove all the coal. Can it be doubted that the deeds in the Ohio case, and in the Iowa case, and *Williams v. Hay*, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719, used language purporting to confer the express right to remove all the coal? There is no claim that the language of the deed under consideration here does more. The deed in *Williams v. Hay* did that, and added a clause which purported to recognize the right of the mine owner to damage the surface, and yet the court said there was no language in the deed by which the intent to waive support of the surface was sufficiently evidenced. In the Iowa case there was an express grant of the right to remove all the coal, and, in addition thereto, language which purported to relieve the mine owner of any liability for injury caused or damage done to the surface of the land in working coal, coal mines, minerals, mineral products, and oil, and removing the same, provided said owner should not enter upon the surface of the land, and the court said that was not sufficient. It is said in the argument that this last decision denies to the owner of the surface, on grounds of public policy, the power to release his support by contract. No such reason is anywhere given in the opinion for the conclusion arrived at in that case. Certain English cases recognizing such right and power are referred to, and the principles announced in them not denied or criticised. It was said of them that they did not go so far as to confer the right, under such a contract as the court was considering, to remove all the coal without liability for negligence in not placing pillars for support of the surface. This may have been an erroneous view of those cases, and the Iowa decision may be wrong, but it is no declaration of public policy forbidding the owner of the surface to part with his right of support by express contract. As to the interpretation of this clause, there may be differences in some of the decisions above referred to. In *Harris v. Ryding*, 5 M. & W. 59, Lord Abinger said the clause giving right to enter and re-

move every part of the coal was inserted for the purpose of authorizing an entry upon the land, for the purpose of exploring and searching for, and carrying away, the minerals, which he seems to have thought was necessary to give such right of entry. In this view Maule, B., concurred, and thus they denied to it evidence of intent to authorize the removal of all the coal. Parke, B. without giving any reason for its insertion, said: "I do not mean to say that all the coal does not belong to the defendants; but that they cannot get it without leaving sufficient support." The American cases seem to concede that a clause granting the right to remove all the coal will authorize the removal of all of it, but will not carry, by implication or otherwise, the right to destroy the support of the surface. They say it does not amount to an express relinquishment of the right of support, and that no such right can be relinquished otherwise than by express language, disclosing plain intent to do so.

But it is said that, if the clause giving right to remove all the coal does not authorize the destruction of the support of the surface, it has no effect, for there is no other function it could perform, and the parties are not presumed to have used any language in their contract without purpose, and that the rules of construction require that every word shall have some effect, if possible, and as much effect as it may have consistently with other parts of the instrument. No fault is to be found with these propositions of law. They are sound and incontrovertible; but how about their application to the clause used in this deed? By reference to Judge McWHORTER'S opinion it will be seen that the first part of the clause relied upon confers a right of way through a reservation of coal in the plaintiff's land, which the grantee did not take by his deed and through which he could have no right to go without an express grant of the right of way. There was necessity for this part of it. It performs an important function. Then follows this language: "Together with the right to enter upon and under said land and to mine, excavate and remove all of said coal." But it does not stop there. It goes on, and confers the right to remove upon and under this particular tract of land coal to be mined upon other tracts of land, coal which had been, or might be, purchased from persons other than Griffin. There was reason, therefore, for not stopping with the mere grant of title to the coal and a way through the three-acre reservation. Without this clause, they could not have removed, through Griffin's land, coal taken out of lands of other people. There was absolute necessity for these two additional clauses. There may not have been any absolute necessity for so much of the stipulation as conferred the right to enter upon and under said land and to mine, excavate, and remove all of said coal. The grantee of the coal would have the right, under the law of neces-

sity, to do this. When a man grants a thing, he grants with it, by necessary implication, the means of getting to it. But this principle does not prevent the parties to a deed or contract from expressly stipulating for rights which the law would give without such stipulation. Illustrations of this are to be found in almost every oil lease and coal lease and purchase of timber operative within the limits of the state. Although, when timber is purchased on a tract of land, or oil and gas under it, or a lot or tract of land out of the interior of another, and left surrounded by the residue, the law gives the right to go upon the land and cut the timber or bore for oil and gas, and a right of way to the owner of the lot or tract of land so purchased and situated, the deed or contract almost always contains an express stipulation for such right of entry or way. This denies that express contracts for rights which the law gives are deemed useless and without purpose.

Are express contracts never made where the parties may rest their rights upon the law? Money advanced without an express contract of repayment may be recovered. Goods, wares, and merchandise delivered to a party and by him consumed, without an express promise to pay for them, gives a right of action for the recovery of their value. But does this principle prevent men from taking notes in such cases? And, if in such case, a man takes a note for the money or the value of the goods, is he regarded as having done a vain, useless, and foolish thing? If Mr. Camden preferred to have an express stipulation in his deed for entry upon the land, mining, excavating, and removing the coal rather than rely upon the law of necessity, giving him these rights by implication, is he to be regarded as having had it inserted for no purpose whatever, because, forsooth, the court denies to him the right to establish some other or different purpose for its insertion? Will his assignee be permitted to advance, as a pretext upon which to found the construction it wants, the lack of another and different and baldly apparent purpose? If the court will not permit it to operate as a relinquishment of the right of support, could he not rely upon it in the court as a covenant for the right of entry upon the land? If we say no other purpose than to authorize the destruction of the support of the surface is discoverable, then we must say that, in no case in which a man could assert his rights without written evidence of the contract, does the taking of such evidence admit that there was any reason for it or purpose in it. But this is not all. The law gives no more than is necessary. It does not consult or provide for the mere convenience of the party who must appeal to it alone for his rights, but gives only what he can get along with. Parties often want more than this, and therefore stipulate for it. So did Mr. Camden in this case. After providing for entry upon the land for the purpose of mining, excavating, and re-

moving his own coal and the coal from adjacent coterminus and neighboring lands, he, in the same clause and immediate connection, stipulated for the right to make all necessary structures, roadways, excavations, air shafts, drains, tramways, and openings necessary or convenient for the mining or removal of said coal and the coal from coterminus or neighboring lands. Not satisfied to depend upon the law of necessity for the privileges of structures, roadways, excavations, air shafts, and so on, he stipulated for all such things as might be convenient. Can it be said that this does not evince a purpose limited to the working of the mine conveniently and successfully which stops short of the right to take away the support of the surface, and that, if he cannot take such support under this clause, the clause is useless and valueless to him, and there was no reason for putting it into the contract? An affirmative answer to this question would do violence to the rules of construction and be at variance with the known practice of all classes of business men everywhere, at all times, and in all relations. Even if this express contract did not broaden the rights of the grantee in extent as to the rights of way and structures, it is a contract of a higher nature than a mere implied right, for such right is merged in it. An action for its vindication would have to proceed upon the express contract. But it is said no reason is yet assigned for the use of the word "all" in the clause conferring the right to remove the coal. Why did not the stipulation stop with a grant of the right to mine, excavate, and remove "the coal" or "said coal?" Does not the word "all" prefixed signify every particle of the coal? Can it mean anything else? Plainly it does not necessarily mean that. In seeking its meaning, we must consider it in connection with its immediate context the language of the clause in which it appears. The purpose of that clause is to give the right to necessary and convenient roads, ways, structures, shafts, etc., and it was desired that such necessary and convenient things should extend to all the coal—that is, to the coal under all portions of the coal area purchased, the coal in the northern, southern, eastern, western, central, and all other portions of that area—and the most apt words and expressive terms for securing such right were "all the coal." That is the sense in which it is generally used in conveyances. A deed generally grants all of the tract of land which its purports to convey. In a sale of timber or growing crops the contract almost invariably uses the word "all," unless something is to be excepted. Its use here by no means necessarily signifies intent that every particle of the coal may be removed.

It being thus demonstrated that this deed differs in no essential or material respect from those construed, by courts everywhere, as not authorizing destruction of the support of the surface, and as leaving the par-

ties, as to the matter of surface support, in the situation in which they would be if the deed merely conveyed the coal, reserving the surface, or conveyed the surface, reserving title to the coal, it becomes necessary now to inquire whether this construction is right, as tested by the rules of construction, and to point out the fallacy, if any, in the numerous decisions which have so construed such contracts, and, incidentally, to ascertain whether the reasoning found in Judge McWHORTER'S opinion has clearly demonstrated misapplication of the rules of construction in the long line of decisions which the court repudiates and overthrows. In deeds, as well as in other contracts and in statutes, the intention controls, and the object and purpose of all interpretation and construction is to ascertain the intention. For this purpose, rules have been devised and prescribed by the courts. Dominant over all other rules of that kind is the one which declares that the whole instrument shall be considered, and the intention expressed in every clause and in every word thereof shall be reconciled and harmonized, if possible. 13 Cyc. 605. Chitty on Contracts, volume 1, page 106, states this rule in different language and as the language strongly illustrates the meaning of the rule it is quoted: "An agreement or contract shall have a reasonable construction according to the intent of the parties; as if a man agree with B. for 20 barrels of ale, he shall not have the barrels when the ale is spent." "In the construction of contracts, all the provisions thereof shall be taken into consideration and reconciled if possible, so that the true intent of the parties to the contract may be ascertained." Barber v. Ins. Co., 16 W. Va. 658, 37 Am. Rep. 800; Heatherly v. Bank, 81 W. Va. 70, 5 S. E. 754. Closely akin to this great dominant rule, requiring the construction of the contract as a whole, comes the next most important one, namely, some meaning must be given to every clause, word, and expression, if it can reasonably be done, consistently with the general intent of the whole instrument, so that the deed may operate, if by law it may, according to the intention of the parties. Another rule of great importance, but clearly subject to exceptions and modifications, where the application of the rules above referred to require it, is that which says words must receive that interpretation which is given by the common usage of mankind. That is, as a general rule, the words must be given their popular ordinary meaning. This rule is subject to many exceptions, but the other two are subject to none. They are invariable and unalterable. Whether a word is to be given its literal meaning must be determined in view of the circumstances under which it is used and the context. Where a word has a popular meaning and a technical meaning, the rule requires that the technical meaning shall pre-

vail. Nontechnical words are not to have their plain, natural, grammatical, established, definite, usual, obvious, and ordinary meaning, if the paper is ambiguous on its face. 13 Cyc. 606. Nor are they to have such meaning if to give it to them would prevent a rational exposition of the whole contract. Id. "A literal interpretation will be abandoned where it leads to a capricious and irrational result, if such rational exposition can be followed." Id. It is upon this rule, relating to the sense in which words shall be taken and given effect, that the whole theory of the defense to this action is based. It is upon this rule that the whole contention of counsel for defendant in error, as to the construction of the deed, is founded. It is obviously subsidiary and subordinate to the two rules above referred to, and if in applying it to this deed, as counsel for defendant in error contend, it conflicts with the result of the application of the other two rules to the contract, then it must yield.

What is the general intent manifested by this deed? The grantor owned the tract of land from the sky to the center of the earth. He granted away the coal only. Therefore he retained the surface. He did not reserve the surface. He excepted it by putting no language in the deed which could take any part of it away from him. The dominant intent of the whole contract is that the grantor shall retain the surface and the grantee shall have the coal. All other parts of this deed must receive such construction as will not make them conflict with this general intention, if it be possible to do so, and yet give them some reasonable operation and effect. Other parts must not have such effect as to deprive the grantor of the surface or any part of it, unless they so clearly express that intention as to make it necessary to give them that effect. The court cannot presume that by retaining the surface there was any intention, on the part of the grantor, to retain it otherwise than in that state in which nature placed and left it. If, in his hands, it is to become punctured with craters and holes and riven with fissures, so as to deprive him of the use and benefit of it for those purposes for which, by nature, it is fitted and designed, he does not retain the surface in the true and full sense of the word. If, having bargained for the surface, he is to be put off with a broken, ruined, and useless piece of land, he does not get what he bargained for. Hence it will not be presumed, in the absence of words expressly showing it, that he intended to let the support go from under his surface, for the very reason that loss of the support is loss of the surface itself, and the whole general intent of the contract, viewed as a whole, is defeated so far as the grantor is concerned, and thereby the first great rule of construction violated. On the other hand, the intent plainly dis-

closed is that the grantee shall have the coal and all of it. And, if he is entitled to all of it, he may remove all of it, but he cannot take with it any part of the surface, because the intent that the grantor shall have that is just as full and plain as the intent that the grantee shall have the coal. Therefore, although entitled to remove all the coal, if this contract gives such right, he still has no right to withdraw the support, because he may substitute artificial, for the natural, support. Impracticability of artificial support, because of the great expense, is the only answer to this. But that depends upon the circumstances. As a matter of fact, such support is sometimes employed. The books contain reports of cases referring to instances of the substitution of artificial, for natural, support. But, be this as it may, the deed cannot be so construed as to take away any part of the surface, if the other portions of the deed can have some reasonable effect without doing so. Repugnance is to be avoided, if possible. That which is plainly guaranteed to the grantor by an exception, the surface, cannot be cut down or impaired by another clause of the deed, if that other clause can have reasonable effect in some other way—can subserve some other purpose useful to the grantee. That it can, and does, has been clearly demonstrated. It gives the important rights of entry upon the land, of excavation, of removal, and of necessary and convenient ways, shafts, structures, etc., as to all the coal, and, if it be limited to these things, plainly coextensive with the utmost signification and import of its terms, the clause is consistent with the general and dominant intent of the whole instrument. Thus every portion, provision, clause, and word is given effect as required by law.

The other construction would defeat the general intention and subject the whole instrument and the general intention to the domination and control of the single word "all," and without necessity, as has been clearly shown. This would stand aside the great rule requiring effect to be given to the general intent, which is absolute, for the subsidiary rule, requiring effect to be given to every word, which is not absolute except to the extent that some function must be found for each word. It is not absolute as to what office it shall perform or the extent to which it shall be effective, and under it the import and meaning of mere words are required to be curtailed and limited so as not to conflict with the general intent expressed. "And as the meaning to be put on a contract is that which is the plain, clear, and obvious result of the terms used therein, so these terms are to be understood in their plain, ordinary, and popular sense, unless they have, generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a particular sense, distinct from the popular sense of the same

words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special sense. And the same rule has been thus stated: Words are to be construed according to their strict and primary acceptation, unless, from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect." Chitty on Contracts, p. 113. "As a rule, the terms of a contract are to be understood in their ordinary and popular sense, rather than in their strict grammatical or etymological meaning. Subject to this rule, words are ordinarily to be understood in their plain and literal meaning. * * * However, the literal meaning will not be adopted by the court against the intention of the parties as evidenced by the entire contract." Hammon on Contracts, pp. 812, 813, § 412. "As in the case of all contracts, the intent of the parties to the deed, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law. * * * The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention, if practicable, when not contrary to law." Devlin on Deeds, § 886. "Manifestly, no general rule can be laid down as to the construction of particular words. The primary object courts have in view is to carry out the intention of the parties." Id. § 864.

In order to do this, words are often ignored entirely or discarded as meaningless and useless, and, in some instances, a meaning and effect are given to them entirely different from what they import, in order to effectuate the general intention shown by the deed. Numerous illustrations of this might be given, but one or two will be sufficient. If it appears from the terms of a deed, and the circumstances connected with the execution, that the grantor meant children, although he used the word "heirs," effect will be given to it accordingly, and the deed will not be defeated by the general rule that a conveyance to the heirs of a living person is void. *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46, 24 Am. St. Rep. 438; *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308; *Griswold v. Hicks*, 132 Ill. 404, 24 N. E. 63, 22 Am. St. Rep. 549; *Brollar v. Marquis*, 80 Iowa, 49, 45 N. W. 395. The term "heirs at law" may be construed as children, or grandchildren, where such a construction will effectuate the grantor's intention and is consistent with legal principles. *Waddell v. Waddell*, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575. "Generally whatever is inconsistent with the real intention of the parties as ascertained from the language of the whole instrument may be rejected as superfluous, or false or mistaken, or repug-

nant, provided no rule of law be violated thereby, so as to give effect to the deed according to the intent. But, although words may be rejected which are repugnant to other parts of the deed and to the general intention of the parties, nevertheless no word is to be rejected unless there cannot be given a rational construction to the instrument with the words as they are found." 13 Cyc. p. 619, article on "Deeds."

Under the application of these rules there can be no doubt that the general intention of the parties, to the effect that the grantor shall have the surface in the full sense of the term and the grantee the coal, must govern and control the subsidiary clause giving right to enter upon the land and mine, excavate, and remove all the coal; for these words may have reasonable and important force and effect without working such disturbance, and, under these rules, the court must so limit their effect. This clause adds nothing to the grant of the coal. The grant alone gives the right of removal of all of the coal, if it can be done without depriving the surface of its support. No additional words are required to confer that right. It exists without any additional clause. The mere addition of the right to remove all the coal, without language in connection with it disclosing intent to allow the surface to be thereby injured, leaves the parties in the same situation as if the deed stopped with a mere grant of the title to the coal. The value and character of the surface in its natural state cannot be cut down or impaired without the employment of language expressly and necessarily showing such intent. Under the operation of these rules of construction the courts have said uniformly that, in order to take away the right of support, the language used must not only authorize the taking of all the coal, but must go further, and authorize, in terms or by such language as clearly shows the intent, the letting down of the surface. There must be some words which can refer to nothing but the surface. No such language appears in this deed. No right to compensation for damage to the surface is stipulated for. No word is used which says the surface may be let down, or necessarily means that. In *Davis v. Trebarne*, 6 App. Cas. 460, Lord Blackburn said, in construing a coal lease, under which royalty was to be paid, not a deed conveying coal, that if the lessor had said by express words or by necessary implication you may take away all the minerals, or you shall take away all the minerals, letting down the surface, he would thereby have relinquished his right of support, and that the fact that it was to the interest of the lessor to have all the coal removed because he derived a royalty therefrom might be considered as material on the question of intent. But the words of that lease omitted to say the surface might be let down, and it was held

that the support could not be withdrawn from under it, although it was a lease and although it contained a clause stipulating for compensation to the lessor for any damage or injury done to the surface of the said farms or lands. This stipulation was referred to, and held to be governed by the clause giving the right to erect buildings and machinery and to do and execute all such other acts, works, and things, upon, in, or under, or above the said premises, as should be necessary and convenient for working and carrying away the minerals, and that the use of the word "under" in that clause did not make it applicable to operations carried on under the surface, so as to permit injury to the surface by a withdrawal of the pillars. The general intent disclosed by the whole contract rendered this word irreconcilably repugnant thereto, and it was thrown away and not allowed to control the general intent, because its connection was such, its location such, that the court could see that it was never intended to have such effect, and was intended to play a subsidiary and comparatively unimportant part in the contract. It was restrained by its immediate context and had to yield under the force of the general context, and the contrary intent appearing from the whole instrument.

Now, what are held to be deeds and contracts giving the right to take away the support of the surface? What language is sufficient to disclose intent, on the part of the grantor, to relinquish it? In *Smith v. Darby*, 7 L. R. Q. B. 716, a deed was held sufficient for that purpose, because it conferred upon the lessees the right to enter and work and take the minerals by this clause: "they, the lessees, their executors, administrators, and assigns, making reasonable satisfaction to the lessors, their heirs and assigns, and their tenant and tenants, for the damage done to them respectively by the surface of their lands being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals and converting coal into charcoal, as for such damage or injury as may be done or caused in the dwelling house or other buildings of the said lessors by getting mines of coal, ironstone, or other stone or other minerals under or near to any of the dwelling houses or other buildings of the said lessors, according to the covenant hereinafter contained." Following this was a covenant that the lessors, in case of damage or injury to any dwelling house, cottages, or other buildings already erected, or to be thereafter erected on the land in lieu of those then on it, and not of greater value than those then on it, "by reason of any minerals being got under them, or so near to them as to occasion such damage or injury, the lessees and assigns shall at their own cost, on six days' notice by the lessor, rebuild or repair any such buildings so damaged and

injured, and put them in as good condition and repair as they were before the damage was done." There was a further stipulation for the payment of damages done to the crops on the surface. These provisions of the contract clearly showed an intention to allow the surface to be injured. They had direct reference to injury to the surface by withdrawal of its support, and, seeing that in the language of the contract, the court said it must have effect according to the intent of the parties. It was impossible to say that buildings could be injured by getting coal under them otherwise than from subsidence of the surface, and that could result only from lack of support. Hence the language clearly showed that the support might be withdrawn. *Eadon v. Jeffcock*, 7 L. R. Ex. 879, proceeds on the theory of a difference between a lease and a deed, and seems to go a step further; but in *Davis v. Treharne*, above referred to, Lord Blackburn disapproved that case, and said the intent to relinquish the right to support must affirmatively appear in a lease, as well as in a deed, and the principles announced in *Smith v. Darby* are also inconsistent with the theory of *Eadon v. Jeffcock*. In *Scranton v. Phillips*, 94 Pa. 15, an executory contract of sale determined the rights of the parties in respect to the coal. It excepted and reserved to the vendor the coal under the tract of land, and provided that, on full payment of the purchase money, the grantor was to execute and deliver a good and sufficient deed in fee simple, "reserving the coal and privileges above stated, and with a full and unconditional release and discharge forever, on the part of the said party of the second part, her heirs, and assigns, to the party of the first part, his heirs and assigns, from any liability for any injury that may result to the surface of the said premises from the mining and removal of the said coal; and with a quitclaim on the part of the party of the second part to the party of the first part, his heirs and assigns, of all right, title and interest in and to said coal, and the privileges of mining and removing the same as aforesaid." In the opinion of the court, this contract sufficiently disclosed intent to permit the surface to be injured by the withdrawal of support. It stipulated that there should be no liability on the part of the mine owner for any injury that might result to the surface of the said premises from the mining and removal of the said coal. There was no room to say the injury to the surface contemplated might result from entry upon the surface and doing acts thereon. The language was susceptible of but one signification. It said injury to the surface from the mining and removal of the coal, from taking the coal from under the land, so as to inflict injury by subsidence of the surface. What a vast difference between that contract and the deed here under consideration! Where in this deed is there a waiver of damage for injury to the surface, or reference to

such injury? Search for it will be made in vain. In all these cases the contract showed an affirmative intent to permit injury to the surface by withdrawal of the support, and the language used expressing that intent was such that it could be referred to no other subject than injury to the surface by removal of the support.

Another case in which support was allowed to be taken away, without liability, is that of *Duke of Buccleuch v. Wakefield*, L. R. 4 H. L. 377. It arose under an act of Parliament providing for the inclosure of a commons, the minerals under which were owned, at the time of the passage of the act, by the Duchess of Buccleuch, and the surface held by her tenants. The forty-third section of the clause of the act provided that the owner of the mines should work them "in as full and ample a manner to all intents and purposes as would or might have been done if the said lands had remained open and uninclosed, or this act had not been passed, without any interruption whatsoever, yet nevertheless making reasonable compensation for damages done by such works as aforesaid to the person or persons sustaining such damage." The court found that prior to the passage of that act it had been the usage, custom, and practice of the owner of those mines to take away the support of the surface and pay the tenants the damages occasioned thereby, and, as the act provided that the working of the mines should go on in all respects as if it had never been passed, it was held that the mine owner had the right to remove the support, but was liable for the injury resulting. By accepting their deeds under the act of Parliament, the parties were deemed to have assented to the provision of the act which authorized the working of the mines to continue in the future as they had been carried on previously. *Rowbotham v. Wilson*, 8 H. L. 348, arose under another inclosure act. Under it commissioners were appointed to allot the land, according to the rights of the various persons interested in them, including the mines. The award of the commissioners, assented to by the persons among whom the partition was made by them, provided that the land so allotted should be lawfully held and enjoyed by the allottees without molestation and without any mine owner being subject to damages on account of working and getting the mines, or by reason that the lands might be rendered uneven and less commodious to the occupiers thereof, or by sinking in hollows, or being otherwise defaced or injured. The court held that, whatever is the general right in the surface to support, this clause in the award operated as a grant of a right to disturb the surface of the land. But there was nothing left to implication in the terms of that award. They expressly referred to the surface and exonerated the mine owner from liability for injury to it by causing it to become uneven

or to sink in hollows or to become otherwise defaced and injured. The language used could perform no other office than that of a relinquishment of a right of support, as in the Pennsylvania Case and in all the other cases in which such effect has been given to the deed.

The requirement of expression of intent to impair the surface in connection with the grant of right to remove the coal stands upon sound reason, arising from the nature of the right of support. There must be enough to enable the court to see that there is a covenant on the part of the surface owner not to sue the mine owner for damages for injury to the surface resulting from subsidence, or in any way molest him in the working of his mine. If the right of support is an easement, or a right *ex jure nature*, it is a right which cannot exist except as incident to, and a part of, the surface. It cannot be annexed to the coal, for, by its nature, it is incapable of such annexation and cannot pass with a grant of the coal. It cannot pass by grant in connection with the coal, nor in any way; because, when it is disconnected or eliminated from the surface, it ceases to exist. There must be a subject of grant in order to effectuate a grant. The thing which language purports to grant must be capable of being given to another. This easement is not. *Bonomi v. Backhouse, E., B. & E.* (92 E. C. L.) 622. Nor can it be the subject of release in the legal sense of term, because a release passes an estate, or right. In other words, it passes title; and as this right is incapable of existence, except as part of the surface, it cannot be passed to another, unless he has the surface which is necessary to its existence. This view is explained in *Rowbotham v. Wilson*, by Lord Chelmsford, as follows: "But although the thing itself, namely, the right to support, cannot pass by grant, nor be extinguished by release, yet the covenant amounts to a grant of license to do acts which may be completely destructive of that right; and being by deed, and therefore presumed to be founded upon good and sufficient consideration, it is irrevocable and binding upon all who claim the surface land from Pears. The effect of Pear's deed is not to transfer to Howlette any right or interest in the coal which might serve as a support to the surface land, but it operates as the grant of right to Howlette, his heirs and assigns, to work the mines without molestation, denial, or interruption, even to the taking away this support, and defacing and injuring the surface of the land, which, without such a grant, could not lawfully have been done." As tested by the decisions hereinbefore adverted to and by the rules of construction, which are laws to which the court must bow and submit, the mere grant of a right to remove all the coal, unconnected with any words giving right to damage the surface by withdrawal of the support therefrom, does not amount to a grant which can operate, or

be effective, as a covenant not to disturb, molest, or sue the grantee for such injury to the surface; for the reason that the words "all the coal" are susceptible of more than one meaning. It is an uncertain equivocal grant, not necessarily meaning that the support shall be withdrawn, and grants or covenants which fall short of that intent cannot protect the grantee in the destruction of the right of support.

Another rule of construction which is favorable to the defendant in error, if it were applicable, but which does not seem to be relied upon in the argument, remains to be considered. It is that in deeds and contracts the language of the grantor, covenantor, or promisor is sometimes to be taken most strongly against him. This applies when there is doubt as to the meaning of the contract. It cannot avail here. Hammon on Contracts (at section 413) names six exceptions to which this rule is subject: (1) There must exist in the terms of the contract an ambiguity justifying more than one construction of it. (2) It will not be allowed to defeat the plain intent of the parties as gathered from the entire instrument. (3) It is inapplicable where the terms of the contract were concurrently settled by both parties. (4) It is not allowed where the contract contains anything in its nature odious and unequally burdensome. (5) It does not apply to grants from the sovereign. (6) It is not resorted to in any case until all other rules of construction have been tried and have proved ineffectual. See Chitty on Contracts, p. 137. Any one of the first, second, and sixth exceptions will defeat the application of this rule to this case. The contract is not susceptible to two constructions. To apply the rule would defeat the plain intent to be gathered from the whole instrument. Other rules of construction make the intention of the parties clear. "This rule is subservient to the ascertained intention of the parties, and is to be modified by the rule requiring effect to be given every word so far as possible; nor is it to be applied or invoked until all other rules of construction fail." 13 Cyc. tit. "Deeds," cl. "Construction against Grantor," 600. Of this rule Chancellor Kent says: "It is a rule of strictness and rigor, and not to be resorted to but where other rules of exposition fail. The modern and more reasonable practice is to give to the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction." 2 Kent, Comm. 556. The ambiguity which calls into effect this rule must be, according to all the authorities, one which will not yield to any other treatment, one which, like Banquo's ghost, will not down at the bidding of any other rule. It must be an obstruction which defies crowbar, pick, and shovel, sledge and stone wedges, drill, black powder, and dy-

namite, and requires, for its demolition, the volcanic action of nitroglycerine.

All that has been said thus far in this opinion, however, has been put aside by the declaration that this deed is free from ambiguity, in consequence of which no rules of construction can be invoked or applied. The majority opinion, as well as the brief for counsel for defendant in error, asserts and reiterates that the contract is clear and free from ambiguity. I assert that a contract or deed must be read in the light of the rules of interpretation to ascertain whether it is ambiguous. The mental process of analysis must be performed in the reading of the contract in obedience to the rules of construction. The legal effect of the instrument cannot be determined from one clause. All must be read and collectively viewed. No words or clauses will be limited or transposed or otherwise altered from the arrangement in which they are found, or the ordinary sense in which they are used, unless some conflict is found to exist, but whether there is such conflict must be determined from an analysis of all the parts. "It would seem to follow, from the statement just made as to the object of interpretation, that, if the language of the instrument is plain and unambiguous in itself, there is no room for interpretation or construction, and it is quite frequently so stated. But in determining whether there is such an ambiguity as calls for interpretation the whole instrument is to be considered, and not an isolated part thereof; this being merely an application of the rule considered below, that the instrument is to be considered as a whole." 17 Am. & Eng. Ency. Law, 4. The first great dominant rule of construction is used first to determine whether there is ambiguity, and that rule controls all other rules of construction. The assertion made as to lack of ambiguity, a mere assumption based upon three words of this deed, was made in a case lately pending in the Supreme Court of the United States, with reference to a contract which that court had under consideration. But that court, the highest in the land, and at least the equal of any other in the world, speaking through Mr. Justice White, replied as follows: "The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that, in order to establish want of ambiguity in a contract, a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select

particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them." O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 144, 42 L. Ed. 469. "The meaning of the parties to written instruments must be ascertained by the tenor of the writing, and not by looking at a part of it." Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415. "When the substantial thing which they have in view can be gathered from the whole instrument, it will control mere formal provisions, which are intended only as a means of attaining the substance." Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64.

The keynote of the majority opinion is: "When a person sells a thing with the right to remove it, or the right to occupy and use it, that he is conclusively presumed, in the absence of a contract to the contrary, to have included in the consideration not only the value of the thing sold, but compensation for the inconvenience and injuries which will necessarily result by its removal or occupation." The fallacy of this proposition is that it assumes everything at issue. It is merely saying in another form and in different words that the contract is not ambiguous. It assumes that the question of the right to remove the coal without leaving support has been determined. Illustrations of the alleged rule are given by saying the sale of logs in the tree, wool on the sheep's back, and a growing crop, etc., with the stipulation for the privilege of severing and taking the same away, confers complete title and full dominion over the thing sold. But suppose the purchaser of the wool on the sheep's back should set up a claim, in view of his peculiar practice or mode of enjoying and using such property, to the right to destroy the hide of the sheep, upon the theory that he is entitled, under his contract, to take all the wool and should have that part of it which extends into the skin. Or suppose one who sells a growing crop of clover, stipulating, further, that the vendee shall have the right to enter upon the land, sever and remove all of said clover, and the grantee should set up, under that contract, a claim to the right, not only to take so much of it as stands above the ground, but to turn his hogs in upon it to dig up and consume the roots. All this would be strictly within the literal meaning of the terms, but no one would pretend to say that any such claims could be sustained. The man who has the title to property and the right to remove the same or otherwise use it must do so in such manner as not to injure the property of another. "Sic utere tuo ut alienum non ledas" (so use your own as not to injure another's prop

erty) and "Prohibetur ne quis faciat in suo quod nocere possit alieno" (it is prohibited to do on one's own property that which may injure another's) are maxims enforced by all the courts known to our jurisprudence. They are a part of the common law, and as old as the law itself. No man can free himself from their operation except by a contract which expressly exonerates him from the burden of them. They are rigidly and vigorously enforced by this court. *McGregor v. Camden*, 47 W. Va. 193, 34 S. E. 936; *Powell v. Bentley & Gregory Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53. This old and universal law says, when a man buys a thing with the right to remove it or occupy and use it, he cannot use it in such manner as to injure the property of another. Title alone gives right to remove and use. Every owner of property has that right, but the law limits that right to the extent of the maxims just quoted, no matter how or from whom he acquired the property, or what its character may be. Here the surface belongs as clearly and as fully to the plaintiff in error as does the coal to the defendant in error, and not one word of the contract necessarily, or fairly, confers upon the owner of either the right to use his property so as to injure that of the other, except the express stipulation for rights of entry for certain specified purposes. A contract, by which a thing is sold and a right to remove it is conferred, must be governed to some extent by the nature of the thing so sold. Coal differs in its situation and in its nature from all the things enumerated in the opinion. There is no ground upon which a fair and just analogy between coal and any of them can be predicated. An element to be considered in ascertaining the meaning of all contracts is the nature of its subject-matter, and this rule is utterly ignored in the comparison made. "In construing a contract, the court considers its subject-matter, and reads it in the sense most agreeable to the nature of the contract." *Ham. Cont.* § 400, p. 796.

It is also said that difference in conditions prevailing in England where the principles of law found in the decisions relating to contracts of this kind originated, from the conditions prevailing here, furnishes some ground or reason for departure from those principles. Coal is coal the world over, has like uses and value everywhere, and is mined and handled in the same way wherever use is made of it. The surface has the same general uses and value in all parts of the civilized world. If any difference should be made, probably it would favor, rather than militate against, the adoption of the principles of the English decisions. In England much of the coal seems to lie in comparatively level regions and near the surface, so that the inconvenience of supporting the surface is greater than it is here where the coal, for the most part, is found in the moun-

tains and overlaid with hundreds of feet of solid rock, in consequence of which less coal need be left here for the purpose of support. Another criticism made in the brief of counsel for defendant in error, but not mentioned in the opinion, is grounded upon an alleged unjust and unsavory origin of the English decisions on this subject. It is said that the nobility owned the surface and prided themselves upon the number and breath of the acres held, while the villains, in the feudal ages, operated the mines, and the courts, under the control or influence of the nobility, steadily ruled in the interest of the latter. So far as my limited investigation has revealed the history of the mining of coal in England, it does not sustain this charge, even if, in view of the reasonable and just principles upon which these decisions rest, as viewed in the light of present conditions, it merited any remark or attention. In most of the cases reported the title disclosing rank and fortune is prefixed to the name of the defendant, and not to the name of the plaintiff who brings the action for injury to his surface.

Additional Opinion.

POFFENBARGER, J. (dissenting). Since the decision of this case and the filing of a petition for rehearing, my associate, Judge Cox, has prepared another opinion, setting forth the principles which, in the opinion of the majority of the court, govern the construction of deeds of the class to which the one under consideration belongs, and stating their conclusion. My former opinion dealt with the case as disposed of by the opinion prepared by Judge McWHORTER, embodying the opinion of Judge Mason of the circuit court. As the new opinion of the majority of the court states a foundation for their conclusion, somewhat at variance with the views of Judge Mason, and presents propositions not raised or discussed at the time of the preparation and filing of my dissenting opinion, I feel it my duty to express the reasons and grounds of my dissent from the views stated in the new opinion.

I took the position in my former opinion that the rule of construction which, in case of ambiguity in a deed, requires that the doubt be resolved against the grantor, is only applicable when, after the application of all other rules of construction, a doubt as to the intention of the parties still remains. This seems to be rather acquiesced in, and yet, for some reason, it is said that this rule has been strengthened, extended, or accentuated by section 2 of chapter 72 of the Code of 1899. It is true that Prof. Minor, in the second volume of his work (at page 918), says this statute seems to be designed to carry this rule further than did the common law. But he frankly admits that there is no judicial determination to that effect. It is merely an idea of his own, not emanating from any court. With all due respect to

the great learning and ability of Prof. Minor, I am bound to express my unwillingness to accept his opinion. I do not feel at liberty to engraft upon the law so important a change upon a mere conclusion of this kind without any authority to support it, and, worse yet, without any statement of the process of reasoning by which it is reached. Furthermore, the language of Prof. Minor has not, in this instance, the accuracy and preciseness which usually characterize his statements. He quotes the statute as if it said "every deed conveying lands shall," etc. This is not the language of the statute. Its language is "every such deed, conveying lands," shall, etc. It follows section 1 of chapter 72, which prescribes a simple form of deed to take the place of the cumbersome and verbose instruments by which lands were anciently conveyed. Section 2 then says: "Every such deed, conveying lands, shall, unless an exception be made, be construed to include all the estate, right, title and interest whatever, both at common law and in equity, of the grantor, in and to such lands." The purpose of the two sections was to dispense with the common-law requirements of a deed essential to the passing of the whole estate, or highest estate that a man could have, or may have, in a tract of land, or any other estate, title, or interest, without describing it. If he has less than a fee-simple title, such a deed will pass it. If he has only an easement in it, such a deed will pass that interest. The statute simply enables the grantor to pass any interest or estate he may have in a tract of land by executing a deed purporting to convey the whole of the estate. That is its purpose, and its only purpose. How could this statute have any application to a deed which does not purport to pass the whole of a tract of land without exception? By its very terms, it is only applicable when the deed conveys all of a tract without exception or reservation. When it does not purport to convey the whole tract, but reserves a portion of an estate or interest in a tract, or grants only a certain estate or interest in, or portion of, a tract, how could this statute have any application? It is generally in such deeds and contracts only that rules of construction have to be used, and this statute has no application to such deeds. If it is claimed that a deed, uncertain in its terms, does pass the grantor's title, or title to the land claimed under it, said section 2 has no application. It applies to nothing except a deed in form or effect like the deed prescribed in the preceding section. Hence it is beyond my power to see how it can be deemed to have, in any way, strengthened, extended, or affected the rule of construction in question.

Upon further investigation, I have reached the conclusion that this rule of construction is wholly inapplicable, under any circumstances, in determining whether a deed or

contract granting or reserving coal and mining rights shall have the effect of authorizing the mine owner to injure the surface, belonging to another person, by destroying its support. In the opinion prepared by Judge COX, MacSwinney on Mines, p. 340, is quoted as stating the following to be the principle governing such deeds, deduced from the language of the decisions: "Where it appears, from the express words of such instrument, or by clear intendment therefrom, that it was the intention to exclude the right, effect will be given to such intention." This is the most liberal rule that can be extracted from the authorities; the most liberal rule stated by MacSwinney. It says in effect, in order to deprive the surface owner of the right of support, the deed must do it by express words or by clear intendment. If the language must be such as to make the intent clear, what room is there for the application of the rule prescribed for the government of cases of doubt? Mr. MacSwinney's tenth rule, given on page 341, says: "Where the right has not been expressly excluded, or where the intention to exclude it is doubtful, the principle formerly mentioned, that the owner of land in its natural state is entitled, *prima facie*, to support, lateral as well as vertical, and that in whichever way the severance is effected, whether by a grant of the land, excepting the mines, or by a grant of the land (whether in fee simple, or for a term of years) excepting the surface, is applicable in favor of the contention that the right has been granted or reserved by implication." It has been suggested that the doubt referred to in MacSwinney's rule 10 is a doubt remaining after the deed has been tested by all the rules of construction, including the rule that an ambiguous deed is to be taken most strongly against the grantor. To this view I cannot accede, for the reason that this rule is applicable only in cases of doubt. It does not make a doubtful deed plain. After its application the deed is not plain as construed by the rules of law. It is still a doubtful deed on its face, and the law says, not that it is plain, or shall be deemed to be plain and unambiguous, but that, although doubtful on the question of intent, the thing in question shall pass by it. This law was prescribed for, and is applicable to, instruments disclosing doubt as to the intent of the parties, not instruments showing plain intent, nor for the purpose of making doubtful instruments plain, but only to make a doubtful instrument pass a right or title, non constat the doubt. Mr. MacSwinney does not state this principle in any such sense as is claimed. When does he say "the principle formerly mentioned" shall control? The answer, in his own language, is "where the right has not been expressly excluded, or where the intention to exclude it is doubtful." How are we to take this language? Shall we ingraft upon it

something that the author has not put into it? If so, why? Upon what ground can this be done? It will appear in a subsequent part of this opinion that no decision of the English courts, with a single possible exception to be noticed, has ever given the benefit of the doubt on the question of intent to the mine owner or lessee. It will be further shown that no decision of the English courts, with one possible exception, has ever allowed a deed to take away the right of support from the surface by any implication, except a necessary one. The language in every instance was such that it could not be given force and effect without allowing it to deprive the surface of its support. In at least one case, as shown in my former opinion, words of minor importance, irreconcilable with any other view, were absolutely discarded as being repugnant, and deprived of any effect, because their immediate context was such as to make it plain, upon a view of the whole instrument, that the parties did not intend them to have such effect, or, at least, as to raise a doubt as to what they intended.

I turn now to another proposition deemed by my associates to be important and controlling in the construction of this deed. I am unable to see how the nature of the tenure to the right of support can have such effect. *Harris v. Ryding*, 5 M. & W. 59, and *Humphreys v. Brogden*, 12 Q. B. 739, decided, respectively, in 1839 and 1850, started with the view that where the coal is granted and the surface retained, or where the surface is owned by one person and the minerals by another, and nothing further appears respecting the rights of the parties, the owner of the surface has, by implied reservation, a right of support which the owner of the coal cannot destroy; and where the surface has been granted and the coal retained, and nothing further appears in the deed, the grantor is deemed to have granted the right of support along with the surface, without express words to that effect. In the first instance, it is a reservation in derogation of the grant. In the other, it is a grant in derogation of the reservation, if we treat the right as an easement, resting on the coal. When no title papers appeared showing how the severance had taken place, it was presumed that the estate had been severed into two parts in such manner as to confer the right of support either by grant or reservation as aforesaid. Lord Campbell said, in *Humphreys v. Brogden*: "If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which

it had ever before enjoyed." The first proposition says, in effect, in granting the surface, the grantor is presumed to have granted the surface in its natural condition and state, for otherwise he would have made a reservation in derogation of his grant. The second says, in substance, that, when granting the minerals, he cannot be presumed to have parted with the support of the surface, which he reserved to himself, because the surface, without the support, would not be the surface in truth and in fact. It is not strange that Lord Campbell should have stated these propositions in a case in which no deeds were shown, and it did not appear how the severance occurred, for he had before him the earlier case of *Harris v. Ryding*, in which the deed of severance did appear and had been construed. It was a deed granting the coal and reserving the surface. Therefore it presented the strong case of a reservation to the grantor of a right which stood in the way of his grantee and impaired the value of the thing granted. The court held in *Harris v. Ryding* that a deed should not be so construed as to take away the right of support, even when it granted the minerals, reserving the surface, in the absence of language conferring, upon the grantee of minerals, the right to destroy the surface. Such being the true construction of a deed of that kind, the court very consistently said in the later case, showing nothing except ownership of the surface by one person and of the coal by another, that there could be no presumption that the deed or other instrument by which the severance had been made contained terms which took away the right of subjacent support.

Still later, in *Rowbotham v. Wilson*, 6 E. & B. 593, decided in 1850, Lord Campbell delivering the opinion, the doctrine laid down in *Humphreys v. Brogden* was adhered to, but it was found that the deed in that case was such as to take away the right of support. This decision was in the Court of Queen's Bench. The case was appealed and heard in the Exchequer Chamber in 1857, when Lord Campbell's decision was affirmed. It was here that a different view from that held by Lord Campbell, as to the nature of the tenure of the right of support, was suggested. Watson, B., said that the provision of that deed by which the surface owner had given away his right of support should be treated and regarded as a covenant not to sue for damage to the surface. He said: "No doubt these words might operate as a grant, if the subject-matter was capable of a grant. But I am of opinion it could not be the subject-matter of a grant. * * * To be the subject-matter of a grant, it must be an easement to be imposed on the corporeal property of the grantor. * * * The present claim is not analogous to that of lights; for this, as nothing is to be done on or over the plaintiff's land, but only in the event of surface injury from works, is a covenant not

to sue. Bramwell, B., said: "Now, I think it inaccurate to say that the plaintiff is claiming any kind of easement qualified or otherwise; an easement seeming to me to be something additional to the ordinary rights of property. I think the plaintiff is merely claiming the common right not to be injured in his property by the way in which another uses his." Martin, Baron, after expressing similar views in different form, said: "I think these are the true legal grounds upon which this case rests, and not upon the principle applicable to easements and servitudes; as, in my opinion, the general right which a man *prima facie* has at common law to the support of his land, either subjacent or adjacent, is a natural right analogous to the right of flowing water, and not an easement." Williams, J., said: "It is, I apprehend, in its nature, one of the ordinary rights of property, and not an easement, which is a right accessorial to those ordinary rights." Cresswell, J., said: "Howlette had a right to the mines, and to use them as he pleased, provided he did not, by so using them, injure the property of Pears. And that right of Pears to sue for an injury done to his land was a right given to him by the common law, as owner of that land, and not as being entitled to any easement in or over the mines below it. An easement must be an interest in or over the soil; but the owner of the mines could have removed every atom of the minerals without being liable to an action if the soil above had not fallen."

In 1858 *Bonomi v. Backhouse*, E. B. & E. 622, was decided in the Court of Queen's Bench; Lord Campbell, C. J., participating. The question in that case was when the statute of limitations begins to run for an injury done to the surface. In it Lord Campbell said: "I agree in the opinion that the right of support which the plaintiff claims is a natural right of property, to be presumed till (as in *Rowbotham v. Wilson*, 8 E. & B. [92 E. C. L. R.] 123) evidence is given to rebut the presumption; and that such a right is not to be considered an easement or servitude arising from grant." Wightman, Coleridge, and Earle, Judges, were all of the same opinion. *Rowbotham v. Wilson* went to the House of Lords on appeal, and was there decided in 1860; Lords Wensleydale and Chelmsford delivering opinions, both of whom expressed themselves as satisfied with the views expressed in *Bonomi v. Backhouse* concerning the nature of the right. In 1861 *Bonomi v. Backhouse* was finally disposed of in the House of Lords, where the following was announced as law: "The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property." The injury to the property in that case was the result of the breaking down of the surface over a mine on an adjacent tract of land; but it was agreed that the same principles governed as in the case

of a letting down of the surface by mining operations immediately under it. That case did not determine the principle upon which the right of subjacent support is parted with, whether by grant or otherwise. It was not necessary to do so. There was no pretention that it had been lost. The only defense was the statute of limitations.

When writing my former opinion, I did not regard this new view concerning the nature and origin of the right of support as having any important bearing upon the concrete question presented by this record. Upon reflection, however, I have come to the conclusion that, if it has any such effect, it is an element of strength in the conclusion to which I have come rather than of weakness. It says the right of support is part and parcel of the surface, a property right, naturally incident to the surface, recognized by law as belonging to the surface, and never to be regarded, in law, as having been parted with, unless it clearly appears to have been granted away. It no longer stands upon the questionable presumption of a reservation in a deed in derogation of the grant made by that deed, or as an implied addition to the thing granted. This change elevates it to the impregnable position of a property right belonging to the surface, and going with the surface whenever the surface is granted or reserved. The first theory treated it as an easement, not naturally belonging to the surface, but as rather belonging to the coal, a right of property incident, and belonging, to the coal, and carved out of it and annexed to the surface by the grant or reservation. The new view makes it doubly and unquestionably a part of the surface.

My associates say, in their new opinion, that this ascertainment of the exact nature of the right of support affords more solid ground for the position that it may be parted with otherwise than by an express grant or the equivalent thereof. In other words, that it may be lost or released by mere implication not necessary. As it is not an easement annexed to the surface and operating as a servitude upon the coal, but is a part of the surface, an invasion or disturbance of that right merely gives a right of action, just as any other wrongful act, wherefore, on the principle that a man cannot sue for damages consequent upon the performance of an act to which he has consented, a grant of the right to remove all the coal estops the grantor from recovering damages for the injury resulting to his land. They say that, if it were an easement annexed to the surface by grant or reservation, there would be more reason for saying it could be parted with only by express words or necessary implication. This view impresses me as confusing the right in question with the remedy for redressing a wrong to that right. If it is an easement annexed to the surface, an obstruction thereof or injury thereto would be remediable by an action for damages. If

It is a natural right of property incident to the surface, an injury thereto is remediable in like manner. Permission to inflict the injury by a disturbance of this right would bar an action as effectually in the one case as in the other. If a man consent orally to the mining and hauling away of his coal by another who has not a shadow of title to it, there would be no right of action against him as for a wrong. The taking of the coal would not be a trespass. So, if a man permit any other act to be done to the detriment of his real property, no matter by what right he holds, he cannot complain of it as a wrongful act. If such act be done without permission, it is a mere trespass, and does not in any way affect the estate, although the party is liable in damages for the wrong done. These are acts which do not, in any way, affect or destroy the title or estate of the owner. They merely injure and damage the property. They may be done to an easement or other appurtenance of the property as well as to the corpus. But they are only wrongful acts when not done by consent or permission of the owner. But when the act is done, not as a trespass, admitting title in the owner, nor by his consent and permission, but as a rightful act, and the defense to the action brought for the injury is based upon a claim of title and right in the defendant to do it, then the issue becomes one of title, of right, of estate. A mere permission is revocable at any time, and any further injury done after the revocation gives a right of action for damages. The previous permission, which had been revoked, constitutes no bar to it. I imagine that the defendant in this case would be unwilling to say that its right to remove the support now existing under the surface of the plaintiff's land depends merely upon the will and pleasure of the plaintiff, and that his revocation of the permission expressed in the deed to do the injury, if it be such, will put an end to its right to effect further damage to the surface. If it be only a valid personal covenant, a breach of it would only give a right of action for damages. Its contention is not that it has inflicted an injury upon the plaintiff's property by an act to which the plaintiff consented, in consequence of which he cannot bring an action for the resulting damages, but that the plaintiff has no right of support, because he has parted with it by his deed; that the surface is a servient estate to the coal; that the deed imposed a servitude upon the surface in favor of the coal. The contention is that this right, be it easement or natural right, has been bargained, sold, and conveyed away by the plaintiff and is no longer his property, in consequence of which he cannot prevent further injury to his surface by revoking his consent. In *Rowbotham v. Wilson*, 8 E. & B. 122, *Watson, B.*, and *Cresswell, J.*, in the Court of Exchequer Chamber, took for their position the view thus adopted by the

majority in the new opinion. They said the clause by which the owner of the surface parted with his right of support operated as a covenant not to sue, nothing more nor less. The surface had passed out of the hand of the man who made that covenant and had come into the hands of the plaintiff; and as such a covenant does not run with the land, so as to bind subsequent purchasers, they said the plaintiff might recover, notwithstanding the deed of severance had released the right of support. But *Barons Bramwell* and *Martin* and *Judges Williams* and *Crowder*, constituting the balance of the court, were of a different opinion. They refused to accept this view. They said it operated either as a covenant running with the land and affecting the estate itself, or as a grant of a right in and to the land. When the case went to the House of Lords and was there affirmed, that final decision again repudiated this doctrine of a mere personal covenant, and it was held solemnly that it "operated as a grant of a right to disturb the surface of the land."

The idea of estoppel asserted by the opinion of the majority of the court as a principle to be applied in construing deeds, severing the minerals from the surface, in determining whether the right of support has been relinquished, is the proposition upon which *Eadon v. Jeffcock*, L. R. 7 Exch. 379, seems to partially stand. Whether it is the real basis of the decision may well be doubted, since the court was composed of six judges, three of whom delivered opinions, and only two of these three placed their decisions upon that ground, namely, *Barons Martin* and *Cleasby*. It is not the ground upon which *Bramwell, B.*, concurred in the decision of the case. He merely commented upon the position of the other two judges and looked upon their argument as plausible. He refused and declined to accept it, because it was, in his opinion, contrary to every other decision which any English court had ever rendered. He expressly denied that the authorities relied upon for it by *Barons Cleasby* and *Martin* could be so construed. These cases were *Taylor v. Shafto*, 8 B. & S. 228, and *Shafto v. Johnson*, 8 B. & S. 252, and his interpretation of both was that, by the leases, the lessors of the mines had bound the lessees by covenant to do what was inconsistent with leaving support for the surface, and quoted from the opinion of the Vice Chancellor to prove his statement. Those leased did not merely permit, or authorize, the removal of all the coal, but absolutely bound the lessees, by covenants in the leases, to do so. These covenants raised not a mere implication by probability, not a mere doubtful implication, that the support of the surface might be destroyed, but, on the contrary, a necessary and inevitable one. It must result, else the covenant could not be performed. It must result, else the deed could not have effect

according to either its spirit or its terms. His interpretation of these cases corresponds with that of MacSwinney, who, analyzing *Shafto v. Johnson*, says: "It was considered that the leading features of the lease were (1) the intention, in preference to everything else, to provide for the safety of the mine; and (2) the covenant (not by way of privilege to the lessees, but by way of positive obligation upon them, and for the benefit of the lessor) to get all the coal, which could be got with safety to the mine." MacSwinney on Mines, 323.

Having thus put aside the views of his associates as absolutely devoid of authority for their support, Baron Bramwell found another ground upon which to rest the decision of the court. That was this: The lease bore date 1840 and contained the provisions upon which Barons Martin and Cleasby came to their conclusions. They considered nothing else. From the terms of this lease it was possible to infer that there was an intent that the pillars might be removed. Later, in 1857, the land on which the operations were carried on under the lease was conveyed to persons from whom the plaintiffs took their title, with notice of the provisions of that deed. The deed reserved the bed of mines covered by the lease, together with power to the grantor, his heirs, or assigns, to be exercised from and after the expiration of the term, for carrying on the works of the mine and carrying away the fire clay so reserved. It also reserved to the grantor the coal rent under the lease of 1840. It provided for rent for the land used and occupied by the grantor for the purposes of the mine and for compensation for buildings required or removed for that purpose and for surface damage to the land. It further provided specially that the grantor, his heirs, or assigns, tenants or lessees, should not be liable for any damage caused to buildings which should thereafter be erected on the land conveyed by the sinking of the land through mining operations in getting the coal, clay, stone, and other minerals hereby excepted and removed. It was upon this that Baron Bramwell based his concurrence in the decision in favor of the defendants. His position is best stated in his own language, which is as follows: "And it was contended by the defendants that by this conveyance the grantees took without a right to support for houses built over the mines, and without a right to recover damages for injury to houses arising from the surface being let down by mining operations. This undoubtedly is so, if those mining operations were carried on by Roberts, or by his lessees, under leases granted subsequently to the conveyance to the plaintiffs. But it was said by the plaintiffs not to apply to the defendants, who were lessees at the time of the conveyance to the plaintiffs. I think it does. The lease of June, 1840, under which the defendants have the right to

work, is mentioned in the conveyance to the plaintiffs, and the words are general and unqualified: 'Roberts, his heirs or assigns, tenants or lessees, shall not be responsible for damages caused to dwellings which shall hereafter be erected' by mining operations. And it is clear that, as the mines and the reversion to the mines were separated from the rest of the soil, Roberts covenants with the plaintiffs for the performance of the same matters for the benefit of the surface owners that the lessees had covenanted with Sotherton to perform for their benefit. And it is also clear that a power of distress which is given to the plaintiffs would enable them to distrain on the defendant's goods. It is asked, why are the defendants to have the benefit of an arrangement to which they are not party or privy? The answer is that the very foundation of the plaintiffs' case is a right to support as against the defendants, and if the plaintiffs have taken their estate without that right the defendants incidentally get a benefit perhaps not contemplated."

The case seems never to have been appealed, and what the position of the court of last resort would have been nobody can say. Nor can it be determined upon which ground the decision rests, for only three of the judges out of six have spoken. As two grounds, barring the right of recovery, were stated, one of which seemed to be clearly sufficient, the plaintiff no doubt considered an appeal useless, and so this anomalous and mysterious decision remains. An element which entered largely into that case was a supposed radical distinction between a lease of coal and a conveyance thereof. As a lessor always receives royalty, the working of the mine is partly for his benefit, while the working of the mine which has been sold and conveyed absolutely is not for the benefit of the owner of the surface. It seems to have been supposed by Barons Cleasby and Martin that the mere fact that the instrument governing the rights of the parties was a lease was sufficient to show intent that the surface might be let down by mining operations under it. This erroneous view was utterly demolished in *Davis v. Treharne*, 6 App. Cas. 460, decided by the House of Lords. MacSwinney on Mines, p. 297, says: "According to this decision, it does not follow from the mere facts of a lease having been granted and a royalty reserved thereunder, that there is not a right of support. Those facts may be elements to be taken into consideration in seeing whether or not the right is taken away. But they are not sufficient of themselves to decide that question." *Eaton v. Jeffcock* has never been expressly overruled, it is true, but it is undoubtedly the only case of its kind as regards the proposition that mere permission to remove all the coal sufficiently discloses intent to relinquish the right of support of the surface. Moreover,

there enters into the circumstance that the paper construed was a lease under which the mines were worked on account of the owner of the surface, and not a deed conveying title, in consequence of which benefit from the work inured to the surface owner, the real owner of the mine. In this case the rights of the parties are fixed by a deed, and not a lease. When the works are carried on under a lease, there is some plausible ground for saying the construction should be more liberal to the lessee, because, in one sense, the operations, resulting in injury to the surface, are carried on in part by the owner of the surface himself, for he causes it to be done for his own benefit. He injures his own property for his own benefit. Whatever force there is in this view, and whatever effect it may have had in the decision of *Eadon v. Jeffcock*, and it is conceded that it had some, and more than it could have under the later decisions, it can have none here. Therefore I cannot see that *Eadon v. Jeffcock* is any authority for the position taken by the majority of this court.

Davis v. Treharne, 6 App. Cas. 460, was another case involving the construction of a lease, and foundation for the position of the majority is sought in certain language quoted from the opinion of Lord Blackburn therein. We must consider all his language, and do it in the light of the lease he was discussing. I think his meaning was that the words "letting down the surface" should qualify both sentences "You may take all the minerals," and "You must take away all the minerals." The lease did expressly give the right to take away all the minerals, but it gave no right to let down the surface. It did not say the lessee had the right to mine, excavate, and remove all the coal, it is true, but it did demise the veins, mines, and seams of coal, ironstone, and blackband, with power to the lessee to enter into and upon certain portions of the lands and to open, get, and carry away the said veins, mines, etc. No words limited the extent to which the lessee could carry them away and the general language used clearly covers all. This is the sense of it, the meaning of it. Moreover, there was a clause in the lease which required the lessee at the end of the term to "compensate the said lessor for any damage or injury done to the surface of the said farm and lands." Not only did it authorize the mining and taking away of all the minerals, but it contained, in addition thereto, an express reference to injury and damage to the surface, and provided for compensation. But it did not expressly say, or use any language which necessarily meant, that the surface might be let down. It was the absence of this that decided the case in Lord Blackburn's mind, as is shown by the language quoted from him in the majority opinion. Proceeding, he said: "And when I come to look at the documents, though one is more ready, it being a lease,

to believe that the parties meant to say, 'You shall take all the minerals, letting down the surface,' than one would have been if it was a sale or a reservation of minerals below to be taken out some future time, I cannot agree with what seems to have been said (I do not know whether that was what was meant) by Baron Cleasby in the case of *Eadon v. Jeffcock*. I cannot agree that it follows from that that there is not a right of support. I think the right of support exists unless it is taken away. I think the fact that it is a lease may be one of the elements to be taken into consideration in seeing whether it is taken away or not, but that is not enough of itself to decide that question. My Lords, looking at these two documents, I cannot find anything that takes away that right of support. It is quite true that, where parties have agreed in this way, you shall make compensation for whatever injury you do in respect of these rights, and, amongst other things, you shall make compensation for what you do in letting down the surface, the conclusion is very strong from that that the lessor says, 'You may let down the surface.' I do not say that it is conclusive, but it is a very strong argument, if you find that clause to say that he did mean that the lessee might let down the surface. But when you find it said, as it is here, that he shall do certain things underground and a great many things upon the surface, and afterwards make compensation (as it is said in the lease) 'for all damage occasioned by the exercise of the rights hereby reserved,' or (as it is said in the lease) shall at the end of the lease 'compensate the lessor for any damage or injury done to the surface of the said farms and lands' (that means any damage done to the surface of the said farms and lands in the exercise of the rights previously given), and when we find that those rights do include a great many things which will necessarily damage the surface, the reasonable conclusion is that the meaning is that there is to be compensation for things done in the exercise of those rights. I cannot see that that affords any argument whatever for saying that the lessor intended that the lessee should be able to do something more, and let down the surface. Yet that is really the whole argument; it stands upon that; that because a clause saying you shall make compensation for letting down the surface is a strong argument for saying you may let down the surface. Therefore a clause saying you shall make compensation for damage done to the surface affords a strong argument for saying that the lessee might let down the surface. I cannot see that. It does not seem to me to be any argument at all."

In the face of this language, how is it possible to conceive that he meant that a mere grant of permission to take away minerals would amount to a relinquishment of support? Why, he admits that the lease said

more than that. It said all that, and, in addition thereto, that if damages should result compensation for the injury must be made. But he said even all that stopped short of making the letting down of the surface rightful. Taking all his language together, it is absolutely clear that he meant to say that a permission to take away all the minerals, letting down the surface, or an obligation to take all the minerals, letting down the surface, would amount to a relinquishment of the right of support. He makes it plain that the intent to be looked for and to be ascertained is not that the coal may be removed or must be removed, but that the surface may be let down. Hence the phrase "letting down the surface" must qualify both of the preceding sentences, not merely the latter. This case was decided in 1831, and the general impression is that it wholly repudiates the doctrine propounded by Barons Cleasby and Martin; and to my mind it seems impossible that there could be a doubt about this. If anything further were required to make this plain, it would be found in the opinion of Lord Watson, in the same case: "When a proprietor of the surface and the subjacent strata grants a lease of the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it very clear upon the face of their contract. In other words, they must express their intention so clearly as to enable a court to say that such intention is plain. I think that rule was laid down by the late Lord Justice Mellish in the case of *Hext v. Gill*, and I quite agree with that ruling. It may be done in express terms, but, of course, it is not necessary that express language must be used; for it may appear by a plain implication from other clauses of the deed, as in the case of *Taylor v. Shafto*, where an obligation was laid upon the tenant to perform certain acts which were plainly inconsistent with supporting the surface."

If it be conceded that the lease in *Eadon v. Jeffcock* disclosed nothing more bearing on the intent of the parties than that it gave permission to remove all the coal, there is nothing in any of the opinions delivered in the case to show or indicate that the liberality of that view stands upon the altered opinion as to the nature of the right of support. The distinction between an easement and a right of property is not mentioned or adverted to in any of the opinions. That case, even if it be authority for anything else, affords no more ground for saying the right of support may be relinquished by a covenant or a grant less certain in its terms and direct in its effect, than under the early doctrine, because the right of support is a natural right incident to the surface, and not an easement. The English judges did

not regard the nature of the right of support as important in construing the instrument of severance with a view of determining whether the right was cut off by it. In *Rowbotham v. Wilson*, 8 E. & B. 145, Bramwell, Baron, said: "Now, I think it inaccurate to say that the plaintiff is claiming any kind of easement, qualified or otherwise; an easement seeming to me to be something additional to the ordinary right of property. I think the plaintiff is merely claiming the common right not to be injured in his property by the way in which another uses his. But I do not think it necessary to determine this; for I think that, whether the defendant is entitled to the mines as a separate tenement, whether the space they occupied belonged to him, or whether he has a grant of the minerals and a license to take them, or whether the right of the surface or general owner to support from the mines below is a natural territorial right or an easement, absolute or qualified, or whether the right to sink pits and cause subsidence is a natural incident of a grant of the mines or license to take them, the defendant is entitled to judgment." Lord Campbell did not think it made any difference. In *Bonomi v. Backhouse*, E. B. & E. 622, 643, he said: "I agree in the opinion that the right of support which the plaintiffs claim is a natural right of property. * * * But the consequence does not seem to me to follow that the statute of limitations cannot begin to run for an injury to such a right till there has been an actual subsidence of the surface. * * * The present appears to me to be an action for injury to a right, and not merely for what is called consequential damage."

The later decisions of the English court, rendered in view of all that was said in *Bonomi v. Backhouse*, *Rowbotham v. Wilson*, *Eadon v. Jeffcock*, and *Treharne v. Davis*, all say that language, sufficient to relinquish the right of support, must amount to a grant of the right to disturb the surface or the equivalent thereof. It must rise to the dignity of a positive grant of a property right in the surface. It must touch in direct language the subject-matter of the grant. It is not enough to grant the right to do something with the coal. It is not of the surface. Language touching it only does not reach the subject-matter of the grant affecting the surface. The deed must grant part of the surface. How can it do that without any reference to the surface? That it must amount to a grant or an equivalent assurance is made plain by the later decisions. *Bell v. Love*, 10 Q. B. D. 547, decided in 1883, arose under an inclosure act, as did *Rowbotham v. Wilson*, and makes it plain that the nature of the right is unimportant, and also that a provision releasing the right of support must be a grant or the equivalent thereof. This case was decided long after that question was settled, and, though it arose under an inclo-

sure act, the same principles control as in other cases. In that case, *Baggalay, L. J.*, used this language: "In every case, however, in which the owner of the minerals claims any rights in respect of getting them in excess of, or other than, the prima facie right of getting them without causing injury to the owner of the surface, the origin and the nature of such rights must be clearly defined by some grant or equivalent assurance, in the absence of which the presumption is in favor of the right of the owner of the surface to support." *Lindley, L. J.*, delivering an opinion in the same case, after referring to *Rowbotham v. Wilson*, *Smith v. Darby*, *Duke of Buccleuch v. Wakefield*, *Aspden v. Seddon*, *Gill v. Dickinson*, *Smith v. Haines*, *Blackett v. Bradley*, and *Hext v. Gill*, said: "These cases appear to me to establish two propositions, viz: First, that an inclosure act is not to be construed so as to allow the lord of the manor to let down the surface of allotments by working mines under them unless the language of the act is clearly and unmistakably to that effect; and, secondly, that the absence of all provision for compensation for injury sustained by letting down the surface tends strongly to indicate that the Legislature did not intend by general words to reserve or to confer upon the lord of the manor the right to work his mines so as to let the surface down." These views have the high approval of Lord Coleridge, Chief Justice of England; for *Baggalay, L. J.*, in concluding his opinion, says: "I have the authority of Lord Coleridge, C. J., who heard the argument, to say that he agrees in the conclusion at which I have arrived. He agrees, also, with the substance of my judgment, and he thinks it unnecessary to write a judgment of his own." By judgment here he means what we call an opinion.

These authorities most effectually do away with the view that the right of support can be parted with otherwise than by a grant or an equivalent assurance, notwithstanding the conclusion that it is a natural right of property, and not an easement. The question presented in this case has a double aspect—one of right, the other of remedy. They must not be confused. We must not lose sight of the question of estate by fixing our eyes on that of the remedy for redressing a wrong done to it. In *Dixon v. White*, 8 App. Cas. 833, decided in 1883, Lord Blackburn said: "Lord Mure is reported as saying in this case 'that nothing but the most express terms' would entitle the court to hold that the proprietors of the surface have accepted them under a contract to give up the right of support. I think that is going further than I should like to follow. But I think that the burden is on those who say there is such a contract to show that there is an intention to that effect appearing on the face of the titles." In the same case Lord Watson said: "If A. conveys minerals to B., reserving the property of the surface, or if A. conveys the surface to

B., reserving the property of the minerals below it, A. in the one case retains, and B. in the other gets, a right to have the surface supported, unless the contrary shall be expressly provided, or shall appear by plain implication from the terms of the conveyance." Lord FitzGerald said, in the same case: "If the owner of the minerals, on the other hand, alleges that he has, not only the property in the whole minerals, but has also retained all proper means to make that property available, and amongst them a right to get and remove the whole, although in doing so he may destroy the surface by removing its necessary supports, then he must show by his title that he has such a right." The law as stated by *Baggalay, L. J.*, in *Bell v. Love*, in 1883, was accepted as the settled law of England in 1889, in *Consett Water Works Co. v. Ritson*, 22 Q. B. D. 318. This was six years later than *Dixon v. White*, and adopted the opinions in *Bell v. Love* and *Treharne v. Davis* as true expositions of the law. See opinion at page 321. In *Greenwell v. Coal Co.*, 2 Q. B. (1897) 165, *Davis v. Treharne* was followed as correct law. In none of these late cases is *Eadon v. Jeffcock* referred to or considered. It seems to have dropped almost wholly out of view. All of them are to the effect that it is a question of title, to be established by the mine owner or lessee to an interest in the surface, and not a mere question of estoppel. Nor did any of them treat the change of opinion as to the nature of the right as having any bearing whatever upon the construction of the deed or lease. Its principal effect seems to have related to pleading and evidence. In *Dixon v. White*, Lord Blackburn said, speaking of the right of support and the right of mining: "Those rights are given (to use a phrase familiar to pleaders of the old school in England, but not to Scotch lawyers) 'of common right'; that is, when it is established that the upper and lower strata are in different hands, it is not necessary either in pleading to allege, or in evidence to prove, any special origin for those rights. The burden both in pleading and in proof is on those who assert that the rights are different from those existing as of common right."

Since at no time does it appear that the nature and origin of the right of support was deemed to have any effect upon the question of construction, and the requirement that he who claims the right to deprive the surface of its support must show title in himself as his warrant for such action, such as a grant of the right to let down the surface, or a covenant imposed upon the surface, running with it binding the land in the hands of subsequent allenees, and operating as a grant of title, it seems to me that all of the early doctrine of the English courts, asserted in *Harris v. Ryding* and *Humphreys v. Brogden*, that is material to, or has any bearing upon, the question presented by this record, is firmly adhered to at the present time by the English courts. If the case of *Eadon v.*

Jeffcock may be deemed to have indicated a variance from the line of those early decisions, the loose doctrine propounded by that case has been clearly repudiated and overthrown by the later decisions, and is no longer authority for any proposition, except that the fact that the mines are operated under a lease, and not under a deed, is an element to be considered in construing the lease for ascertainment of the intent. On that question it may be still cited as authority, and properly so. At the present time it can be safely said that there is no impairment of the early English doctrine upon this subject, either in England or any place else. It was at one time threatened in England, but the case which seemed to put it in danger was quickly and effectually condemned in *Davis v. Treharne*, and since that time there has been no deviation in the same direction or along any other line variant from the principles of the early cases, as to any subject or proposition that enters into the disposition of this case.

The length of this opinion, the limit upon my time, and the breadth of the great field of the law of estoppel, forbid any attempt at an extensive exposition of the principles of that law, in an effort to determine whether its application, as made in this case, is consistent with those principles. For my part, I am content with the knowledge that no other court has ever professedly rested its decision upon principles of that law in a case of this kind. I feel impelled, however, to say that the application of that principle here places the parties in an anomalous situation. It admits that the right of support belongs to the plaintiff in this case. He has not granted it. He is only precluded from recovering damages for a wrong done to his own property. This is a presumption raised by the court in order to work out the conclusion to which it has come. It says the plaintiff must have intended this, else he would not have consented. There is law for the position that the court cannot indulge in any presumption that a man has consented to an unlawful act. For this we need look no further than the great case of *Davis v. Treharne*, relied upon in the opinion of the majority, and later in date than *Eaton v. Jeffcock*. The lease provided that the seams and veins of coal should be worked "in the usual and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan." By the usual and most approved method of work in that county the surface was let down. It was contended that the lease showed plain intent by reference to this custom to allow the surface to be let down. In the House of Lords, Lord Chancellor Selborne said in his opinion: "It is impossible that those words, 'the usual and most approved way of working in the county of Glamorgan,' can have been intended to absolve the lessee from a legal obligation collateral to the working

of the mine. For this purpose it cannot make any difference whether the question arises between a lessor who is owner of the surface, and his lessee, or between the lessee and a surface owner who is not lessor. Those words are equally apt, equally effectual, and have the same meaning, in each of those cases. They relate simply to the manner of working the mine for mining purposes. They have no reference to the right of other persons, which there could not possibly be any local custom in such a district as a county to disregard, and which must be respected in carrying on those works. They cannot be understood to have been meant by either of these parties to signify that the working must be carried on as if there were no such rights of other persons, or of the lessor himself, which the lessee was bound to respect." Other judges have said the same thing. It was decided in a Pennsylvania case. I cannot take time to hunt them up.

The application of this principle makes it necessary to indulge in the further presumption that this immunity from the consequences of an unlawful act is for a valuable consideration. As this case stands upon a demurrer to a declaration, without any averment on the subject of consideration, I am unable to see how the court can accept as a truth the payment of any consideration. How can we look beyond the declaration? It may be that the deed itself imports a consideration for whatever is granted by it. But to assume that there was a consideration of any certain amount, or for the purpose of determining what the deed grants, is an unheard of proposition. The recital of the consideration in a deed is wholly unimportant as regards its amount. In determining what has been granted, we must look to the terms of the deed. It cannot pass titles and rights upon mere presumption. They must pass by the terms of the instrument and the intent disclosed thereby. What the consideration was does not appear from this declaration. The usual and only correct way of construing the granting part of a deed is to look at its terms, and the court never concerns itself about the consideration. There can be no presumption from the fact of consideration or the amount of consideration in determining what the language of the granting part of the deed means. How can this court say what the coal, without the right to let down the surface, was worth? or what the coal, with the right to let down the surface, was worth? We know nothing about that, and are not permitted to indulge in any presumptions. When is it that the court may presume that the surface owner has been compensated for the right to destroy the support of his surface? Mr. MacSwinney answers, from the authorities, by saying it is when the mine owner is, by the terms of the deed, relieved from liability for damage. MacSwinney on Mines, 340. He does not say we may look to the consideration expressed in the deed to de-

termine whether the mine owner is relieved from liability. On the other hand, he says the exact reverse of this. When, from the terms of the deed, it appears that the mine owner is relieved from liability, then it may be assumed that the surface owner was paid for that immunity. The decision in this case reverses the rule, and the court makes an assumption of payment of a consideration in order to strengthen the force and effect of the language upon which the defendant relies as a grant of the right to destroy the subjacent support. In all other courts when the deed, by its terms, gives the right to let down the surface, it is deemed that there has been a grant of a property right to the mine owner, the imposition of a servitude upon the estate of the surface owner for the benefit of the mine owner, and that the effect is to make the action of the mine owner in letting down the surface a rightful, lawful act, in consequence of which no right of action arises. This decision makes it a wrongful, unlawful act and then bars recovery for the damages by the principle of estoppel. Another thing inconsistent with the principles of law is found, in this: that the mere consent or permission operating by way of estoppel is revocable, as has been shown hereinbefore, except under peculiar circumstances, making it inequitable to allow a revocation, as where, on the faith of it, large expenditures have been made, or the party has, in some other way, altered his position on the faith of it. But it may be revoked at any time before it is acted upon.

Now, we must determine what this deed was at the time it was made. Its character has not been changed by lapse of time. No doubt considerable time intervened between the execution of the deed and the beginning of operations under it. If it was a mere consent, a mere permission, and did not pass any estate in the land, then it was revocable, and the grantor had it in his power under this deed to defeat the professed object of this clause. It was nothing more than a mere license, even if it rested upon a consideration. Being such, it was revocable; and, if revoked before it was acted upon, not even a court of equity would lend its aid to prevent a revocation of it. Suppose Griffin had revoked this license before the mines were opened. What would then have been the consequence? A mere right in Camden to recover back what he paid for it, if anything. Would any coal owner in this state, or would this defendant, be satisfied with such a determination as to the character of the right? It may be that if a man consent to the building of a slaughter house or a factory by his neighbor on a lot adjoining his residence, and thereby induce him to lay out large sums of money in such work, he cannot, after the work is completed, compel him to abate that work as a nuisance. But having consented to it, in writing or otherwise, if, before the act is done, before any

money had been laid out on the faith of it, he revoke that promise, or refuse to allow that to be done which he agreed to allow, the only remedy against him, if any, would be a personal action for the consideration. No court would compel him to specifically perform. It would give no right to burden his estate or his property with a servitude. In order to do that, it must rise to the dignity of a grant of a right in the property, and amount to more than a mere license or a covenant not to sue a man for something which he does on his own property. No such agreement can have any such effect. No covenant runs with the land unless it relates to, or is connected with, an interest in the land or estate transferred by the deed. There must be a privity of estate. "A covenant which may run with the land can do so only when there is a subsisting privity of estate between the covenantor and the covenantee that when the land itself, or some estate or interest therein, even though less than the entire title, to which the covenant may attach as its vehicle of conveyance, is transferred. If there is no privity of estate between the contracting parties, the assignee will not be bound by, nor have the benefit of, any covenants between the contracting parties, although they may relate to the land he takes by assignment or purchase from one of the parties to the contract. In such a case the covenants are personal and collateral to the land." 11 Cyc. 1081. If this be a covenant, it is unconnected with any grant of any part of the surface, and would not, for that reason, run with the land. Such a covenant would not amount to a license to do anything upon the covenantor's land. It would have no relation whatever to his estate in any legal sense, but would be a mere personal covenant, which he would be at liberty, at any time, to break and pay the consequent damages. These principles seem to me to be absolutely conclusive of the unsoundness of this theory of estoppel or personal covenant, whichever it may be. Its character is not very clearly defined in the opinion.

To show that the position above taken and the principles enunciated concerning the nature and effect of a license or mere personal covenant are correct, the following is quoted from Wood on Nuisances, a work by a celebrated and able author, whose analysis of the cases cited by him is no doubt perfectly accurate. I do this for want of time to set out and analyze all of them in my own language.

"Sec. 360. When assent had been given to one by another to do an act, the natural and probable consequences of which are to produce a certain result, and the person to whom the assent is given goes on and expends money on the strength of the assent and makes erections of a permanent character, while the consent does not give any interest in the land, and at law is revocable

at any time, even though given for a consideration, yet a court of equity will enforce it as an agreement to give the right, in a case of fraud or great hardship, or will generally enjoin a party from revoking it. But it must be made to appear in such a case, to entitle a party to such relief, that the license has not been exceeded, and that its exercise produces no more injury to the party than might have been reasonably foreseen or apprehended. In *Veghte et al. v. Raritan Water Power Co.*, 19 N. J. Eq. 142, this question was discussed by the court upon an application for an injunction to restrain the defendants from raising and tightening their dam on the Raritan river, by which it was claimed that a larger portion of the water of the river would be diverted than formerly. The defendants set up a consent from the plaintiffs, or a part of them, to the diversion of the water, in writing, and the erection of works and the diversion of water under it. The chancellor says: "The consent in such case is only a license, at law or in equity. In general, a license at law will create no estate in the hands of the licensor, but will justify or excuse any acts done under it. It is revocable, even when given for a consideration. But in such cases, where the revocation would be a fraud, courts of equity give a remedy, either by restraining the revocation or by construing the license as an agreement to give the right, and compelling specific performance."

"Sec. 361. As to the effect to be given to a license from one to do an act upon his land, at law, the court of New Jersey, in the case of *Hetfield v. Central R. R. Co.*, 29 N. J. Law, 571, is in point. In that case the charter of the defendants authorized them to enter upon and take the lands required for their road, but directed that they should not enter without the consent of the owner. The defendant entered upon the plaintiff's lands by his consent, but did not take any conveyance from him in the manner required by law, in order to give them right or title. The court held that this consent did not dispense with the necessity of a deed or conveyance of the land or right in the form required by law; that it was not a consent that was intended to confer a title and was revocable. In *Wood v. Led-bitter*, 13 M. & W. 838, the question as to the effect of a license arose in an action of assault and battery. The evidence disclosed that the plaintiff purchased a ticket for the sum of one guinea, which entitled him to admission to the grand stand; that the Earl of Ellington was one of the stewards of the races, and that the tickets were issued by the stewards, but were not signed by Lord Ellington; that under this ticket the plaintiff entered the ground on one of the race days, when the defendant, who was a policeman, under the directions of Lord Ellington, who first ordered him to leave, upon his refusing to do so committed the assault com-

plained of, using no more force than was necessary for that purpose. Upon the trial the judge directed the jury that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Ellington, it still was lawful for Lord Ellington, without returning the guinea, to order the plaintiff to quit the inclosure, and that after a reasonable time had elapsed, if he failed to leave, then the plaintiff was not on the ground by the leave and license of Lord Ellington, and the defendant would be justified in removing him under his orders, and this ruling was sustained in *Exchequer*. In *Miller v. Auburn & Syracuse R. R. Co.*, 6 Hill (N. Y.) 61, which was a case somewhat similar to that of *Hetfield v. Central R. R. Co.*, before referred to, the defendants erected their railroad with an embankment upon Garden street in Auburn, interrupting the plaintiff's access to his premises, in 1839, and maintained it until 1842, when this suit was brought. The defendants offered to prove that the embankment was raised under a parol license from the plaintiff, but the proof was excluded by the court, and the case was heard in the Supreme Court upon the question of the admissibility of that evidence. Cowen, J., among other things, said: "If what the defendants in this case proposed to show was true, viz., that the plaintiff verbally authorized the making of the railway, while the authority remained, their acts were not wrongful. License is defined to be a power or authority. So long as the license was not countermanded, the defendants were acting in the plaintiff's own right." In this case the court uphold a license as a defense until it is revoked, and hold that it must be revoked before an action can be brought; but in *Veghte v. Raritan Power Co.*, ante, the court held that the bringing of the action is a revocation of itself, and all that is necessary. But the former would seem to be the better rule, and the one generally adopted. The following authorities will be found applicable upon the question of the effect of a license.

"Sec. 362. The case of *Roberts v. Rose*, L. R. 1 Exch. 82, is a leading case both upon the effect of a license, the right to revoke it, and the rights to abate nuisances affecting their individual rights. In that case it appeared that the plaintiffs were the lessees of a colliery called the 'Bank Colliery,' and that in 1861 they obtained from the owner of the fee of the adjoining lands written permission to make a water course from their colliery to an old pit in what was called the 'Broadwater Colliery.' A part of the surface of the Broadwater colliery was at that time in possession of a tenant, and the plaintiff also procured a license from him to build and maintain the water course in question, and the tenant also used the water course for the prosecution of the business of brickmaking. Shortly after the water course was

built the plaintiffs were required by the owners of the fee to extend the water course over the spoil banks of the old pit, so as to join another water course that had formerly been built to carry away the waters from the Broadwater colliery, and which was discharged into a neighboring canal. The premises over which the water course extended were subject to mortgage, and early in 1861, but after the water course was built, the defendants leased the Broadwater colliery of the mortgagors. The lease was of the coal in or under the land, and leave was given to the defendant to occupy such parts of the lands as might be necessary for the due carrying on of the coal mines, and also to make use of the water courses over the land. The lessors reserved the right to make water courses for certain mines on the land, proper compensation being made to the lessees therefor. The defendant, on entering into possession, assented to the continuance of the plaintiff's water course, and certain changes were made therein at the defendant's request, and the extension thereof was also made as required by the owner of the fee. In 1863 the defendant applied to the plaintiffs for a money payment in consideration of their use of the water course, but the plaintiffs refused to comply with their demand, insisting that under their license from the owner of the fee, they were entitled to continue their water course as it was. The defendants thereupon gave them notice that the water course must be discontinued, and, the plaintiffs not having discontinued it, the defendant stopped up the water course on the lands of the tenant from whom the plaintiffs had license, near the boundary of the premises occupied by the plaintiffs. The result of this obstruction was to pen back and throw the water pumped from the plaintiff's mines back upon the plaintiff's premises, and by its accumulation there it percolated through the soil into their mines. The court held that the license to the plaintiffs was revocable, and, having been revoked, deprived them of the right to maintain the water course, but that the defendant was bound to adopt a reasonable mode of abating the nuisance, and so as to do no unnecessary or unreasonable damage, and if the mode adopted by him was unreasonable and unnecessary he would be liable. A verdict was found for the plaintiff, upon the ground that the obstruction of the water was unreasonable and unnecessary at the point where it was made, and upon hearing on exceptions in Exchequer the verdict was sustained."

The cases put by way of illustrating the application of this new doctrine are not apt. They are not parallel. They totally ignore the difference in subject-matter of the contract. Nobody ever sells all the materials in one story of his house, except in view of the wrecking of that house and its conversion into personal property. Coal in place is sold

all over the world without any view of disturbance to the surface. Nobody ever sold a chair on which he was sitting with a right to remove it from under him before he got up. No particular chair, nor any particular position, is necessary to the personal support of an individual in his natural state. If he stands, lies down, or sits down, he is natural. The chair has no connection with his person. Besides, it would be an impossibility by any covenant or contract for one person to confer upon another any estate, right, or title in his person. Of course, if one person allow another to tear down his house and move it away, he has no right to sue him. But by that act such other person acquires no interest in the estate. If he sell him the houses or any part of them, and authorize removal of them, he thereby severs them from the estate and converts them into personal property. If, when the purchaser comes to take them off, he refuse to allow him to do it, the only remedy would probably be an action for damages. But if he pass title to a part of the land, or give him an easement upon the land to be attached to his adjoining land, then he acquires a part of the estate. It is not a mere personal covenant. But the terms of the deed must be broad enough to take hold of part of the estate, take it out of the covenantor, and vest it in the covenantee. If this deed is to be operative, it must carve out of the surface owned by the plaintiff a part of it, a right in it, and attach it to the coal for the benefit of the owner thereof, and make it a servitude or burden on the superincumbent land. Such sales as are supposed in the illustrations shown in the majority opinions are not sales of property in place. A sale of coal by deed, passing title, is a sale of coal in place. It confers title to real estate, immovable property, not mere personal property. The rules of law governing the rights in and to the two classes of property are wholly different. Nor are illustrations of agreements allowing a man to do something on his own real property of any force here. Such agreements pass no title. They merely bar the remedy for doing a thing which the actor had no right to do. This right of support is real estate, confessedly and indisputably. Title to it must pass by deed, not by mere estoppel, and a deed does not pass it unless the terms thereof extend to it with the same degree of certainty that is required in other cases.

A comparison of these results of the law of estoppel or mere license with the principles declared and conclusions expressed in the later English decisions shows conclusively that those decisions do not rest at all upon that law. *Bell v. Love*, decided in 1883, after the true nature of the right of support had been ascertained, says the right to disturb or destroy it "must be clearly defined by some grant or equivalent assurance." In *Dixon v. White*, decided in 1883, Lord Blackburn said:

"It is established that the titles may show that the surface is held on the terms that the owner of the minerals is at liberty to remove the whole of them without leaving any support to the surface"—thereby distinctly asserting that it is a question of title. In the same case, Lord FitzGerald said that if the mine owner claims the right "to get and remove the whole, though in doing so he may destroy the surface by removing its necessary support, then he must show by his title that he has such right." It is likewise so declared in the syllabus of that case in these terms: "If the owner of a piece of land sells the surface and reserves the minerals below it, with power to get them, he must, if he intends to have the power of destroying or letting down the surface by subsidence in getting them, frame his power in such language that the court may be able to say from the titles that such was clearly the intention of the parties." In *Bell v. Earl of Dudley*, L. R. 1 Ch. D. 182, decided in 1894, Chitty, J., said: "This inference [of retention of right of support] is strong. In order to rebut it the burden lies on the owner of the minerals to show affirmatively and by clear words that he has the right of letting down the surface." And this language is incorporated in the headnotes of the case. If *Harris v. Ryding* and *Humphries v. Brogden* may be regarded as having been trenchanted upon by *Taylor v. Shafto*, *Shafto v. Johnson*, and *Eadon v. Jeffcock*, or by any of these, the later decisions, as just shown, must be taken and treated as having fully restored to their pristine vigor and force all the principles of construction of those first two cases, applicable upon the inquiry for the intent as to whether the right of support has been parted with. The altered view as to the nature of that right does not, in any degree, affect this question. As to this, the early English decisions are not, in my opinion, at all discredited, either at home or elsewhere.

Since, to my mind, the certain import of the decisions everywhere is to the effect that the right to destroy the support rests upon a grant by the owner of the surface to the owner of the coal of an easement or right in the surface as an appurtenance of the coal and a consequent burden or servitude upon the surface, it becomes necessary, I think, to keep in view the requisites of a deed sufficient to pass such an interest, and to test this deed by the rules governing the subject. These principles are important, in view of the fact that the clause in this deed, relied upon as connecting or attaching to the coal a servitude upon the surface, contains not a word relating to or touching the surface. It adds nothing to the coal. The owner of the coal has a right to remove it. That right is an incident of his estate in it. We must look at this deed, and construe it as the conditions were at the time of its execution. Nobody knew exactly

what the geological formations were under that land. Nobody knew how the coal laid, its quantity, or the nature of the overlying strata. Nobody knew how much coal it would take to support the surface. We may say that it was probable that it would take some, as it does almost everywhere in this state. But, for aught that anybody knew to the contrary, the conditions existing in that tract of land might have been such as to enable the owner of the coal to remove every particle of it without letting down the surface. Not a word in the clause purports to grant any right to injure or use the surface for any purpose other than those specified. None of these extend to the letting down of the surface. As to the removal of the coal, that was a power to do something, not to the surface, but to the coal—not to the plaintiff's property, but to the defendant's property. And the thing authorized was what he had the right and power to do, by reason of his ownership of that property. It is not pretended by anybody that the grant of this power is in and of itself an express grant of any right in the surface. Thus far, the contention for the defendant rests, not upon any grant, either express or implied, but upon the principle of estoppel, which, in my judgment, absolutely fails to reach the question of title, and is, therefore, inapplicable to this case. The alleged intent here to grant an easement out of the surface, to be used and enjoyed in connection with the coal, disclosed by the clause granting the right to mine, excavate, and remove all the coal, is a mere conjecture. As it does not stand upon any language which in any way includes or touches any part of the surface, its foundation is a mere presumption. No matter what intention the grantor had, if he did not express it in the deed, it is not effective. A deed never carries any interest or estate in land except by words of express grant, or words which amount, in legal effect, to a grant. That a deed, in order to carry an estate or interest, must contain operative words of grant, is a rule from which the courts can never depart. Even when aided by a statute, requiring deeds to be liberally construed, this essential element must still appear.

"Sec. 313. The courts will construe the words used by the parties so as to give effect to the deed, if possible. 'The judges have been astute to carry the intent of the parties into execution, and to give the most liberal and benign construction to deeds, "ut res magis valeat." Upon this principle a feoffment, or a bargain and sale from a parent to a child, to take effect after the death of the parent, may be held to be a covenant to stand seised to the use of the parent for life, because a deed of bargain and sale would be void. A release to one not in possession, if made for a valuable consideration, will be construed to be a bargain and sale, or a covenant to stand seised, by which the estate

might pass. And so a deed of lease and release has been held to be a covenant to stand seised to uses where the consideration was a good one. A deed which cannot take effect as a bargain and sale, for want of a pecuniary consideration, may be given effect as a covenant to stand seised if there is a consideration of blood. In Massachusetts, where a valuable consideration is sufficient to support a covenant to stand seised, a deed of bargain and sale may operate as a covenant to stand seised when it is necessary that it should have that effect in order to carry out the manifest intention of the parties.

"Sec. 314. A deed without words of conveyance passes no title. In some states it is provided by statute that any instrument in writing signed by the grantor is effectual to transfer the legal title, if such was the intention of the grantor, to be collected from the entire instrument. But, even under such statutes, some words of conveyance are necessary. The statute does not wholly dispense with the use of words operative to convey, but simply imposes upon the courts the duty of construing liberally the words employed as words of transfer. An assignment of a deed, indorsed thereon, does not convey any interest in the lands therein described. In equity it might entitle the assignee to a decree for a specific performance, but it cannot operate as a transfer of the legal title.

"Sec. 315. If an instrument has no words of conveyance, the courts have no right to put them in by interpretation. 'Courts cannot make contracts for parties. It is not their province to write in an instrument words which will make it operative as a deed, where none of that character have been written by the parties themselves. The rule that courts will so construe an instrument as to make it effective does not mean that courts shall inject into it new and distinct provisions.'

"Sec. 316. A deed does not bind a person signing it unless it contains words expressive of an intention to convey some estate, title or interest. 'It has been said that the signing of a deed manifests the intention of the signer to be bound by it, and that the courts should construe every instrument so as to give effect to the intention of the parties to it. But the intention of the parties to a written contract must be derived from the language of the contract itself; and, where there is nothing in the deed to show an undertaking on the part of one of the signers to convey, we do not see very clearly that his signature manifests a purpose to make a conveyance. Where the title is in one person, and the consent of another is essential, under the law, to convey such title, and such other signs the deed, his name not appearing thereon as a grantor, the signature, it would seem, would merely manifest his consent to the conveyance.' Merely signing, sealing, and acknowledging an instrument in which another person is grantor is not sufficient.

"Sec. 317. If from the whole deed the grantor appears to be named as such, and his intention to convey is manifest, the deed is not void, though his name does not appear in its proper place in the granting clause. Thus, where a conveyance is in the form of an indenture between the person who signs it as grantor, of one part, and a person named as grantee, of the other part, the omission of the grantor's name in the granting clause, when it appears in the covenant of warranty as well as in the testimonium clause, is not a fatal defect. The receipt of the consideration by a person who signed a deed, but did not join in it as a grantor, does not operate to give effect to the deed as his conveyance.

"Sec. 318. A deed by a husband in his own name only, conveying his wife's land in fee, in which she does not join, though she affixes her signature and seal, is not a conveyance of her estate in fee. Her signature, 'in token of her relinquishment of all her right in the bargained premises,' or 'in token of her release of dower,' does not convey her title in fee, nor bar her from asserting her title. That it was her intention to convey her estate in fee is not sufficient unless this intention is expressed in the deed. Such intention will not enable a court of chancery to correct the mistake and decree the execution of a perfect deed. The signing of the deed by the wife at most merely signifies her consent to the conveyance. It does not convey any interest or estate she has in the granted land. Under statutes which provide that a conveyance by a married woman may be made with the written consent of her husband, it is held that this consent is sufficiently manifested by his signing a deed by which his wife conveys her separate property, though he is not named as a party to the deed. The husband has nothing to convey, and his assent to the conveyance by his wife is all that is required. The case is very different when the legal interest or estate is in the wife, and she does not join in the deed, or use any words manifesting an intention to convey such interest or estate, but merely signs a deed which purports to be a conveyance by the husband alone.

"Sec. 319. A wife cannot bar her right of dower by signing and sealing her husband's deed without any words of conveyance or of release by her of dower. By usage, however, in New Hampshire, a wife may bar her dower by signing her husband's deed without any words of conveyance or release. The words, 'in token of her free consent,' used at the conclusion of a deed, do not sufficiently express her intention to bar her right of dower, nor do the words, 'I agree in the above conveyance.' If a wife, having an estate in fee, executes a deed of it with her husband, both joining in the granting part of the deed, the fact that the wife also releases dower and homestead in the

granted premises does not restrict her conveyance to these interests, but the deed passes the title of the wife in fee."

Jones' Law of Real Prop. in Convey. § 313-319.

A deed can never convey a thing to which it makes no reference and does not purport by any language to pass. This deed does not grant a right to let down the surface, either in express terms or any other language touching or relating to the surface. The right of support belongs to the surface, no matter how, whether by reservation or ex jure nature. It cannot be parted with except by cutting it out of the surface. A deed which makes no reference to the surface cannot by any possibility take anything out of it. In the clause relied upon here there is no word which either expressly or impliedly touches the surface. No matter what intention Griffin had with reference to this right of support, if he did not use language which touches it, relates to it, carries it away, the defendant did not obtain it. "Nothing passes by a deed except what is described in it, whatever the intention of the parties may have been. Though parol evidence is often admissible to ascertain what lands are embraced in the description, such evidence cannot make the deed operate upon land not embraced in the descriptive words. A deed described the land conveyed as beginning at a certain rock, and running thence one mile east, one mile north, one mile west, and one mile south, to the place of beginning, and also stated that it was the land set off to a certain Indian under a treaty with the government. The Indian had previously selected his land as 'a tract one mile square, the exact boundaries of which may be defined when the surveys are made.' After the deed was given, the Indian's land was located and patented so as to include a section not in the form of a square, no part of which lay within the boundaries named in said deed. It was held that the deed, being for a specific tract of land, could not be construed to convey the grantor's interest in the land actually patented to the Indian. That one parcel or some portion of the lands is not described with sufficient certainty does not invalidate the deed as to other parcels that are sufficiently described." Jones' Law of Real Prop. Convey. § 325. Not only must a deed by some language used in it include the thing, title to which is set up under it; but the language must be certain. It is not enough that a man has a piece of land or other property and makes a deed conveying land to another man. Because it appears that he intended to convey something, the courts cannot permit a resort to parol evidence to show what he intended to grant. What he intended to grant must be shown by the language of the instrument, and parol evidence can only be used for the purpose of identifying that which is described in the deed—applying the description to its

subject-matter. Jones' Law of Real Prop. Convey. § 323; Mathews v. Jarrett, 20 W. Va. 415; Westfall v. Cottrills, 24 W. Va. 763; Dickens v. Barnes, 79 N. C. 490; Brown v. Coble, 76 N. C. 39.

The suggestion that a deed, even where there are terms touching property or property rights claimed under it, will pass title thereto by anything but a necessary implication, where there are no words of express grant, is inconsistent with a rule of law applicable to the construction of all muniments of title. The phrases "plain implication" and "necessary implication" have exactly the same meaning when used in reference to the construction of such instruments. By these is not meant a physical necessity, but a logical necessity. Where a clause is enlarged in its effect beyond the import of the words used, on the theory of an intent established by implication, it must be necessary to so enlarge it in order to give effect to the plain and express provisions of other clauses, or the probability of intent must be so strong that the contrary thereof cannot be supposed. In *Wilkinson v. Adam*, 1 Ves. & B. 422, 466, Lord Eldon said: "With regard to that expression 'necessary implication' I will repeat what I have before stated from a note of Lord Hardwicke's judgment in *Carlton v. Hellier*: That in construing a will conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed." An intent by implication cannot be ingrafted upon the whole instrument because it is barely probable that the grantor intended the words to have such broader meaning and effect. It is well settled that a more liberal rule obtains in the construction of wills than in the construction of deeds. There is never any presumption that a man granted a thing by deed. The presumption is that he did not, unless the language of the deed includes it. Nothing will ever be added to a deed upon the mere presumption that the grantor intended to dispose of property; but in the law of wills there is a presumption that a man who has made a will intended to dispose of his whole estate and not die intestate as to any of it. Another rule is that, when a will contains language relating to children, there is a presumption that the testator did not intend to give his property to strangers in preference to his children. But even in these cases the lax rule contended for here does not apply. Though a will is aided by this presumption as to the intent of the testator, his whole estate does not pass, nor are his children preferred to strangers in the case of doubtful language, unless the intent to that effect appears by necessary implication. "There may be a legacy given by implication, but to raise such implication it must be necessary to do so in order to carry out a manifest and plain

intent of the testator which would fall unless such implication be allowed." *Bartlett v. Patton*, 33 W. Va. 72, 10 S. E. 21, 5 L. R. A. 523. This rule was applied in the case just mentioned, in the very face of the presumption that the testator did not intend to die intestate as to any part of his property. "Since the courts endeavor to ascertain the intention of testator from his whole will, rather than disjointed parts thereof, and enforce this intention, if lawful, when thus ascertained, it follows that it is possible for testator to dispose of property, not by any formal disposition in his will, but by necessary implication from his will taken as a whole. The presumption is very strong, however, against his having intended any devise or bequest which he has not set forth in his will. There must, as has been quoted in recent cases, be a probability arising from the whole will that testator intended to make the bequest or devise, which he has not set forth expressly, so strong that it cannot be supposed that any other intention existed in the mind of testator." Page on Wills, § 468; *McMichael v. Pye*, 75 Ga. 189; *Reinhardt's Estate*, 74 Cal. 365, 16 Pac. 13; *Eneberg v. Carter*, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664; *Barnhard v. Barlow*, 50 N. J. Eq. 131, 24 Atl. 912; *De Silver's Estate*, 142 Pa. 74, 21 Atl. 882; *Sutherland v. Sydnor*, 84 Va. 880, 6 S. E. 480; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; *Wilkinson v. Adam*, 1 Ves. & B. 445; *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95, 25 N. E. 30, 8 L. R. A. 740; *Masterson v. Townshend*, 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816; *Goodright v. Hoskins*, 9 East, 306; *Jackson v. Billinger*, 18 Johns. (N. Y.) 386; *In re Springfield* (1894) 3 Ch. 603, 64 L. J. Ch. (N. S.) 201; *Smith's Trusts*, L. R. 1 Eq. 79; *Blake's Trusts*, L. R. 3 Eq. 799.

Another proposition to be remembered is that even in the constructions of wills, liberal as are the rules, a court can never go outside of the language of the will and make it pass something or pass a thing to somebody, on the bare ground of a probability that the testator intended to do so. The intention must be gathered from the language of the will, and that language must either give the thing expressly or by necessary implication. By the use of the term "expressly" it is not meant that it shall be given by any particular formula of words, but only that the intent must be shown by express language, which language must reach to and include the object of the donation, the person to whom the thing is given, and must also take in by some form of description the thing to be given. Neither of these can be supplied, except by necessary implication, and that implication must arise from some intent plainly expressed somewhere in the will, under the rule that in construing a will all its parts must be considered. When, being so considered, something must be sup-

plied which is not expressed in any form, in order to effectuate the general intent, it is necessarily implied. That is the only way a thing not expressed in a will can be added to it, and that addition must be founded upon an express intent in the deed as to other matters in some way connected with the particular matter. Nothing can be added upon any theory of intent not derived from the language of the will, no matter how clear it may appear from something outside of the will that it was intended. "In the interpretation of a will, the true inquiry is, not what the testator meant to express, but what do the words used express. When the language of the testator is plain and his meaning clear, the courts can do nothing but carry out the will of the testator, if it be not inconsistent with some rule of law." *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23. Such is the strictness of the rule in testamentary alienation by implication. It must be more strict in alienations by deed, because they are unaided by the presumptions as to intent as already stated. If any such rules are at all applicable to deeds, they must be of very limited application. No author, so far as I can see, mentions them among the rules given for the construction of deeds. Every deed, of course, carries with it everything naturally or artificially attached to the property conveyed. This does not stand upon any rule of conveyance by implication. It is an express conveyance, because the things that go with the land are parts of the land. I know of no instance in which a piece of property, not mentioned in the deed in some way, has ever been held to have passed by it, nor in which any person not made a grantee in a deed by some sort of expression, has ever been permitted to take property under it. As the liberal rules above mentioned as being applicable to wills do not apply to deeds, nothing can be held under a deed, unless it be conveyed by express words of grant, or by some language or provision which is, in legal effect, the equivalent of a grant. Such other language or clause must be equivalent in the sense that it shows express intent, not mere possible or probable intent, to part with the thing claimed under it. It is not enough that it grants the right to do some other thing. It must show intent to part with the very thing claimed. The grant of a right to a man to remove his own coal is very different from the grant to him of a right to let down the surface belonging to another person, and it does not necessarily mean that the surface shall be let down or may be let down.

Such is the result of proper application of the rules of law, if the words of the clause, "together with the right to enter upon and under said land and to mine, excavate, and remove all of said coal," be given their full force and effect according to their ordinary and plain meaning. If we say the

grantor thereby authorized the removal of every pound of coal under the land, it is not enough to carry the right to let down the surface, for the language falls short of granting any right to let it down. But, be this as it may, the very latest English authorities say no mere grant of any powers to work the mines, however broad and ample they may be, will be accepted by the courts as showing intent to part with the right of support. The present state of the law is expressed by Lord Chancellor Halsbury, in *New Sharlston, etc., Co. v. Earl of Westmoreland* decided by the House of Lords in 1900, reported in L. R. 2 Chy. D. (1904) 443, as a note to *Bishop Auckland, etc., Society v. Butterknowle, etc., Co.*, as follows: "My Lords, the state of the law is now, by the decisions which have been referred to, perfectly clear. The mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common-law right of the surface owner to have his surface undisturbed. That is a plain proposition of law, and when one approaches the question from that point of view it is manifest that in each of the cases that have been referred to the learned judges were talking of the particular instruments they had then to construe, and their problem was to find out whether by the express language of the grant, or by that which might be construed to be the general effect and intent of the whole instrument, there was a power to interfere with that common-law right. I do not think that those principles were so firmly established some 10 or 20 years ago as they are now; but that is the proposition of law, and it must be applied to the particular instrument which the court has to construe in each case. In this instrument, my Lords, I confess I am wholly unable to find any such permission to let down the surface. One observation which lies very plainly before one is that there is no express permission to do it, and if the arrangement between the parties was that it was contemplated, it is not, as was pointed out, I think, in *Love v. Bell*, 9 App. Cas. 286, an immaterial circumstance that it is not mentioned when they are dealing with such a subject, and dealing with it in such a way as would naturally suggest the question whether that is to be the state of relations between the parties—the lessor and lessee, or the vendor and vendee, as the case may be. The absence of such an express permission is not without its significance. Then we have to deal with the question whether upon the whole instrument we can discover from its language that the parties did contemplate giving the right to let down the surface. My Lords, I can find no such right here; and it appears to me that, applying the principle of *Davis v. Treharne*, 6 App. Cas. 460, and the long line of cases which may have now settled the law, it would be a reversal of what has been so settled if your Lordships were to assume, or from any-

thing that you can find in this deed to imply, a right to let down the surface. It appears to me that the law upon the question must now be regarded as settled, and, there being no express permission, the onus lies on the person who says he has a right to do so to show something in the instrument which gives him that right."

In *Bishop Auckland, etc., Society v. Butterknowle, etc., Co.*, L. R. Ch. D. (1904) 419, 424, Farwell, J., said: "Words, however large, applicable to the right of working and privileges connected with it and compensation for the exercise of such right and privileges are not enough, at any rate, if the words used are fairly applicable to the ordinary course of working and nothing more." In the same case (pages 435, 436, 440) Vaughan Williams, L. J., said: "The keynote of the law which controls the relations of surface owners and mineral owners is as stated by Lord Halsbury in *New Sharlston Collieries Co. v. Earl of Westmoreland*, namely, that 'the mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common-law right of the surface owner to have his surface undisturbed.' This law does not exclude the obligation of the court to ascertain the meaning of the parties to a contract, whether such contract is embodied in an act of Parliament or not; but the 'letting down' of the surface by underground workings is so injurious to the user of the surface by the surface owner that it is not reasonable to construe a contract as giving the mineral owner this right unless the words of the contract make this plain, either by express words or by implication. The surface owner has by common law a right to have the surface supported by the subjacent lands. It is not reasonable to suppose that the surface owner intends to give up a right so important for the 'user' of the surface without adequate consideration, and the courts do not easily come to the conclusion that it is the intention of a contract to give up this right to support, and therefore, in construing a contract intended to determine the relative rights of the surface owner and the owner of the subjacent land, it is fitting to take into consideration, not only the words of the contract, but the nature of the right which it is sought to say the contract intends that the surface owner shall surrender. In this case there are no express words giving a right to the mineral owner to let down the surface, so it becomes necessary to see if the words of the contract embodied in the act of Parliament are such as to make it plain that it was the intention of the parties thereto that the surface owner should surrender the right of support. * * * The case is near the border line; but I am not prepared to hold that the terms of the compensation clause are sufficiently plain and unequivocal to make it right that we should hold that there is by necessary implication power given to the mineral own-

er to let down the surface in a case in which there is no express power, and the general powers construed by themselves would not include such a power. I think the decision of Farwell, J., ought to be affirmed." In the same case Romer, L. J., said: "General powers of working conferred by the act on the mine owner, however large, will not be held to take away the right of support, if the general powers are not inconsistent with the right. * * * And all I need say is, after a careful consideration of the compensation clause in the present case, that the Legislature has not made it clear that it was contemplating compensation for damage arising from letting down the surface. The words, 'searching for, winning, and working the mines and quarries within and under their respective allotments' are quite general, and I cannot gather from the use of the word 'working' (a very general word and of large import), even coupling it expressly with the word 'under' the allotments, that the Legislature must have contemplated damage arising from letting down the surface."

It is to be observed that the case just quoted from follows Bishop Auckland, etc. Society v. Butterknowle, etc., Co., decided in 1900, which took for its keynote *Bell v. Love*, 9 App. Cas. 286, decided by the House of Lords in 1884. Lord Chancellor Selborne based his opinion in that case upon *Harris v. Ryding*, *Dugdale v. Robertson*, *Davis v. Treharne*, and *Duke of Buccleugh v. Wakefield*, passing over, in silence, *Eadon v. Jeffcock*, *Taylor v. Shafto*, and *Shafto v. Johnson*, as did also Lords Watson and Bramwell. His interpretation of *Davis v. Treharne* was as follows: "In the same case [*Davis v. Treharne*], two pages later, Lord Blackburn deals with the question which there arose, and on this principle: That when the person on whom the burden of proof lies has to satisfy it, he will not be able to do so merely by showing that there are words, however large, applicable to the right of working, and privileges connected with it, and compensation to be paid for working and for the use of those privileges, which may receive full effect consistently with the right of support. I will not refer in detail to that passage. It is in accordance with what is to be found in other authorities." Lord Bramwell said: "If there had been nothing more in the act, the dean and chapter would have had no right to touch the surface to get the minerals. And if all the right the act gave them was to use such part of the surface as was necessary to get the minerals they would have no right in getting them to let down the surface. In other words, when the ownership of the soil generally and of the minerals is severed, the mineral owner has no rights as against the surface in getting the minerals except what the instrument of severance gives him, and if it gives the right to get the minerals, without more, there is no right to let down the surface." All these late decisions emphasize

the proposition that the intent to be ascertained is that the surface may be let down—not that the coal may be removed or that large powers may be exercised under ground; and occasionally there is an intimation to the effect that even such intent is not enough, and that ample compensation for that, aside from the consideration recited in the deed, must appear to have been specially provided for. Thus, in *Bell v. Love*, 9 App. Cas. 286, Lord Watson said: "The terms of the reservation to the dean and chapter of Durham present a marked contrast to the broad and comprehensive terms of the clause with which the House had to deal in *Duke of Buccleugh v. Wakefield*, a clause which, to use the words of Lord Hatherly, conferred the 'largest imaginable power' upon the owner of the mines; yet in that case the decision of the House was given in his favor, not because the clause per se enabled him to work so as to cause subsidence, but in respect that its powers were made subject to the condition that those who worked the mines should make full compensation for all injury thereby occasioned to the owners of the surface. I concur in the opinion expressed by Mellish, L. J., in *Hext v. Gill*, that 'no one can read the judgment without coming to the conclusion that, if the provision as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would in all probability have come to another conclusion.'"

That the grant of a right to remove all the coal under the land does not authorize letting down the surface was expressly and unequivocally decided and held in *Aspden v. Seddon*, 10 Chy. App. 397, a case cited in the opinion of the majority of this court. To show this, no more is necessary than a quotation from that part of the opinion of Mellish, L. J., which decides the case, emphasizing the language that states this conclusion. It reads as follows: "Now, by the deed, all mines and seams of coal, iron stone, and other minerals are reserved to Stott, with full liberty, power, and authority for Stott and his lessees 'to search for, get, win, take, cart, and carry away the same, and sell or convert to his or their own use the said excepted mines, veins, and seams of coal, cannel, and iron stone, and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes.' These words do certainly appear in very plain terms to give power to the mineral owner to remove any part of the minerals at his pleasure; but, nevertheless, we think that we are bound by the authorities to hold that these words are not by themselves sufficient to take away the surface owner's right to support. If the sentence had stopped there, these words would be consistent with the construction that the mineral owner may take away every part of the minerals, provided he can do so without violating the sur-

face owner's right to support, but not otherwise, and some further words would be necessary to prove that the intention of the parties was that the mineral owner should be at liberty to take away the whole or any part of the minerals, notwithstanding he might thereby let down the surface or any buildings thereon. Accordingly the respondents rely on the words which immediately follow in the deed as sufficient for this purpose. Those words are, 'but without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof.' As by the express words of the reservation the mine owner in working the mines is not to enter upon the plot of land conveyed by the deed, the damage to the buildings for which compensation is to be given must be damage to the buildings caused by the removal of the minerals reserved, and therefore it follows that a right to remove all the minerals, notwithstanding the buildings above might be thereby damaged, was one of the liberties reserved by the deed. In substance, the plain meaning of the whole reservation seems to us to be that the mine owner is to be at liberty to remove the whole or any part of the minerals at his pleasure, paying compensation to the surface owner for any damage which may be thereby occasioned to the buildings of the surface owner, which is equivalent to saying that he may remove the whole of the minerals, notwithstanding the buildings may be thereby damaged, subject to a liability to pay compensation. We do not think there is any other clause in the deed which really affects the question." Test the language of the deed in this case by the opinion in *Aspden v. Seddon* and reach the conclusion declared by the decision of this court in this case! It is an utter impossibility. *Aspden v. Seddon* reiterates in plain terms the following declaration of Baron Parke in *Harris v. Ryding*, the first reported case: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support."

Strange as it may seem, *Aspden v. Seddon* is cited by Mr. MacSwinney (339) for the proposition, quoted in the majority opinion, to the effect that the later English cases construe mining deeds and leases in a manner different from the "curious mode" adopted in the earlier ones. The decision was an absolute necessity arising from the terms of the deed. In no other possible way could they be made effective. The compensation clause could not be referred to surface workings, for none were authorized. Hence, damage to the surface from workings underneath was the only damage that could result or be compensated. The rule of presumption against an intention to part with the right

of support, asserted in the early cases, was allowed to stand in that case until overcome by the absolute necessity of making it yield in order to give effect to plain terms used in the deed, utterly irreconcilable with any other construction, so far as the court could then see. And, moreover, whether *Aspden v. Seddon* is good law in England to-day may well be doubted, in view of the opinion of Lord Davey in *New Sharlston, etc., Co. v. Earl of Westmoreland*, decided in 1900, concurred in by Lords Brampton and Robertson, which, in part, reads as follows: "Speaking for myself, I cannot see why a covenant providing a particular measure or mode of obtaining compensation is in any way inconsistent with the existence of an obligation not to let down the surface, even though that covenant extends beyond the surface and is applicable also, or even exclusively, to underground operations. The use of the words 'by reason of the exercise of the powers' does not seem to me to carry it any further, because it may apply to any incidental injury done—whether accidentally or willfully makes no difference—whilst exercising the powers. It does not seem to me to give a license to do the injury, if you say that a person shall pay compensation if he does it. A covenant to pay compensation for doing a thing which you are prohibited from doing is in no way contrary to or inconsistent with the continuance of the obligation not to do it. Indeed, one may go further and say that, if the thing notwithstanding the prohibition is done, there is no other means by which you can obtain a remedy for what is past (an injunction, of course, will not extend to the past), except by provision for payment of compensation. Therefore, I do not accede to the argument that the existence of a covenant for payment of compensation for letting down the surface is, whether it applies wholly or partially to underground operations or not, in any way inconsistent with the continuance of the common law obligation." Lord Davey's views were approved in *Bishop Auckland, etc., Society v. Butterknowle, etc., Co.* decided in 1904, and elaborated upon by Vaughan Williams, L. J., as follows: "Be this how it may, it seems to me that the finding of Lord Esher that the only damage which could be done by the underground working would be by causing a subsidence of the surface does not bind us to-day, because it is a finding of fact in a particular case, arrived at by consideration of the words of a particular instrument which had to be construed in that case, and is not a judgment laying down a canon of construction. I can conceive myself injuries which might be caused by underground working other than 'letting down the surface.' It seems to me that underground working might affect the springs and streams and wells on the surface, and I am not sure that underground working might

not affect the surface or the buildings on the surface by vibration, without actually letting the surface down."

MacSwinney on Mines was published in 1884, since which time some very important cases have been decided, and the tendency has been strongly in the direction of the rigidity of the presumption in favor of the retention of support. MacSwinney's first and second rules, quoted by Judge COX, are mere general conclusions, for which no particular authority is cited by him. The third undertakes to set out specific rules, founded upon authority, saying: "Where the mine owner is relieved from liability for damage, the surface owner may often be presumed to have been compensated by anticipation." He deduced this rule from *Rowbotham v. Wilson*, and cited *Richards v. Harper*, L. R. 1 Exch. 199, *Williams v. Bagnall*, 15 W. R. 272, *Buchanan v. Andrew*, L. R. 2 Sc. & D. 286, and *Bensfield, etc., Board v. Consett Co.* In the first, the clause of release exonerated from liability "to any action or actions for damage on account of working and getting the said mines, for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof, by sinking in hollows or being otherwise defaced and injured where such mines shall be worked." Moreover, the award, under which the plaintiff took his title, contained the following recital: "The said several proprietors, parties to these presents and interested in the disposal of lands and mines under the circumstances aforesaid, having agreed with each other and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject, nevertheless, to any inconvenience or incumbrance which may arise from the cause aforesaid." Injury to the surface resulted necessarily from giving effect to these provisions. In no other way could they have had any effect, as the court then believed. There was nothing else to which they could refer, and they extended to and expressly mentioned the surface and injury thereto. Nothing was left to presumption. The second case went off on an entirely different point; the deed relied upon never having been recorded and the surface owner having neither actual nor constructive notice of the right claimed by the mine owner. *Williams v. Bagnall* was like *Aspden v. Seddon*, except in one particular. There was in it a clause releasing from liability instead of one providing for compensation. The deed allowed nothing to be done on the surface. Hence the injury contemplated by the release was necessarily injury from underground working—subsidence. It was a case of necessary implication—of letting down the surface or rejecting part of the deed—because it could not mean anything else. The nature of *Buchanan v. Andrew* and the grounds of the decision are best stated in

the following language of Lord Chancellor Hatherly, taken from his opinion, delivered in the House of Lords: "Your Lordships will see that this express agreement to exclude claims for damage is not confined to some particular description of damage, but it extends to any damage; the words being 'and shall not be liable for any damage.' Secondly, the feu contract particularly takes notice of the buildings, and of the liability of those buildings to damage through the workings; and it says that the superior shall not be liable for any damage which may happen to any buildings then upon the property, or afterwards to be there. The importance of that reference to buildings will be seen presently, when we come to the latter part of the deed which relates to that particular subject. Thirdly, the feu contract takes notice of the modes of working by which such damage may happen, and puts foremost 'long wall workings'—a remarkable thing because that was not the mode of working actually in use, or which ever had been in use there; and it was a mode of working which would completely extract, if it were followed, the whole of the coal without leaving any support whatever, except such limited supports as might arise by rubbish left in the mine, and which, according to the evidence relating to this mine would have been clearly insufficient to prevent damage by subsidence. I ought further to remark that the feu contract notices two kinds of damage: The one direct damage by the working of the seams remaining to be worked; and the other what I may describe as indirect damage by the subsidings of the wastes in the two seams already worked, in consequence of those excavations. The feu contract deals with the damage arising from the loss of lateral support occasioned by working in the neighborhood, as well as with the damage arising from the loss of support occasioned by working immediately under the surface in question. Can anything possibly be more clear than that the intention of the parties on both sides was that the superior was to have the unrestrained right of taking out the whole and every part of the reserved minerals, the whole risk of any consequent damage being undertaken and to be sustained by the feuar?" The deed provided for "long wall" working. By that method, all pillars were withdrawn and the surface let down. It released the mine owner from all damage of every kind, occasioned by the workings. This is another clear case of absolute necessity resulting from express terms relating directly to the surface and injury thereto by subsidence. *Bensfield, etc., Board v. Consett Co.* was a case of injury to a public highway, established pursuant to a local inclosure act, by which a commons was inclosed and partitioned, and the mine owner released from liability for damages to the surface. The court refused to apply to the public the rules

governing the rights of individuals, saying it could not have been intended, that an act which appointed a public road should at the same time legalize a public nuisance by injuring the road. So the principle of that case has no application here.

It will be observed that MacSwinney does not say a release of liability will always, and of itself, sufficiently evidence intent to part with the right of support. He would not be justified, by the authorities he cites or any others, in intimating that it will ever do so. The cases just analyzed show that the liability for which the release is provided must affirmatively appear to be liability for damages resulting from letting down the surface. Not one of them stops short of the disclosure of such intent by express words or necessary implication. They are no authority for the proposition that a general release from liability for damages, and nothing more, will exonerate the mine owner from the consequence of subsidence, occasioned by him. Some later cases, illustrating the effect of such a clause, not only fail to carry it so far, but show that it stops short of that. In *Consett Waterworks Co. v. Ritson*, L. R. 22 Q. B. D. 31, decided in 1889, the inclosure act under which it arose provided that the lord of the manor should enjoy all mines and minerals as fully and freely as if the act had not passed, without paying damages or making satisfaction for so doing, etc., and further provided that the annual rental of 500 acres (out of about 20,000) should be set apart to provide for the compensation to which the allottees of the surface might thereafter be entitled, any deficiency to be made up by means of a rate levied upon the allottees. The Court of Queen's Bench held the lord answerable for letting down the surface, notwithstanding the provision for compensation; but the decision was reversed by the Court of Appeals.

Commenting on the decision of the Court of Appeals in the *Consett Case*, Vaughan Williams, L. J., said, in 1904, in *Bishop Auckland, etc., Society v. Butterknowle, etc., Co.*: "It is argued that this court is bound by reason of its own earlier decision on the *Consett Case* to hold that the necessary effect of a compensation clause, coupled with the words 'without making or paying any satisfaction for so doing,' if it extends to working under the surface, is to give the mine owner a right to let down the surface. But it seems to me that all the Court of Appeal were doing in the *Consett Case* was to construe those words in that case, and that we are not bound to put the same construction in this case if we find matters in the present statutory contract which were not present in the *Consett Case* going to negative the intention to give the lord a right to let down the surface. Before calling attention to these differences, I would like to call attention to the fact that Lord Esher,

at all events, gave his judgment upon the basis that the presence of a compensation clause takes away the fetter put upon the courts as to construing 'large words' according to their ordinary effect. I do not think that this view is in accordance with the decisions in the House of Lords. It may be that the presence of a 'compensation clause,' especially where the compensation is to come from others than those who do the act for which compensation is to be made, is a matter to which considerable weight ought to be given on a question of construction, but I cannot think that there is no fetter on construction left. The presumption in favor of the common-law right of support should still prevent the court from construing 'large words' as freely as if no such presumption existed. Now the words of the compensation clause in the present act are as follows: [His Lordship read the clause, and continued:] It appears, therefore, that any person who suffers damage in his allotment by the 'searching for, winning, and working of the mines and quarries therein,' or by the laying or repairing of wagon ways, and a number of other matters (the damages resulting from which last-mentioned causes would be obviously small), is to complain to one or more justices, who are to inquire into the compensation in a summary way and to finally settle and determine the damages sustained by such person, which damages are to be borne by the occupiers of the several allotments ratably in proportions to be fixed by the justices, with a liability to distress in default of payment. It will be observed that the damages from whatever cause are to be paid by the occupiers, not by the owners and proprietors, of the allotments, who are mentioned a few lines later, and that the summary inquiry before the justices to finally settle the damages recoverable from the occupiers by distress seem very unsuitable to the fixing of large damages, but suitable rather to the recovery of small damages. Compare section 48 of the *Consett act*. It is true you find the same collocation of damages from various causes, but these damages are to be paid primarily, not by the occupants, but from a fund resulting from the rents of lands allotted to justices as trustees for the very purpose of providing compensation to persons injured by the working of the mines. It is true that there is in section 49 a provision, that if the fund formed by the clear rents and profits is deficient, the deficiency may be recovered from the owners or occupiers of all the several allotments ratably in proportion to value, and may be recovered by distress; but it is provided 'that every occupier or tenant who shall have paid such damages as aforesaid shall and may deduct and retain out of his or her rent or rents so much money as he or she shall so pay.' I am not saying that mere inadequacy of the statutory compensation would justify a lim-

itation of the 'large words' of definition of damages, but I think that the consideration of the class of persons on whom the liability to pay the compensation is thrown may make it right to put a narrow meaning on the words defining the damages for which compensation is to be given. With regard to the Consett Case itself, I am not sure that it is consistent with the observations of Lord Davey in *New Sharlston Collieries Co. v. Earl of Westmoreland*, to which I have already called attention. It clearly would not be consistent with those observations but for the differences in the sources from which the compensation is to be paid. It may be, however, that Lord Davey's observations as to the payment of compensation, rather importing that the thing the doing of which is to be compensated for is wrong than that it is right, only apply where the compensation is paid by the person doing that act."

In the same case, Romer, L. J., commented on the Consett Case as follows: "But then come the words: 'And that without making or paying any satisfaction for so doing.' And it is with reference to somewhat similar (though not identical) words in the act considered in *Consett Waterworks Co. v. Ritson* that some of the passages in the judgments occur which have occasioned me difficulty in the present case. I am bound to say that I cannot fully follow or appreciate the force of some of the observations in the passages in question. I cannot myself see why the words in question are not quite consistent with the surface owners having the right of support. The expression, without making or paying any satisfaction 'for so doing,' means to my mind, after I find that 'so doing' means doing something not involving the right to let down the surface, merely not making or paying any satisfaction for doing any of the acts authorized or enumerated, and is not dealing with or considering the act of letting down the surface. At any rate, that is the conclusion I come to in the present case, notwithstanding what was said in *Consett Waterworks Co. v. Ritson*. That being so, all that remains for me to consider is the compensation clause. Again there are, I admit, some passages in the judgments in *Consett Waterworks Co. v. Ritson* with reference to the compensation clause there considered which have caused me considerable difficulty; for those judgments are of the Court of Appeal, and would or might bind me if the compensation clause there had been identical with that in the present case. But the two clauses are not identical. I need not enumerate the differences. Some of them have been already referred to by the Lord Justice in his judgment just delivered. And all I need say is, after a careful consideration of the compensation clause in the present case, that the Legislature has not made it clear that it was contemplating compensation for damage arising from letting down the surface. The

words, 'searching for, winning, and working the mines and quarries within and under their respective allotments' are quite general, and I cannot gather from the use of the word 'working' (a very general word and of large import), even coupling it expressly with the word 'under' the allotments, that the Legislature must have contemplated damage arising from letting down the surface. And this view is fortified by the provision that the persons who have to pay the compensation are only 'occupiers' of the allotments, and moreover occupiers excluding the occupier of the allotment damaged." These two cases show conclusively that a mere general release is not enough to authorize the letting down of the surface, because it stops short of the expression of any intent to allow the surface to be affected in that way. Another case illustrating and accentuating this view is *Bell v. Earl of Dudley*, L. R. 1 Chy. D., decided in 1894. The inclosure act under which it arose released from liability and provided for compensation for "great damage" to which the lord of the manor was himself obliged to contribute.

I have quoted enough from the decisions to demonstrate that a compensation clause alone is not sufficient to show intent to relinquish the support (*Davis v. Treharne*), even though it expressly relate to underground workings (*New Sharlston, etc., Co. v. Butterknowle, etc., Co.* Such a clause and a release from liability both failed in the *Bishop Auckland Case*).

From the foregoing review of the English decisions, the following conclusions are inevitable: First. Neither the principles of estoppel, nor those of mere license, govern in the construction of a lease, deed, or statute to determine whether the right of subjacent support is thereby relinquished. A provision in an instrument, to have such effect, must be a grant of a right in the surface or an equivalent assurance. Second. Such provision must, in express terms, in some form, relate to and permit injury of the surface by subsidence, occasioned by underground workings. Third. The express grant of a right to remove all the coal, without an express release of liability for consequent damages, resulting from subsidence, or a provision for compensating for such damages, is not sufficient. *Aspden v. Seddon*; *Williams v. Bagnall*; *Davis v. Treharne*; *Harris v. Ryding*. Fourth. The consideration recited in a deed conveying minerals will never be presumed to include compensation for loss of the right of support, in the absence of an express release from liability for damages, resulting to the surface from subsidence, occasioned by the working of the mines. Fifth. The right of support passes, not by implication, but only by express grant or an equivalent assurance; but intent to pass it may be disclosed by necessary implication, arising from express language, relating to the surface or right of support. The clause in the deed under con-

sideration here, relied upon as passing the right of support, wholly fails to comply with these conditions and requirements. I think I made it clear in my former opinion that that clause has another purpose and stated what its office is. No attempt to get rid of that exposition of its purpose has been made; and I therefore consider it unnecessary to say anything more on that branch of the subject, except that the cases herein reviewed overwhelmingly sustain the proposition that it must be subordinated to the general intent shown by the deed whenever that can be done. I have plainly demonstrated how it can be done.

But it is said this doctrine leads to an absurdity, for conditions may be such as to require the whole of the coal to be left for the support of the surface. In one or two cases I have examined the court has ventured to say that if the deed conferred no right to disturb the surface, and none of the coal could be taken out without letting down the surface, then it must all be left; but it is a mere dictum. The cases in which the statement has been made presented no such question for decision. This hypothesis puts an extreme case, such as is not likely ever to be found in this state, and occurs rarely, if ever, elsewhere. General rules and laws are neither founded upon, nor controlled by, such exceptional conditions. The law assumes that contracting parties will be governed by reason, common sense, and their knowledge of conditions. If the coal lies under a thin stratum of earth, such as must come down on removal of any of the coal, this condition is apparent, and it is not to be assumed that a man would do the idiotic act of buying the coal without taking, in his deed, an express grant of the right to let down the surface in taking it out. He is presumed to know the conditions, when apparent, as well as the law. He is bound to know both, and if he puts himself in a helpless condition by his own contract, with knowledge both of the facts and the law, it is beyond the power of any court to extricate him. Hence the effort to break down the well-established law by the process of *reductio ad absurdum* runs counter to the law itself, and so fails. There is one case, however, which, as applied to china clay, expressly holds that the owner, not having reserved the right to disturb the surface in obtaining the minerals, was bound to leave every bit of it, for the reason that none of it could be removed without tearing up and disturbing the surface. That case is *Hext v. Gill*, L. R. 7 Chy. App. 699. The Duke of Cornwall had granted the surface, reserving to himself "all mines and minerals within and under the premises, with full and free liberty of ingress, egress, and regress, to dig and search for, and take, use, and work, said excepted mines and minerals." It was admitted in the case that china clay could not be gotten without totally destroying the surface. A bill, by the owner of the surface to

restrain the owner of the minerals from taking china clay, having been dismissed by the Vice Chancellor on the ground that the reservation included china clay with the power to get it, the Court of Appeals held "that the china clay was included in the reservations, but that the surface owner was entitled to an injunction to restrain the owner of the minerals from getting it in such a way as to destroy or seriously injure the surface." This prevented the mining of any china clay at all. *Hext v. Gill* has been cited with approval as a leading case from the date of the decision (1872) down to the present time. Moreover, it postdates the decision of *Rowbotham v. Wilson* in which the new view as to the nature of the right of support was settled. That case is cited in the opinion. Another case somewhat similar is *Bell v. Wilson*, L. R. 1 Chy. App. 303, in which it was held that a deed conveying all mines and minerals, but giving no right to let down or destroy the surface, included freestone, but did not authorize the working of an open quarry on the surface, and that whatever freestone should be taken must be obtained by means of underground quarries without disturbing the surface. Viewed in the light of the nature of their respective subjects-matter and the conditions and circumstances, these two decisions show that the application of this law, in its alleged absurd aspect, operated justly, according to each party what the deed, upon a fair and reasonable construction, gave him, and nothing more. In either case, to have allowed the mine owner to do what he had undertaken would have deprived the other party of practically everything that the deed purported to vest in him. It would have left him with the legal title to a worthless thing, a surface which could not be beneficially used, and that on a bald and obviously false presumption that he had been compensated for conveying away in substance, but not technically, what by the tenor and effect of the deed he appeared to hold. Such is the operation of the deed now under consideration under the construction which this court gives it. Griffin is deprived of the surface, as well as the coal, notwithstanding the fact that he took the strongest possible measure for retaining it, by not referring to it in his deed in any way, except by giving certain specific and clearly defined rights and privileges in and upon it. As owner of the whole tract, he undoubtedly had title to the surface. By not in any way granting the surface, he felt that he must have retained it. I think he did. This decision admits that he did, but it nevertheless destroys that surface in his hands and entertains and enforces the intolerable presumption that he has been paid for allowing this to be done. Search will be made in vain for any other decision in which such a presumption was allowed under a deed, lease, or legislative act (and as to all of them the same principles and rules

of construction now apply [Bishop Auckland, etc., *Society v. Butterknowle Co.*, 1904]) which did not contain an express release from liability for damages, and, moreover, for damages for letting down the surface. The court had to be able to see plainly that the damages contemplated by the release were that kind of damages. Where the instrument did not contain such clause of release, a provision for compensation had to affirmatively appear in the deed. In cases involving leases, the royalties stipulated for were sometimes treated as such provisions.

The decision in this case says the deed grants the right to remove all the coal, and that this grant incidentally carries with it the right to do all things which may be incidental to the exercise of that power, and therefore includes a grant of a right in the surface. I think I have effectually shown that the law does not warrant any such construction. For this purpose, I have adverted to general legal principles. But on this very point I have a decision which distinctly and emphatically sustains my position, and decides that the title to land, or an easement in land, does not pass, as an incident to the grant of a right merely to do an act. An act of George II authorized certain persons to convert an existing brook into a navigable stream, and to maintain such navigation and to make such new cuts and canals as might be requisite for the purpose, paying compensation by annual rent or a payment in gross to any landowner for user of or damage to his land in carrying on or maintaining the said navigation, and to charge tolls for the user by the public of the said brook, cuts, and canals. There was no express power given to purchase lands, and there was no reference to mines or minerals, nor any express provision for their purchase. The brook was converted into a canal. Many years afterwards the owners of the coal under the canal worked so as to cause a subsidence, and the canal owners sought an injunction to prevent them from injuring or destroying the canal by mining the coal. The court held "that the act of George II was to be read as equivalent to a grant by the owners of land over which the canal passed of a mere right to make and maintain the canal as a waterway, and not to a grant of the surface land, and that a grant of such a right did not carry with it, as a necessary incident, a right of support so as to prevent the landowners from working their subjacent mines." It was merely the grant of the use of a stream, a right to do certain acts, stopping short of the use of any express words giving or purporting to give any interest in the land.

Having thus satisfied myself of the correctness of the position I have taken in this case, I wish slightly to qualify one proposition asserted in my former opinion. It is there said or intimated that a covenant

not to sue, running with the land, might be the equivalent of a grant of a right to disturb the surface. That depends upon its terms. A covenant not to sue for removing the coal or all the coal would not run with the land. A covenant not to sue for damages to the surface by subsidence, resulting from removing coal or working the mine, might be sufficient. Whatever the form, there must be express words in the instrument from which the intent to allow the surface to be let down can be ascertained. It cannot be put in as a mere presumption, nor can any presumption against the right of support be indulged. Every reasonable presumption and intendment in its favor must be recognized, if the law is to be applied in accordance with the latest and most authoritative expositions thereof.

In order to show the relevancy of some portions of the foregoing opinion and of my original dissenting opinion, it becomes necessary for me to call attention here to changes that have been made, on the rehearing, in the opinion originally filed by the majority of the court on the decision of the case.

After the question, "Why should a different rule prevail when a contract is for the sale of mineral below the surface?" found in that part of Judge Mason's opinion which was adopted in the opinion of Judge McWHORTER, the following language was, on the petition for rehearing, stricken out of the part originally quoted and adopted: "None are suggested by counsel, except that the courts of England have established a different rule, and many of the American courts have followed these decisions. While these decisions do not have the force of law in this state, yet they are of such character as to deserve the careful consideration of the courts. They are persuasive, but are not conclusive, arguments, especially should it be found that one simply leans on the other."

After the citation of *Noonan v. Pardee*, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722, all of the following was eliminated from the part of Judge Mason's opinion which originally appeared in the opinion of Judge McWHORTER: "The learned judge in delivering the opinion of the court in this case said: 'Of course, the defendant has a right to all the coal under his lot, but he had no right to take any of it if thereby necessarily the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface.' This is the English rule broadly and frankly stated, and the one which a large number of American courts have rigidly followed without question. So far as I have been able to ascertain, the first American case announcing this rule was decided by the Supreme Court of Pennsylvania in 1871. Without giving any substantial reasons for the opinion the learned judge says: 'The

English cases referred to and others which might be referred to emanate from great ability, and from a country in which mining, its consequences and effects, are more practical, and the experience greater than in any other country of which we possess any knowledge. We think it safe, therefore, to follow its lead in this matter.' Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385. There are a number of other cases in Pennsylvania decided the same way. The same rule has been adopted in Alabama. See Williams v. Gibson, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368, decided in 1887. In the case of Marvin v. Brewster Iron Mining Company, decided in 1874, and reported in 55 N. Y. 538, 14 Am. Rep. 322, the Supreme Court of that state recognized this rule. See, also, Ryckman v. Gillis, 57 N. Y. 68, 15 Am. Rep. 464. The Supreme Court of Indiana has adopted this rule in the case of Yandes v. Wright, 66 Ind. 319, also 32 Am. Rep. 109, decided in 1879. The same rule is adopted by the Supreme Court of Illinois. See case of Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242, decided in 1880. The Supreme Court of Iowa has not only approved this rule, but has gone a step further, and held that when one conveys land to another, reserving the right to remove the underlying coal if necessary to support the surface of the soil, he must leave pillars or ribs of coal, although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations. See Livingston v. Molingona Coal Company, 49 Iowa, 369, 31 Am. Rep. 150, decided in 1873. It must be conceded that plaintiff's contention is supported by many of the best American and English courts. But it will be found, upon careful examination of the decisions of the American courts, that they have been contented with following the dicta of the English courts. The Pennsylvania courts first adopted the English rule for the reason that the cases 'emanate from great ability, and from a country in which mining, its consequences and effects, are more practical and the experience greater than in any other country of which we possess any knowledge.' And hence the court declared 'we think it safe to follow its lead.' This was the first decision of this question in this country and it is still the leading case, referred to and followed by all the other American courts, and yet no better or other reason is given for it than the court thought it safe to follow the English cases. I refer to Jones v. Wagner, 66 Pa. St. 429, 5 Am. Rep. 385. So that, while we find many American courts following the English decisions, we gain nothing from the American cases, and must look to the English cases alone for the principles upon which the decisions rest."

On the petition for rehearing, the two paragraphs near the conclusion of Judge McWHORTER'S opinion as it now stands,

commencing respectively, "We agree with the conclusion," and "We in no sense question," were inserted as additional matter. They did not appear in the opinion as it was originally delivered.

(140 N. C. 310)

MAY et ux. v. GETTY et al.

(Supreme Court of North Carolina. Dec. 15, 1905.)

1. CONTRACTS—RESCISSION—ABANDONMENT.

Parties to a written contract may rescind the same by parol or abandon it by matter in pais.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1149.]

2. SPECIFIC PERFORMANCE—DEFENSES—ABANDONMENT OF CONTRACT.

Where the vendee of land abandoned his contract by positive and unequivocal acts which were inconsistent with the existence of the contract, such abandonment operated as a bar to his right to specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 228, 238, 239.]

3. VENDOR AND PURCHASER—CONTRACT—ABANDONMENT BY VENDEE.

Where a vendee of certain land told the vendor that the parties who were to furnish him with the money to pay for the property had failed to do so, that he could not pay him, and if the vendee could make his money out of the property to do so, and the vendee never thereafter exercised possession or any acts of ownership over the land, but left the state, such acts constituted an abandonment of his equities under the contract.

4. EXECUTION—VENDITIONI EXPONAS—FIERI FACIAS—WAIVER OF LIEN.

Under Code, § 370, providing that the sheriff, on receiving an execution, shall satisfy the judgment out of property attached by him, etc., a general execution issued to a sheriff who has seized property under an attachment was, in effect, a venditioni exponas, though not such in form.

5. JUDGMENTS—PROCESS—ATTACHMENT.

Where the only jurisdiction which a court acquired in an action against a nonresident was by attaching certain real estate within the state in which he had an interest, a general judgment rendered in favor of plaintiff in such suit was effective, only so far as it related to the property attached.

6. EXECUTION—PROPERTY SUBJECT TO SALE.

The interest of a vendee of real estate who had paid certain earnest money under a contract of sale is not subject to levy and sale on execution.

7. JUDGMENT—COLLATERAL ATTACK.

Where a general judgment was rendered in favor of plaintiff under jurisdiction obtained by attaching certain property belonging to defendant within the state, the judgment was not subject to collateral attack in so far as it affected the property so attached.

8. SPECIFIC PERFORMANCE—TITLE OF VENDOR.

Where a vendor had a contract to purchase the land he contracted to sell from one having a valid title, the fact that such vendor had not paid the entire purchase price was no defense to an action by him to compel his vendee to specifically perform the contract, the latter being entitled to a decree requiring a sufficient portion of the price to be paid to plaintiff's vendor to satisfy his contract.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 257-277.]

Appeal from Superior Court, Macon County; Shaw, Judge.

Suit by S. J. May and another against R. P. Getty and others. From a decree in favor of complainants, defendants appeal. Affirmed.

This action was brought to compel specific performance of a contract to convey land, made November 23, 1896, between the plaintiffs, S. J. May and wife, and the defendant R. P. Getty. The defendants resist the enforcement of the defendants' equity, upon the ground that they are not the owners of the title they contracted to convey. It appears that on June 22, 1889, the plaintiffs, by an instrument, having in some respects the form of a deed, covenanted for the consideration of \$2,350 to convey to H. V. Maxwell "all their right, title, and interest in and to the mineral interests in certain land in Macon county on Partridge creek known as the 'Forrester Gold Mine,' and consisting of three several tracts." This is the land in controversy. They further agree in said instrument "to make to H. V. Maxwell, or his assigns, a good and sufficient deed with warranty," to all their mineral interests in the said tracts of land. On November 23, 1896, the plaintiffs contracted to convey with covenant of warranty to the defendant R. P. Getty, for the consideration of \$6,000, the land above described. The plaintiffs allege that the purchase money so agreed to be paid has not been paid in full, and they demand judgment for the balance due, \$4,400, and for a sale of the land. The defendants aver that, at the date of said contract, and at the date of the contract with Maxwell, the plaintiffs did not have a good title to the land, as H. V. Maxwell and J. M. Forrester had interests in the 50-acre tract, Maxwell an interest in the 61-acre tract, and Forrester the entire interest in the 10½-acre tract, and that the title was further incumbered and complicated by the outstanding contract of the plaintiffs with Maxwell for the sale of their interest to him, which contract has already been set forth. It further appears that Forrester duly contracted to sell his interests to the plaintiff S. J. May for \$1,070. Sundry payments were made by the defendant Getty on the purchase money due by him upon his contract with S. J. May, leaving a balance due of \$4,889.76, and also by the plaintiff S. J. May on the purchase money due by him upon his contract with Forrester, leaving a balance due of \$1,313.25. H. V. Maxwell, on March 5, 1896, for the consideration of \$1, transferred all his right, title and interest in the land to H. P. Wyman by an instrument in the form of a deed, but not having any seal, and Wyman conveyed all the right, title, and interest thus acquired, to the defendant R. D. Woodward, by deed dated January 17, 1900, for the consideration of \$150. On August 25, 1893, the plaintiff S. J. May brought suit against Maxwell for the sum of \$2,350 balance due on the contract for the sale of the mining property above

mentioned, and caused an attachment to be issued and publication to be made. Maxwell being then a nonresident, the said attachment was levied on the property described in the contract between May and Maxwell and also on the other real estate belonging to Maxwell, including all interest he had in the property in controversy outside of that mentioned in the said contract. The plaintiff May recovered judgment, which recites the issuing of the attachment and the levy of it on the said lands and interests by the sheriff "as appears by his return." A general execution issued upon this judgment in which there was no reference to the attachment. After referring to the judgment roll, it required the sheriff, if sufficient personal property could not be found, to satisfy the said judgment out of any real property of the defendant in his county "in whose hands soever the same may be." The description of the property, in the return of the sheriff upon the execution, corresponds with that found in his return upon the warrant of attachment. At the sheriff's sale, August 6, 1894, the property was purchased by the plaintiff Sarah J. May, and a deed was made to her by the sheriff, August 13, 1894.

The referee found as facts that Maxwell never tendered or paid May any money, other than \$100 paid on the date of the contract, and never demanded the deed for the land. Two years after the execution of the contract with May, Maxwell left this state, and has never since exercised any ownership over this property or had possession of the same. Thereupon May entered upon the said property and held possession thereof until the date of the Getty contract (either for himself or by authority of his wife). Maxwell has not since been a resident of this state; that S. J. May, acting under authority from his wife, took possession of the property shortly after the execution of the deed from the sheriff to Sarah J. May, and did certain work tending to develop the property and at intervals took ore therefrom, and did other work or repairs when necessary to keep the property in shape until the date of the contract to R. P. Getty, at which time said Getty took possession and spent about \$6,000 in developing the mine, improving it, putting up buildings, and taking out between 1,500 and 2,000 tons of ore. In this connection it is well to state that the court found, as additional facts, that 12 or 13 years prior to the date of the judgment (Spring term, 1905), "H. V. Maxwell told S. J. May that the parties who were to furnish him with the money to pay for the property had failed to do so, and that he did not think he could pay him, and if he could make his money out of the property, to go ahead and do so. Maxwell left the state, has never exercised possession over the property since or tendered any payment; that Maxwell left the property with the intention of relinquishing all rights and equities he had by reason of his contract with May, and May assented

to it." The court then held upon this finding that Maxwell abandoned the said contract, and relinquished all his rights and equities thereunder at that time. The court also held that the sale and sheriff's deed under the attachment and judgment in the case of *May v. Maxwell* passed to the plaintiff Sarah J. May all of the property and interest of Maxwell, which were sold by the sheriff, except such interest or equity as he acquired by virtue of the contract between him and the plaintiff S. J. May. The case was referred, and the referee reported the facts and his conclusions of law. From his report and the findings of the judge, we have taken the foregoing statement of facts.

Numerous exceptions were filed to the report of the referee. The court passed upon the exceptions and finally adjudged that there was due by the defendant Getty upon his contract with the plaintiffs the sum of \$4,889.76, and interest, and that the plaintiffs owed Forrester on his contract the sum of \$1,313.25, and interest. It was thereupon adjudged that if the defendant Getty failed to pay the sum due by him within the time fixed in the judgment, the commissioners appointed for the purpose should sell the lands described in the contract between the plaintiff S. J. May and R. P. Getty, and report the sale to the court at its next term, and a similar direction was given as to the land described in the contract between the plaintiff S. J. May and J. M. Forrester, in case the said plaintiff failed to pay the amount found to be due to Forrester. It was further adjudged that if the money due by Getty to the plaintiff S. J. May, and the interest thereon should be paid by Getty, a deed should be executed by the proper parties to Getty for the lands described in both contracts, and that out of the money so paid the sum of \$1,313.25, and interest should be paid into the clerk's office for the use of the heirs of Forrester, he having died; this being required, as we assume for the exoneration of the Forrester lands from the lien for the balance of the purchase money due under the contract between the plaintiff S. J. May and Forrester, the said amount being properly chargeable against the plaintiffs in the general settlement and adjustment of the equities, as between the several parties, and this being a short way of relieving the Forrester land of its burden. At any rate, there was no exception to this provision of the judgment, nor was there any to its form in any particular, the defendants excepting to it only upon the ground that the court erred in adjudging any amount to be due by the defendant Getty, and that it should have adjudged that the plaintiffs were indebted to Getty in the sum of \$9,330.14, with interest. Defendants appealed.

El. B. Norvell and Jones & Johnston, for appellants. Horn & Mann, for appellees.

WALKER, J. (after stating the case). We agree with the learned counsel of the defend-

ants that the vital questions in this case are those raised by their seventh and eighth exceptions to the referee's conclusions of law and the ruling of the court thereon. Indeed we think that a decision upon the matters thus presented will be sufficient to dispose of the appeal, as the other exceptions are subsidiary to those two, and, if there are any not thus strictly related to them, they are not essential elements in the case, and the rulings upon them, even if incorrect, and we do not think they were, cannot be assigned as reversible error. There are three questions which we will consider in the following order: (1) Did Maxwell agree with May to rescind, and thereupon abandon the contract of sale? (2) Were the proceedings in the suit of May v. Maxwell through which the feme plaintiff, Sarah J. May, claims title to the land of Maxwell, not covered by the said contract, valid and sufficient to vest the title in her? (3) Is there any defect in the title of the plaintiff to the Forrester land of which the defendants can avail themselves?

It is now well settled that parties to a written contract may by parol, rescind, or by matter in pais abandon the same. *Faw v. Whittington*, 72 N. C. 321; *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924; *Holden v. Purefoy*, 108 N. C. 163, 12 S. E. 848; *Riley v. Jordan*, 75 N. C. 180; *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85. In the case first cited, Bynum, J., for the court, says: "The contract is considered to have remained in force until it was rescinded by mutual consent, or until the plaintiffs did some act inconsistent with the duty imposed upon them by the contract which amounted to an abandonment." *Dula v. Cowles*, 52 N. C. 290, 75 Am. Dec. 463; *Francis v. Love*, 56 N. C. 321. What will amount to an abandonment of a contract is, of course, a question of law, and the acts and conduct which are relied on to constitute the abandonment should be clearly proved, and they must be positive, unequivocal, and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance. *Miller v. Pierce*, 104 N. C. 390, 10 S. E. 554; *Faw v. Whittington*, supra; *Holden v. Purefoy*, supra. We are of the opinion that the facts found by the referee and the court are sufficient to show a rescission of the contract and an abandonment of all rights under it by Maxwell. They are quite as significant for the purpose of indicating the intent of the parties, and especially the purpose of Maxwell to relinquish all his rights, as any we find in the books which have been held sufficient to defeat a claim for specific performance or the assertion of an equity in the property. *Francis v. Love*, 56 N. C. 321. There was evidence to sustain the findings of fact as to the rescission and abandonment; and, this being so, the findings will not be reviewed by us. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384.

The defendants' next contention is that

as the plaintiffs in the case of *May v. Maxwell* issued a general execution on the judgment, instead of first having the land, which had been attached, condemned in the judgment to be sold by the sheriff under a special execution to be issued for that purpose, they lost the lien acquired by the levy of the attachment and all rights thereunder; and, as the judgment was a personal one, nothing passed by the execution issued upon it to the purchaser, *Sarah J. May*. Counsel, in support of this position, cited *Amyett v. Backhouse*, 7 N. C. 63, and *Powell v. Baugham*, 31 N. C. 153. Those cases decide that the suing out of a writ of fieri facias, instead of a writ of venditioni exponas, on a judgment taken in a suit wherein an attachment has been levied, waives the lien of the attachment, there having been no condemnation of the land. By taking out a general execution on the judgment containing no clause of condemnation, the land previously levied on under the writ of attachment was thrown into the general mass of landed property belonging to the defendant, just as if the plaintiff had taken out an execution against his property generally as is done in ordinary cases. The practice prevailed of issuing a venditioni exponas with a fi. fa. clause, so that the property formerly levied upon under an attachment or fieri facias might be sold under the venditioni exponas and the special fieri facias might be used to reach any other property not subject to the lien of the levy. But the old procedure has given way to the new, and now we have no such distinctions between the forms of process as then obtained. The law now looks more to the substance than to the form, and ignores the ancient technicalities which were frequently used to defeat justice. The Code explicitly provides that the sheriff, upon receiving the execution, shall satisfy the judgment out of the property attached by him, and for that purpose he shall proceed to sell so much of the attached property, real or personal, as may be necessary. Code, § 370. This is an express direction to the sheriff to sell the property previously levied on by him under the attachment, and invests him with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property. This has been the uniform construction of our statute upon the subject, as will appear by reference to the adjudged cases. *Electric Co. v. Engineering Co.*, 128 N. C. 199, 38 S. E. 831; *Chemical Co. v. Sloan*, 136 N. C. 122, 48 S. E. 577. In *Gamble v. Rhyne*, 80 N. C. 183, it is said: "The property seized is a legal deposit in the hands of the sheriff to abide the event of the suit, the lien of the attaching creditor having priority over any subsequent attachment or execution which may come to his hands; and on the rendition of judgment against the defendant, and when execution is

issued, and comes to the sheriff's hands, then his powers as sheriff under the attachment to hold merely are merged into the larger powers acquired by him under the execution." It is undoubtedly true that a plaintiff cannot take a general and personal judgment against a defendant, who is a nonresident; upon a service by publication, and not even when an attachment has been levied on his property; the court having jurisdiction to adjudge against him only to the extent of the property seized. In the latter case, it acquires jurisdiction by actual seizure of the res, under its process, and not otherwise. This is familiar learning and our observations upon it need not be extended. *Cooper v. Reynolds*, 77 U. S. (10 Wall.) 308, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 585; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198; *Long v. Ins. Co.*, 114 N. C. 465, 19 S. E. 347; *Stone v. Myers*, 9 Minn. 303 (Gil. 287), 86 Am. Dec. 104; *State v. Eddy*, 10 Mont. 311, 25 Pac. 1032.

In the case of *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173, we had occasion to discuss both of these questions, and it was there in part said: "It is contended that, if the debt was subject to garnishment at all, any lien acquired by the service of the writ of attachment was waived, and the garnishee released by taking a general and personal judgment against the defendant and the garnishee, instead of taking an order condemning the debt to the payment of plaintiff's claim. We do not think that, if the plaintiff acquired any lien on the debt due the defendant by the tobacco company, he lost it by taking a judgment against the defendant and the garnishee. The judgment against the defendant is void, as a personal judgment, as the court could acquire no jurisdiction to proceed against him, except in so far as it could, by its process, levy upon or seize his property; and in this respect the suit is, to all intents and purposes, in the nature of a proceeding in rem, and not one in personam. But in this case the defendants can derive no benefit from the fact that the execution issued upon a general judgment. It was necessary to take such a judgment to ascertain the debt and the execution issued to the sheriff was, by virtue of the special provision of the statute we have mentioned, in the nature of a vend. ex. to sell the property attached and, for the purpose of subjecting the latter to the payment of the judgment, the court had plenary jurisdiction." The plaintiff, in the case of *May v. Maxwell*, could not sell under execution, the property described in the contract with Maxwell, who had paid \$100 on the purchase money, as his interest was not the subject of sale under such process (*Hinsdale v. Thornton*, 75 N. C. 331; *Ledbetter v. Anderson*, 62 N. C. 323; *Love v. Smathers*, 82 N. C. 369); but the sale passed title to the property belonging to

Maxwell, and not described in the contract, as there was no trust relation subsisting with respect to it. We cannot inquire into the validity of the cause of action in *May v. Maxwell*, the judgment being conclusive as to that in a collateral proceeding. *Cooper v. Reynolds*, 77 U. S. (10 Wall.) 308, 19 L. Ed. 931. In the case cited, Mr. Justice Miller says, that the court cannot disregard a judgment in another suit, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it, and then proceeds: "It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has often been held by this court, and by all courts, and it takes rank as an axiom of the law." That case is precisely in point, as the court was dealing with a question in all respects like the one we are now considering. If the cause of action in *May v. Maxwell* was defective, it could be taken advantage of only by a proper pleading in that cause, and any ruling upon it could be reviewed by exception and appeal. The judgment, in any view, was merely erroneous and correctible by appeal, and not in a collateral proceeding by direct attack.

Sarah J. May having already acquired title to the other property by reason of the rescission and abandonment of the contract, as we have shown, it therefore follows that as the proceedings in the attachment suit cannot be successfully assailed, the plaintiffs can give a good title to all the land embraced in their contract with the defendant Getty, unless there is some defect in the title to the Forrester land. It is not denied that Forrester had a good title to the three several tracts of land which, on the 16th day of November, 1896, he contracted to sell to S. J. May, or rather that he owned the right, title, and interest therein which he claimed. This being so, we do not see why, under the judgment of the court in this action, the defendants will not be fully protected as to this part of the land. If they pay the amount found by the court to be due, as the balance of the purchase money under the contract of the plaintiffs with the defendant Getty, with interest and costs, so much of that payment will be applied to the amount due by the plaintiff S. J. May on the Forrester contract as will discharge it, and relieve the Forrester land of any further lien. And the same result will follow if the mineral interests and other rights and property adjudged to be sold to pay the sum of \$4,889.76, due on the plaintiff's contract with the defendant Getty, bring enough to pay that amount with interest and costs. If the property so adjudged to be sold does not bring enough, the rights of the parties can be easily and equitably adjusted by a

sale of the Forrester land, upon the principle which the learned judge evidently had in mind when the judgment was rendered, and which is plainly set forth therein, namely, by a sale of the Forrester interest, and the application of the proceeds, first, to the payment of the Forrester debt, and then to the payment of any balance due the plaintiffs; or, if the plaintiffs redeem the Forrester interest from the lien, adjudged to rest upon it, by subrogating them to the rights of F. M. Morgan, administrator of Forrester, when they may have that interest sold to reimburse themselves, provided they have not already been paid in full the amount due by the defendant Getty. The latter under this arrangement cannot lose anything unless by his own default.

In the discussion of the case we have treated the instrument executed by S. J. May to H. V. Maxwell, as a contract to convey, as it is such in substance and effect. And of the same nature are the instruments executed by S. J. May to R. P. Getty and by J. M. Forrester to S. J. May. We have carefully reviewed the whole case and are unable to see why the defendant Getty will not be able to secure a good, and, indeed, a perfect title, if he complies with the terms of the decree by paying the amount adjudged to be due by him. We do not deem it necessary to refer particularly to the other exceptions, as the most of them are practically covered by the decision we have already made, and those that are not, either refer to matters not reviewable here, or are, in themselves, without merit. If there ever has been any defect in the title, it does not exist now; and if the plaintiffs can give a perfect title at the time of the trial, it is sufficient to induce a court of equity to compel performance of the contract. *Hughes v. McNider*, 90 N. C. 248.

There was no error in the rulings and judgment of the court below.

No error.

(73 S. C. 155)

WILSON v. GORDON et al.

(Supreme Court of South Carolina. Dec. 22, 1905.)

1. WITNESSES—PRIVILEGED COMMUNICATIONS.

Where an attorney is employed jointly by two persons to draw two wills of like import, communications made by them to him are not privileged as against persons claiming under one of such wills.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 780.]

2. EVIDENCE—DECLARATIONS.

It is competent, on the issue of an agreement to make mutual wills, to introduce evidence of a decedent given in a probate court in establishing the will of the other party to the agreement as a declaration against her right to revoke her will.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1135.]

3. WITNESSES—CROSS-EXAMINATION.

On cross-examination, declarations in one's favor, when they are part of the conversation brought out in chief, are admissible.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 933.]

4. WILLS—CONTRACT FOR MUTUAL WILLS—EVIDENCE.

An attorney was employed by two maiden sisters on joint request to prepare two wills, giving the property of each to the other, with the provision that, if the devisee should die in the lifetime of testator, the property should go to a niece and her children. *Held* not mutual wills, and that the surviving sister, after having accepted the benefit of the deceased sister's will, might destroy her own will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 168-170, 449.]

Gary, A. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Abbeville County; J. E. McDonald, Special Judge.

Action by M. Harvey Wilson against Jane L. Gordon and others. Decree for plaintiff, and defendants appeal. Reversed.

Wm. N. Graydon, H. J. Haynesworth, Thos. P. Cothran, and Wm. P. Greene, for appellants. Tribble & Prince, Frank B. Gary, and J. P. Carey, for respondent.

WOODS, J. This is an action for the partition of the lands of Miss Jane L. Gordon, who died in 1902, intestate, having destroyed her will a short time before her death. Mrs. Jane W. Crymes, a niece, and her children, who are defendants in the cause, deny the right to partition, claiming the entire property under the allegation that Jane L. Gordon and her sister, Mary Gordon, in pursuance of a binding agreement between them, executed mutual wills, each giving to the other her entire property, with a provision in the will of each testatrix that, if her sister should die in the lifetime of the testatrix, her property should go to Mrs. Crymes and her children; that the destruction of her will by Jane L. Gordon after the death of her sister was a violation of the contract of which Mrs. Crymes and her children were the beneficiaries; and that in enforcement of the contract the court should decree the title to the property to be in them as if the will had not been destroyed. It is admitted by the other heirs of Jane L. Gordon that she and her sister Mary did execute contemporaneously wills of this purport, but the case turns on the issue whether these wills were executed in pursuance of a contract which bound the survivor to leave her will so made in force at her death. The referee to whom the cause was submitted held there was no such contract, but the circuit judge came to the opposite conclusion.

1. We consider first the exceptions charging error in the admission and in the exclusion of evidence. It is not necessary to decide whether an agreement to make a will in the future devising real estate may be proved by parol. Here the wills were actually made, and the testatrix who undertook to revoke after the death of her sister had received the

full benefit of the provisions of her will. The case is, therefore, stronger on this point than *Turnipseed v. Sirrine*, 57 S. C. 569, 35 S. E. 757, 76 Am. St. Rep. 580, where such evidence was held competent, and stands on the same ground in this respect as *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415. The two wills were drawn by Col. J. N. Brown as attorney for both sisters, and appellants submit his testimony as to the contents of the letter of instruction, and the preparation of the wills should have been excluded as a privileged communication from client to attorney. Mrs. Crymes and her children claim against the heirs of Jane L. Gordon through a contract alleged to have been made by her with Mary Gordon. If Col. Brown was the confidential attorney of either of these ladies, he occupied that relation to both, and as between them or those claiming under them the communications made by them to him were not privileged, especially as these communications related to instructions for drawing their wills. *Moffatt v. Hardin*, 22 S. C. 9; *O'Brien v. Spalding*, 66 Am. St. Rep. 202, note.

2. The testimony of Jane L. Gordon, taken by the probate judge in proving in solemn form the will of Mary Gordon, was admitted as the declaration against her right to revoke her will. We do not perceive on what grounds this evidence could be regarded incompetent, and none has been suggested in argument.

3. W. J. Milford testified on behalf of respondents that Jane L. Gordon told him she had destroyed her will. Upon the cross-examination, in giving the remainder of the conversation, he testified: "She said she advised her sister that both should destroy their wills, but she would not do it. She said [Miss Mary] would let hers go as she had made it. It might save each other some trouble, but that Miss Jane might destroy hers if she wanted, but if both destroyed it might cause some trouble." "The general rule upon this subject is that, while it is competent to introduce declarations of a party against his interests, it is not competent to introduce his declarations in his own favor, unless they were made in, and constitute a part of, the conversation brought out by the other side; and this we understand to have been the ruling of the circuit judge, in which we think there was no error." *Williams v. Mower*, 29 S. C. 332, 338, 7 S. E. 505. Under this rule, when in the effort to show the destruction of the will after the death of her sister, in violation of the contract not to do so after she had received the benefits of the contract, Miss Jane's declaration to the witness that she had burned her will was introduced, it was competent for the witness to testify at least that she told him in the same conversation of having given notice to Miss Mary of her intention to destroy it.

4. The vital question is whether Jane L. Gordon made the will which she destroyed

in pursuance of a contract with her sister Mary Gordon; the consideration being the execution of a will by Mary Gordon under which Jane L. Gordon received her property. If the wills of the sisters were made under a mutual contract, and Jane L. Gordon did not give notice to her sister of her intention to revoke, so that she could revoke also, then the right of Mrs. Crymes as a beneficiary of the contract to take the property that would have passed to her under the will of the survivor is unquestioned. A contract to make a certain disposition of property by will is as valid as any other contract; citing 8 Pomeroy's Equity Jurisprudence, § 1244. Chief Justice Simpson, in discussing such contracts, says, in *McKeegan v. O'Neill*, 22 S. C. 455, 467: "Agreements may be divided into two classes, distinguished by the mode in which they are made. (1) The ordinary agreement, where an intentional offer is made on the one side founded upon a sufficient consideration, and an intentional acceptance on the other, resulting in the meeting of minds upon the same terms. (2) 'Where it is created by representations made by one party and acts done by the other upon the faith of such representations. Where an absolute, unconditional representation of something to be done in the future is made by one person in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the act by which the intended result is obtained and purpose accomplished, a contract is thereby concluded between the parties.' " Such contracts may be established by direct proof of an express promise or inferred as a conclusion of facts from the circumstances surrounding the parties. But where a contract to make or not to revoke a will is set up there are strong reasons for requiring an agreement definite and certain established by evidence clear and convincing. The evidence comes from the living against the dead, who cannot speak in her own behalf in disproof of a charge of the violation of a solemn obligation. For this reason it is obvious little, if any, consideration should be given to the testimony of those who claim the benefit of such a contract. On account of the secrecy observed by most persons as to the will they expect to make, there is little general discussion of the subject, and it is therefore difficult to disprove any intention or agreement attributed to a testator. Again, the discussion by two persons bound to each other by the closest ties of affection as to disposition of their property, resulting in separate wills by which the property of each was left to the other, affords no grounds for the inference that either undertook or exacted a legal obligation. Such action may be far more reasonably attributed to the promptings of affection, and courts should not introduce the mercenary element, except upon clear affirmative proof that it was present within the understanding of both parties.

With this statement of the character and strength of the evidence which ought to be required in cases of this kind, we consider that which is here offered. Mary Gordon and Jane Gordon were maiden sisters, who lived together until the death of the former at the age of 82. They were devoted to each other, and seem to have lived very much in common, though keeping their property separate. Mrs. Crymes was a favorite niece, who lived with them from infancy until her marriage at the age of 18, and after her marriage frequently visited at their home; their affection for her being apparently unchanged. In 1892, after consulting with each other, they came to the common determination to make wills, and communicated their intentions to the husband of Mrs. Crymes. As a result of consultation with him, they sent written instructions, signed by both of them, to Col. J. N. Brown, an attorney living in Anderson, who prepared the wills as directed; the language used in each being precisely the same, except for the transposition of the names. Each left by her will her entire property to the other without limitation, but provided that, if her sister should die during the lifetime of the testatrix, her property should go to Mrs. Crymes and her children. The old ladies executed the wills at their home at the same time and in presence of the same witnesses, but neither of them said anything as to any agreement to make them or not to revoke them, or as to their terms or the motives and intentions by which they were actuated. Miss Mary Gordon died in 1894, and her sister Jane took her entire property under her will. Proof of this will in solemn form having been required, Miss Jane Gordon testified at the hearing, and, as her evidence taken by the probate judge is relied on to support the alleged agreement, so much of it as is pertinent is quoted: "Col. Brown, of Anderson, drew up the will of sister Mary W. Gordon. Sister sent instructions by Mr. Crymes to Col. Brown for making the wills in December. She gave in all her property at the time and stated that she wanted me and Mrs. Crymes and her children to have all she had. She raised Mrs. Crymes from infancy, and that is why she gave the property to her. She took Mrs. Crymes when she was but three weeks old. Mr. Crymes sent the wills down in January, I think. We read the wills and laid them away and were a little careless about signing them. People don't generally talk about their wills. That is left till they are gone. Mary was in her eighty-third year when she died. She never made any other will. We consulted each other often about making our wills. We spoke of Judge Lyon as a proper person to draw our wills, but finally agreed to get Col. Brown to draw them. I think Mary's will was signed first. She read her will often before it was signed. She knew all about her property, and gave Mr. Milford special instructions about her business. She suggest-

ed the making of the wills. The instructions to Col. Brown for making the wills were written by her. * * * None of the relatives were consulted about making the wills." Mrs. Crymes testified that Miss Jane gave this additional testimony, which was not taken down by the probate judge: "Miss Jane L. Gordon testified that my aunts had agreed to make wills, and had so agreed for a long time, but did not carry the agreement out until after her brother's death. She said that my husband had confidence in Col. Brown, and that she was willing for him to do such work. She said that my aunt had said she wanted to leave her property to the widow and the fatherless. This was not put down, but she said it." Miss Mary on her deathbed said to Mr. W. J. Milford that he had witnessed her will, and she wanted him to see it fully carried out. After the death of her sister, Miss Jane having become dissatisfied with the settlement made by the executor of her sister's will, burned her own.

This is the testimony upon which the court is asked to find that the wills were made in pursuance of a binding contract. It will be observed the only direct evidence that the sisters had agreed to make wills is the statement attributed by Mrs. Crymes to Miss Jane in her testimony before the probate judge; but this is not borne out by the written version of her evidence taken by the probate judge, and is not corroborated by any witness present at that hearing. Assuming, however, that this testimony is true and uncolored by any feeling of self-interest, it is very far from proving an admission by Miss Jane of a binding contract between the sisters to make wills, the one being the consideration for the other. The testimony establishes conclusively an almost common life, mutual affection for each other, common purposes, common affection for Mrs. Crymes, conference and agreement as to the wisdom of making wills, and the terms in which they should be made. But this flowing together of life, thought, and action, so far from importing that what they did for each other was the result of contract, a benefit received being regarded the consideration of another bestowed, connotes the mutual bestowal of benefits growing out of devotion and intimate association entirely independent of consideration and without thought of contract. Contract imports the standing apart and coming together as the result of an agreement for a consideration. The distinction is forcibly illustrated by the case of *Gardner v. Gardner*, 49 S. C. 62, 26 S. E. 1001, where the parties stood in antagonism to each other, and after the execution of a will by one, as it was alleged, in pursuance of a contract to settle the dispute, the others ceased to press their claim. On the other hand, these wills were the result of the union of life and purpose, and not of a negotiation between the sisters in which each as a separate party represented her own interest. It was most natural that each should wish to bestow upon

her sister her entire property, and no contract can be implied from the fact that this reasonable and natural testamentary disposition should have been made. That the wills were made at the same time is of little, if any, significance when the close association and common life are considered. The testimony of Miss Jane before the probate court as to why Miss Mary wished to give property to Mrs. Crymes and her children was manifestly offered to establish Miss Mary's sanity, which was in issue, by showing that she had reasonable motives and knew the objects of her bounty. All the facts relied on as implying a contract to make mutual wills are entirely consistent with the absence of contract, and the presence of the union of life and mutual affection as the impelling motive.

In *Dufour v. Periera*, 1 Dick. 419, the will itself contained words indicating an intention to make a binding contract. In *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415, and *Turnipseed v. Sirlime*, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 580, distinct and definite contracts were proved by indisputable evidence. No case has been cited, and we have been able to find none where a contract was held to be established by evidence so uncertain as is offered here. The facts are singularly like those which were held in *Edson v. Parsons* (N. Y.) 50 N. E. 1117 and *Cawley's Appeal* (Pa.) 20 Atl. 567, 10 L. R. A. 93, not to imply a contract. The latter case is cited with approval in *Buchanan v. Anderson*, 70 S. C. 454, 50 S. E. 12. See, also, note to *In re Davis* (N. C.) 38 L. R. A. 289. But there are some facts which go very far towards disproving any contract. Not only was there no intimation from either of the sisters that they so understood it in the lifetime of Miss Mary, but the terms of the wills are very significant. They were prepared with great care and after much consideration. The fact that there was an absolute devise to each other without limitation, was strong evidence that there was no intention to limit the power of alienation. When an intention is reduced to writing, either in the form of a will or a contract, there is always a strong implication of fact that the whole intention has been expressed, and an implication still stronger that there is no agreement or intention contrary to that expressed. The evidence is far from clear and convincing that Jane L. Gordon made an intentional offer to make a will as a consideration for a will to be made by her sister, or that her sister intentionally accepted such an offer, or that Jane L. Gordon made an absolute representation that she would make a will in order to induce her sister to make one of like import in her favor. The right to dispose of property by will would be seriously jeopardized if it was held to be surrendered upon such meagre proof as is here offered.

A petition has been filed very recently in this court by S. L. Miller and others, who

claim land involved in this litigation by title paramount to Mary Gordon and Jane Gordon. This court has no power to adjudge their rights at this stage of the litigation, but this judgment is without prejudice to any proceedings they may be advised to institute in the circuit court.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause be remanded for further proceedings consistent with this opinion.

GARY, A. J. I cannot concur in the conclusion announced in the opinion of Mr. Justice WOODS, as I think the judgment of the circuit court should be affirmed for the reasons therein stated.

(73 S. C. 165)

STATE ex rel. HAY v. FARNUM.

(Supreme Court of South Carolina. Dec. 22, 1905.)

1. INTOXICATING LIQUORS—COUNTY DISPENSER—EXAMINATION OF PAPERS.

A county dispenser is a state officer, and all books, documents, and letters in the dispensary relate prima facie to the public business, and are open to examination by any committee appointed by the General Assembly.

2. SEARCHES AND SEIZURES—CONSTITUTIONAL LAW.

A committee appointed by the General Assembly to examine the books of a county dispenser, in acting under such authority, is not violating the provisions of the federal and state Constitutions that the right of the people to be secure in their persons and property against unreasonable searches and seizures shall not be violated.

3. INTOXICATING LIQUORS—COUNTY DISPENSER—EXAMINATION OF PAPERS—MANDAMUS.

Where a committee appointed by the Legislature seeks to examine books and papers of a county dispenser, and it is stated under oath by such dispenser that papers in his office do not belong to the business of the dispensary, but are private papers, neither the committee nor the officer attempting to seize such papers has the right to decide that question, but upon application the court will examine the papers, and if, on examination, it determines that any of them pertain to the affairs of the office, it will issue a writ of mandamus requiring such officer to submit them to the committee.

Application by the state, on the relation of J. T. Hay and others, for writ of mandamus against James S. Farnum. Writ granted.

J. T. Hay and J. F. Lyon, for petitioners. Mordecai & Gadsden, for respondent.

WOODS, J. This petition for mandamus alleges that J. T. Hay, C. L. Blease, Neils Christensen, Jr., T. B. Fraser, J. F. Lyon, A. L. Gaston, and J. B. Spivey were, by a concurrent resolution passed on the 25th day of January, 1905, appointed a joint committee of the Senate and House of Representatives to investigate the affairs of the state dispensary, and as a means to that end the resolution provided that the committee "shall have access to all the books and vouchers and other papers of the said institution

or any officer or employé thereof," and that it became necessary in the course of the investigation so authorized for petitioners, J. T. Hay, B. F. Lyon, and Neils Christensen, Jr., as a subcommittee of the joint committee, to inspect and examine all books, letters, vouchers, and other papers in possession of J. S. Farnum, as dispenser of dispensary No. 12, in the city of Charleston. The petition further alleges: "That on the 17th day of June, 1905, an alternative writ of mandamus was issued by Chief Justice Y. J. Pope, commanding the said J. S. Farnum to deliver to petitioners for inspection all books, papers, letters, letter files, vouchers, and other papers and records in his dispensary No. 12, or that he show cause to the contrary; that said writ was duly and legally served on respondent on the 20th day of June, 1905; that in obedience to said writ respondent allowed petitioners to inspect letter files and other papers called for in his dispensary No. 12, in Charleston, S. C., but stated to petitioners J. Fraser Lyon and Neils Christensen, Jr., that he had, in anticipation of petitioners making demand to be allowed to inspect said letter files and papers in his place of business, removed such letters and papers from the file in said dispensary No. 12, as he did not wish petitioners to see; that said respondent stated that said letters and papers which were removed from dispensary No. 12 were his private matters, which petitioners had no right to inspect; that thereupon petitioners made demand upon the said J. S. Farnum to deliver to them for inspection all of the letters and other papers which had been removed from dispensary No. 12, under the circumstances hereinbefore alleged, but respondent refused to allow petitioners to inspect said papers and letters; that many of the letters and papers removed from said dispensary No. 12 and placed beyond the reach of said committee, as your petitioners are informed and believe, and so allege, bear directly upon and give information concerning matters which petitioners are authorized and ordered to investigate under the terms of the said resolution; that if the said J. S. Farnum is allowed to withhold the said letters and papers from your petitioners they will be hindered and circumvented in carrying out the terms of said concurrent resolution, and the state will be deprived of the benefit of the information contained in said letters and papers." The petitioners pray for a writ of mandamus commanding J. S. Farnum "to immediately deliver into the possession of petitioners for inspection all letters, papers, vouchers, and books removed from dispensary No. 12, in Charleston, S. C., and all books, papers, vouchers, and records in his possession or under his control relating to the affairs of the dispensary, or of any officer, employé, or agent thereof; (2) that the said J. S. Farnum be restrained and enjoined from removing, making away with, or putting beyond the

reach of your petitioners any of said letters or papers covered by the provisions of said concurrent resolution."

An order was made by the Chief Justice on July 15, 1905, requiring the defendant to show cause at his chambers on July 25, 1905, why the writ of the mandamus should not issue as prayed for, and in the meantime enjoining the defendant from removing, secreting, or placing the documents referred to beyond the reach of the petitioners. The defendant denied the committee had any power whatever, because the subject of the resolution under which it was appointed was not expressed in the title, because it lacked the style, "Be it enacted by the General Assembly of the state of South Carolina," and because the several readings, the signature of the Governor, and other formalities necessary under the Constitution to give a bill or joint resolution force of law, were not complied with. The defendant further insists the resolution is null and void, and this proceeding cannot be maintained thereunder, because it violates the provisions of the federal Constitution (Amendment 4) and the state Constitution (article 1, § 16), which provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." Finally, the defendant alleges he has exhibited to the committee all books and other documents in dispensary No. 12, which relate to that business, and that he has removed only those which related to his private business, having no relation whatever to the dispensary. This return was traversed, the petitioners denying the legal conclusions stated by the defendant, submitting the question involved to the determination of the court, and alleging that the office held by the defendant was a public office, subject to examination by any committee of the General Assembly authorized to make such examination, and that the books, papers, and documents therein are public records subject to like examination.

The issues of fact were referred by the Chief Justice to a referee, and upon the coming in of his report this court made the following order: "By an order heretofore made in this cause by the Chief Justice it was referred 'to Jas. F. Izlar, Esquire, as special master, to take such testimony as may be offered by the parties, respectively, on the issues of fact presented by the pleadings, and to report the same to the court, together with his conclusions of fact.' The special master has submitted the testimony taken, but by agreement of counsel omitted to report his conclusions of fact. The main issue of fact is whether the books, papers, letters,

vouchers, and records removed from dispensary No. 12, in the city of Charleston, and now in the possession or under the control of the defendant, relate 'to the affairs of the dispensary, or any officer, employé, or agent thereof,' or to the private affairs of the defendant. Aside from the presumption that such documents kept in the dispensary related to its business, there is practically no testimony on the subject. The documents were not produced before the master, and opinions expressed by witnesses in giving their testimony cannot be accepted as determining the character of the papers. To the end, therefore, that the court may be informed as to the nature of all the books, papers, letters, vouchers, and records taken by the defendant, or any of his agents, attorneys or servants, from dispensary No. 12, in the city of Charleston, it is ordered that the defendant produce before this court, on Monday, December 11, 1905, at 10 o'clock in the forenoon, all such books, papers, letters, vouchers, and records so taken from the said dispensary. This order is not to be construed as determining or indicating any opinion of the court as to any question of law or fact involved in the cause. It is further ordered, that this order be forthwith served upon the defendant Jas. S. Farnum." In compliance with this order certain letters and other documents have been produced and are now in the hands of the court.

It is quite true that no action of the General Assembly, by whatever name it may be called, can have the force of law, binding on the citizens of the state generally, without complying with the statutory requirements above referred to, and relied on by the defendant. But no attempt is made to give any such effect to the concurrent resolution here under consideration. Subject to his constitutional rights, every officer of the state administers his office as required by acts passed by the General Assembly. To enable the General Assembly to legislate intelligently, it is not only its right, but its duty, to obtain information as a basis of future legislative action as to every public office and institution in the state. It would indeed be a startling proposition to lay down that the legislative department of the state government is without power to examine public offices and records through its committees appointed for that purpose without the passage of a law conferring such power. In *Pinckney v. Henegan*, 2 Strob. 250, 49 Am. Dec. 592, the court had under consideration the force of a concurrent resolution providing that a certain commissioner to be appointed by the governor should have access to the books of the Secretary of State. The Secretary of State refused the commission access to his books and an application was made for a writ of mandamus. Judge O'Neal says: "The third objection, that the resolution or reports of the committee concurred in have not the power of acts, and that an act was

necessary to compel the Secretary of State to submit to the will of the Legislature in reference to this office, is also, I think, without just foundation. It is very true that neither reports nor resolution have the power of an act. Their whole office and legal effect is as a formula for acts or directory to the officers or agents of the state. It is in this last point of view that these operate." As to the records themselves he says: "I think there is nothing in the second objection made to the answer, to wit, that the respondent has the care and custody of the records, and that the relator cannot have access to them but by the respondent's consent, obtained on payment of the fees of the office for search and copies. The public records in the Secretary of State's office do not belong to the Secretary. They are the property of the state. He is the mere keeper under her authority. Whatever she wills about them, he is bound to obey."

The defendant's claim that the resolution contemplated unreasonable search of private papers is based upon a complete misapprehension of his position. The state has undertaken to take charge of the entire liquor business of the state and to prohibit any private person or corporation from dealing in liquor, except as they may find warrant in the Constitution and laws of the United States. The defendant, as a dispenser, is an officer of the state, keeping for it a dispensary in the city of Charleston. He has no right to any private business connected with the dispensary and presumably has no such business. All books, documents, and letters in that dispensary *prima facie* relate to the public business and are open to examination by any committee of the General Assembly. The offices and place of business of the dispensary stand precisely in the same relation to the state as the State Treasurer's office. The proposition would not be countenanced for a moment, indeed, it would hardly be advanced, that that officer upon the entry into his office of a legislative committee of investigation, could withdraw from his office beyond the reach of investigation all papers that he might designate as private and deny the right of inquiry into their character, on the ground that such an examination would be an unreasonable search of private papers. In such cases, however, neither the officer nor the committee can be the final arbiter as to the character of the papers. If the question is seriously made under oath that by any means private papers, in no wise relating to the duties of the office or its affairs, happen to be actually in the office, it is the duty of the courts under proper proceedings to inquire into the matter as a judicial question, and examine the papers themselves to ascertain whether the papers relate to private affairs, contrary to the presumption that they are public documents. It is the plain and obvious public duty of any officer to keep books, letters, and other documents relating

to the business of his office and to the manner in which he has discharged or failed to discharge its duties in the place where the public business with which he is charged is conducted, subject to examination by any of the committees appointed by the General Assembly; and upon an application for mandamus to compel him to perform this obvious public duty, it is essential for the court to ascertain the facts and inform itself whether there has been an actual removal of public documents or other public property and a refusal to restore them for examination. This the court has in this case undertaken to do by a careful examination of the papers themselves. That examination has disclosed a number of papers relating to the defendant's transactions in spirituous liquors. All such papers are public documents, subject to the examination of the committee, for the reason that they relate either to the rightful discharge of the duties of the office of the defendant or to his violation of the official trust reposed by the state in him, by dealing with liquors in a manner forbidden by law. It is difficult to conceive any foundation for the contention that the examination of such documents can be denied to the committee as an unreasonable search of private papers. From the papers submitted to the court, all those which refer to dealing in spirituous liquors have been separated and placed on file in the office of the clerk of this court under seal. These are subject to the examination of the committee.

It is therefore ordered that a writ of mandamus be issued requiring the defendant, as dispenser No. 12 in the city of Charleston, to turn over to the committee the papers and documents now on file with the clerk of this court as the public documents of dispensary No. 12 on such day and at such hour as the committee may designate, on 24 hours' notice to the defendant or his attorney; such transfer to be made in the presence of the clerk of this court, with a right to the defendant to be present at the examination by the committee of such papers. After the completion of such examination, it is further ordered that said papers be returned to dispensary No. 12, in the city of Charleston.

(73 S. C. 193)

STATE *ex rel.* HAY v. FARNUM.

(Supreme Court of South Carolina. Jan. 16, 1906.)

CONTEMPT—DISCHARGE OF RULE.

Where the answer to a rule to show cause why a party should not be attached for contempt is verified, and no evidence is offered to show that the return is false, the rule will be discharged.

Application by the state, on the relation of J. T. Hay and others, for writ of mandamus against J. S. Farnum. Application for an attachment against the defendant. Rule discharged.

J. T. Hay and Mr. Lyon, for application.
T. M. Mordecai, opposed.

PER CURIAM. Heretofore this court granted an order requiring the respondent to produce certain letters and papers relating to dispensary No. 12, in the city of Charleston. In pursuance of said order the respondent produced certain letters and papers, stating that they were all that were in his possession at the time said order was granted. Afterwards another order was issued by this court requiring the respondent to show cause why he should not be attached for contempt of court in failing to obey its mandate. The respondent made return to the effect that he did not have, at the time the original order was issued, any letters or papers in his possession of the character described in the petition except those heretofore produced.

The court will not issue another order requiring the respondent to produce said letters and papers, but will simply consider the question whether the respondent should be adjudged in contempt of court. The return is verified, and there is no testimony to the effect that it is false.

Under these circumstances it must be accepted as true, and the rule discharged.

(73 S. C. 150)

DICK et al. v. SCARBOROUGH et al.
(Supreme Court of South Carolina. Dec. 20, 1905.)

1. MUNICIPAL CORPORATIONS—WATERWORKS—ISSUANCE OF BONDS—ELECTION.

Const. art. 8, § 5, provides that cities and towns may acquire and operate waterworks and lighting plants on majority vote of the electors of the town and issue bonds therefor. Civ. Code, 1902, § 2008, provides for elections to determine the issuance of bonds for the construction of waterworks, but omits all reference to bonds for the purchase of waterworks. *Held*, that the Legislature could not so limit the use of the election machinery as to deny to the voter the constitutional right to vote for the purchase of waterworks, and all rights given by the Constitution might be exercised by the voters, whether expressly mentioned in the statute or not.

2. SAME.

Civ. Code 1902, § 2021, providing that municipal authorities may order a special election for the purpose of issuing bonds for enlarging, extending, or establishing waterworks, includes the purchase of waterworks.

3. SAME—ELECTION—BALLOT.

In a city election to determine the issue of bonds for purchase of waterworks, any form of ballot in accordance with the previous notice, giving the voter full knowledge of the issue involved, is sufficient.

Petition of George W. Dick and others for a writ of mandamus to R. Lee Scarborough and others. Writ granted.

Haynesworth & Haynesworth, for petitioners. Fraser & Cooper, opposed.

WOODS, J. In this proceeding, the city council of the city of Sumter asks for a writ

of mandamus to compel the commissioners of public works to sell certain municipal bonds, aggregating in amount \$116,000, turned over to them by the city council, and to use the proceeds in the purchase, under an option held by the city, of the waterworks now owned and operated by the Sumter Water Power Company. The answer admits all the facts set out in the petition, but alleges that "the bonds are invalid, unsalable, and void, because: (a) The bonds were issued for the purchase of waterworks already constructed, and under the statute a city in South Carolina has no power to purchase waterworks already constructed. (b) Because the question voted upon in the election was as follows: 'Shall the city of Sumter purchase the property and right of the Sumter Water Power Company and issue bonds in payment thereof in such amount as may be necessary? Yes.' The negative ballots, it is alleged, were in precisely the same words; 'No' being substituted for 'Yes.' Whereas, it is respectfully submitted that the definite amount of bonds to be issued should also have been submitted to the voters voting in said election."

1. The first objection to the validity of the election raises a serious question of constitutional and statutory construction. It is provided by section 5, art. 8, of the Constitution: "Sec. 5. Cities and towns may acquire, by construction or purchase, and may operate water works systems and plants for furnishing lights, and may furnish water and lights to individuals, firms and private corporations for reasonable compensation: Provided, that no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns who are entitled to vote on the bonded indebtedness of said cities or towns." This article of the Constitution, expressly conferring the power to issue bonds for the purchase of "water works systems * * * upon a majority vote of the electors," necessarily implies the power of the municipality to hold an election to ascertain the will of the majority, though possibly this might have been defeated by the failure of the General Assembly to provide election machinery. Section 7, art. 8, contains this provision: "Sec. 7. No city or town in this state shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein, and no such debt shall be created without submitting the question as to the creation thereof to the qualified electors of such city or town, as provided in this Constitution for such special elections; and unless a majority of such electors voting on the question shall be in favor of creating such further bonded debt, none shall be created." The provision for "such special elections" here referred to is found in section 13, art. 2, which is as follows: "Sec. 13. In authorizing a special

election in any incorporated city or town in this state for the purpose of bonding the same, the General Assembly shall prescribe as a condition precedent to the holding of said election a petition from a majority of the freeholders of said city or town, as shown by its tax books, and at such elections all electors of such city or town who are duly qualified for voting under section 12 of this article, and who have paid all taxes, state, county and municipal, for the previous year, shall be allowed to vote; and the vote of the majority of those voting in said election shall be necessary to authorize the issue of said bonds."

In pursuance of these articles of the Constitution, the General Assembly enacted a general law on the subject (Civ. Code 1902, § 2008), providing for elections to be held, "in accordance with the laws of force governing municipal elections," and prescribing as a condition precedent to the holding of the election, the filing of the petition described in the Constitution. Either by inadvertence or design, however, this statute, while providing for the issuance of bonds, sanctioned by an election, for the construction of waterworks, omits all reference to bonds for the purchase of waterworks. The case therefore, stands thus: The Constitution conferred upon municipalities the right to acquire, by construction or purchase, waterworks systems, and to issue bonds therefor, under the sanction of an election. In enacting the general law for holding such elections, it was not within the power of the General Assembly to so limit the use of the election machinery provided as to deny one of these constitutional rights while giving opportunity for the exercise of the other, which was linked with it and stood on precisely the same footing. When the machinery is provided and the prerequisites of the election are laid down by the General Assembly under the mandate of the Constitution, all rights to which they were intended by the Constitution to give effect may be exercised under them, whether expressly mentioned in the statute or not.

2. But, aside from this, section 2021 of the Civil Code of 1902 provides: "It shall be the duty of the municipal authorities of any incorporated city or town of this state, upon a petition of a majority of the freeholders of said city or town, as shown by its tax books, to order a special election in any such city or town, for the purpose of issuing bonds for the purchasing, repairing or improving of city or town hall, or park or grounds therefor, markets and guard house, enlarging, extending or establishing electric light plants or other lights, or water works, or sewerage, erecting, repairing or altering school buildings, fire protection purposes, improvement of streets and sidewalks, or any corporate purpose set forth in said petition." It is true, power to hold

an election to authorize the issuance of bonds to purchase waterworks is not given in this statute by use of the word "purchase," but "establishing" municipal waterworks may be accomplished by purchase as well as by construction. Establishing waterworks obviously here means the acquirement and inauguration of a system of waterworks as a municipal enterprise and as municipal property by either construction or purchase. Besides, the words, "or any other corporate purpose," used in this statute, manifestly include the purchase of waterworks, a corporate municipal purpose authorized by the Constitution.

3. The facts of this case do not warrant the court in sustaining the objection to the form of the ballot. Without doubt, it is safer in such elections to have the ballot express the precise amount to which it is proposed to issue bonds, for then there can be no doubt of the voter having fair notice of the import of his vote. But there is no statutory provision as to the form of the ballot, and the most that the court can require in this respect is that the voter should have reasonable notice of the election and the issue it involved. In this case the ballot expressed that the issue was, whether the city should purchase the Sumter waterworks and issue bonds for the purchase money. The record shows the purchase price agreed on by the city council before the election was "\$116,511.65, with certain small contingent additions for experimental boring of additional wells, and that this was published officially and was otherwise known to the qualified electors and the freeholders of the city of Sumter." It thus appears that the municipal voters, with full knowledge, by the election gave their assent to a bond issue exceeding \$116,000, which is the aggregate of the bonds actually signed and now in the hands of commissioners of public works. The bonds, therefore, cannot be held invalid on the ground that the ballots did not give notice to the voters of the issue involved in the election. Under the facts of this case the ballots were sufficient.

It is therefore ordered and adjudged that a writ of mandamus do issue, requiring the commissioners of public works of the city of Sumter to sell the bonds turned over to them by the city of Sumter and make the purchase of the waterworks sanctioned by the election hereinbefore referred to.

(73 S. C. 198)

LOCKWOOD v. LOCKWOOD et al.

(Supreme Court of South Carolina. Dec. 20, 1905.)

APPEAL—ORDER OF REFERENCE.

An order of reference in an equity case, made without special notice on call of calendar, is within the discretion of the judge, and not appealable.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 735.]

Action by Laura M. Lockwood, executrix, against Willie H. Lockwood and others. Motion to dismiss appeal. Granted.

Mr. Elliott, for the motion. Mr. Galatley, opposed.

PER CURIAM. This is a motion to dismiss an appeal from an order of reference to take testimony in an equity cause, made on the call of the cause at a regular term of the court of common pleas for Beaufort county. The order was purely administrative, made by the circuit judge, in the exercise of his discretion, to speed the cause, and did not prejudice the rights of the parties. No special notice of such an order was necessary. *Brookshire v. Farmers' Alliance Exchange*, 51 S. E. 442.

The order was not, therefore, appealable and this appeal must be dismissed.

(73 S. C. 119)

WILLIAMS v. HALFORD.

(Supreme Court of South Carolina. Dec. 5, 1905.)

1. TRIAL—USE OF TESTIMONY AT FORMER TRIAL—OBJECTIONS FORMERLY MADE—NECESSITY OF RULING.

Where it is agreed that testimony taken at a former trial shall be used, subject to all the objections urged at the first trial, and is presented in bulk to the judge, together with the agreement mentioned, reduced to writing, he need not make a specific ruling on each objection.

2. HUSBAND AND WIFE—CONVEYANCE IN FRAUD OF WIFE—LIMITATIONS.

Under Civ. Code 1902, § 2368, authorizing an action by a wife and children to recover property conveyed by the husband to a concubine or bastard issue, the right of action accrues when the gift of conveyance took effect and the wrong was discovered by the wife and children, so that limitations run from that time.

3. SAME.

Under Civ. Code 1902, § 2368, authorizing an action by a wife and children to recover property conveyed by the husband to a concubine or bastard issue, such conveyance may be set aside during the lifetime of the husband, but in that event he takes nothing thereby.

4. PARENT AND CHILD—SERVICES RENDERED BY BASTARD—PRESUMPTION.

The services of illegitimate children while living with and working for their father, under the belief that they are legitimate, are to be presumed gratuitous.

Appeal from Common Pleas Circuit Court of Colleton County; Purdy, Judge.

Action by Julia Williams and another against J. R. Halford and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Howell & Gruber, for appellants. Griffin & Padgett, for respondents.

JONES, J. This case has been in this court twice before. 64 S. C. 396, 42 S. E. 187; 67 S. C. 296, 45 S. E. 207. The action is brought under section 2368, Civ. Code 1902, by the widow and son of James J. Williams, alias J. J. Halford, to set aside certain

conveyances of his property by said Williams to his paramour, Jane Crosby, and by her to his illegitimate children, in violation of said statute, and for partition and accounting. Besides a general denial, the defendants set up title by adverse possession and plead the statute of limitations. The case, on the second appeal, having been remanded for a new trial upon the issue of title and for any further proper proceedings, was submitted to Judge Purdy without a jury. Judge Purdy rendered a decision in favor of the plaintiffs, adjudging that they were entitled to three-fourths of the property so conveyed, amounting in value to \$1,025, and decreeing for a sale and partition of the property, unless defendants within 30 days elect to pay plaintiffs three-fourths of said valuation, or \$768.75, with interest from November 21, 1896, together with one-fourth of the costs. The exceptions of defendants to this decree raise three questions.

1. The first exception is as follows: "That the presiding judge was in error in failing to pass upon the objections interposed by the attorneys of the respective parties to portions of the evidence taken in the previous trial, such testimony being received in evidence by agreement of the attorneys subject to such objections." This exception is based on agreement between counsel, made before the trial, as follows: "It is agreed between counsel that the testimony as introduced on the previous trial in November, 1902, and as contained in the case for trial in the Supreme Court, shall be received as evidence for the respective parties in the approaching trial, subject to the same objections as made and noted on the previous trial, and also subject to any motion or motions which either side may see fit to make just as though such testimony was being offered for the first time," etc. Under this agreement the testimony taken on the previous trial was submitted to Judge Purdy with other evidence, but it does not appear that any objection to testimony was otherwise called to the attention of Judge Purdy. Judge Purdy, as it appears from the case, although making no rulings as to such testimony during the trial or in his decree, duly considered and passed upon every objection to testimony in arriving at the judgment rendered. The record before us contains nothing from which we can say that Judge Purdy committed reversible error. In the absence of any showing to the contrary, it is to be presumed that the circuit judge in reaching his conclusions, discarded all incompetent testimony. It is the duty of counsel, when they desire the court's ruling upon testimony, to present their objection thereto, when it is offered, so that the court may know the ground of objection and that a specific ruling is desired. The mere presenting of a mass of written or

printed testimony under the agreement of counsel that the testimony is taken subject to objection does not meet the requirement, and does not require that the court make a specific ruling on each objection on pain of committing reversible error. The case is not like *Grollman v. Lipsitz*, 43 S. C. 338, 21 S. E. 272, wherein objection was made to the introduction of certain affidavits offered, on ground that they were not in reply, and the court allowed them to be read, stating that he would pass upon them when he came to consider the motions on the merits, which the court failed to do, thereby committing reversible error. The case falls rather within the rule stated in *Ross v. Jones*, 58 S. C. 11, 35 S. E. 402, 36 S. E. 1, the syllabus of which states that "a circuit judge in deciding a law case, a jury trial being waived, is not required to embody in his decree or judgment what testimony he regarded as competent or as incompetent, or upon what testimony he based his findings of fact, especially when it does not appear that any special objections to testimony were argued before him." This exception is therefore overruled.

2. The second, third, and fourth exceptions are as follows: "(2) That the presiding judge was in error in holding as a matter of law that neither the plea of adverse possession nor the statute of limitations can avail in this case; whereas, he should have held that such defenses were available if supported by the facts. (3) That the presiding judge was in error in holding and deciding that the plaintiffs could not have brought suit until after the death of James J. Williams, alias Halford; whereas, he should have held that their right of action accrued, if at all, at the time of the execution and delivery of the conveyances complained of to the defendants and their mother. (4) That the presiding judge was in error in holding and deciding that if any of the alleged gifts by the said J. J. Williams, alias Halford, had been set aside during his lifetime, that title thereto would have reverted in him, and that he could thereupon during his life have disposed of such property to suit his interest or fancy, and no one could have complained; whereas, he should have held that if such alleged gifts had been set aside, the same would have been in favor of the legitimate wife and children, and that title thereto would not have reverted in the said Williams, alias Halford."

These exceptions are directed to the following portion of the decree of the circuit court: "From the foregoing, it follows that neither the plea of adverse possession nor the statute of limitations can avail. The plaintiffs could not sue until after the death of Williams, alias Halford, and if any of these gifts and conveyances had been set aside during the lifetime of the said Williams, alias Halford, title would have been reverted in him, and

he could have disposed of the property during his lifetime to suit his interests or fancy, and no one could have complained." We think that the court erred in holding that plaintiffs could not have brought suit until after the death of James J. Williams, and that he erred, further, in holding that, if any of said gifts had been set aside during his lifetime, title thereto would have reverted in him, to be disposed of as he pleased. This view is a misconception of the nature of the claim which the lawful wife and children have with respect to the property conveyed, in violation of section 2368. That section reads: "If any person who is an inhabitant of this state, or who has any estate herein, shall have already begotten, or shall hereafter beget, any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give, or settle, or convey, either in trust or by direct conveyance, by deed of conveyance, or by deed of gift, legacy, devise, or by any other ways or means whatsoever, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after payment of his debts, than one-fourth part thereof, such deed of gift, conveyance, legacy or devise made, or hereafter to be made, shall be null and void, only in favor of wife and legitimate children, for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate."

In construing this statute, it has been held that the claim is entirely personal to the lawful wife and children to call upon the mistress or illegitimate children for the amount or value of what said mistress or children received over the one-fourth part of the donor's or testator's estate; that the legal title of the mistress or bastards is good and perfect, subject only to the purely personal equity created by the act in favor of the lawful wife and children; that because it is a personal privilege, the right to vacate the gift for the excess does not survive to the executor of the lawful wife or child; that the bastard may elect what property he will retain, throwing off the excess, or to retain the whole and pay the excess; that the lawful wife has no absolute right to a partition of the property based upon the theory of community of title or interest, or tenancy in common with the mistress or bastard, although partition may be resorted to, in the discretion of the court, when that process is necessary to do justice in granting relief under the statute. *Chancellor Harper*, in *Breithaupt v. Bauskett*, 1 Rich. Eq. 465, and in *Ford v. McElray*, 1 Rich. Eq. 474; *Chancellor Dargan*, in *Hull v. Hull*, 3 Rich. Eq. 80. It has also been held that, in determining whether the gift is in excess of one-fourth part of the amount or value of the donor's estate, the time of valuation is when the gift

takes effect in possession. *Bradley v. Lowry*, Speer, Eq. 18, 39 Am. Dec. 142. The object of such legislation is thus declared in *Hull v. Hull*, 2 Strob. Eq. 188: "The general scope and intention of this act are very evident. Its provisions are intended (so far as the Legislature could safely interpose for that purpose) to prevent a man, who had forgotten his domestic duties, from squandering his property upon the object of his perverted affections to the wrong and injury of his family; and by depriving him of the means of rewarding the associates of his vitiated appetites, or providing for their progeny, to discourage both him and them from entering into such immoral and pernicious connexions." Further, touching the nature of the claim and the object of the statute, Chancellor Johnson, in his decree on circuit in *Hull v. Hull*, 2 Strob. Eq., at page 183, said: "The wrong done to the lawful wife and children consists in taking property from them and bestowing it upon the illegitimate family, and the measure of the wrong is the amount and value of the property thus given away. The law does not compel the husband and father to give his property to his lawful family. It does not take from him his right of free alienation, arising from the very fact of his ownership of the property. It is only when he gives an undue portion of it to those who have perverted his affections from those naturally entitled to them, that the law vindicates their wrong by declaring them entitled to a certain portion of the amount and value of the property thus improperly bestowed. The statute intends to compensate them for the wrong."

This consideration of the object of the statute and the nature of the claim for relief under the statute prepares us to determine when the cause of action accrued, and it seems clear (there being nothing in the statute to the contrary) that the right of action accrued when the delict or wrong occurred, which was when the gift or conveyance took effect and the wrong was discovered by the lawful wife or children. If, therefore, the cause of action is to recover upon a liability created by statute other than a penalty or forfeiture, or an action for relief on the ground of fraud, the statute of limitations, as provided in section 112 of the Code of Civil Procedure of 1902 (subdivisions 2 and 6), would ordinarily bar the action, unless brought within six years after the cause of action accrued; or if the action was for relief not otherwise provided for, it must be brought within ten years after the accrual of the cause of action. If, also, it be true that the title of the illegitimate is good and perfect, subject only to this personal equity in favor of the lawful wife and children, it must follow that if relief under the statute is obtained during the lifetime of the husband, he takes nothing thereby, since, so far as he is concerned, he has parted with his interest in the property.

But, granting that the court was in error in the particulars mentioned, are defendants entitled to a reversal of the judgment? They did not plead the statute of limitations as provided in actions other than for the recovery of land, but pleaded as if the action was for the recovery of real property; their plea being, in accordance with section 98 of the Code of Civil Procedure of 1902: "That neither the plaintiffs nor their ancestors, nor predecessors, nor grantors, were seised or possessed of the premises described in the complaint within ten years before the commencement of this action." This is not an action to recover real property, but is to secure the special relief afforded by section 2368, Civ. Code 1902. The defendants' plea, therefore, can only be considered in connection with their plea of adverse possession for ten years, in support of their claim of title paramount, such as would defeat plaintiff's claim for relief. Upon the second appeal in this case, 87 S. C. 296, 45 S. E. 207, the court held that defendants' answer raised an issue paramount and remanded the cause for a new trial upon said issues. The court used this language in that opinion: "Upon the trial of the legal issue of title by the jury, it is incumbent upon the plaintiff to introduce testimony tending to prove all the material requirements of the statute alleged in the complaint, in order to show that the title of appellants (defendants) is not paramount to their right to assert their equity under the statute. The defendants may defeat the case as made by the plaintiffs' testimony, either by the introduction of testimony directly contradicting it, or may show that valuable consideration was paid for the property, or that they have an independent title arising from any other facts. We desire, however, it should be distinctly understood that we do not undertake at this time to declare whether the defense of adverse possession is available or applicable in this case, as such question is not properly before us for consideration, and is, therefore, left open."

3. We think the plea of adverse possession for ten years would have no application when defendants claim to hold under a gift from the husband or father, but has application when they claim to hold title paramount to and independent of that of husband and father. On the second appeal referred to, this court regarded such last-named issue as an issue of title paramount to be tried by a jury. When the case was called for trial, the parties waived trial by jury and submitted all the issues to the court without a jury. When an issue of title is thus submitted to a judge, he is both judge and jury. If in his decree he committed no error of law bearing upon the facts, and there is any evidence sustaining his finding of fact, his judgment on the facts is final as to the issue of title paramount, and is not reviewable here; but if he commits error of law which affects his finding of fact in such issue, his conclusion

thereon may be set aside. The case would stand as if there was a jury sitting on the issue of title and the judge had charged such error of law. Under this view we must hold that the court committed prejudicial error in holding that the plea of adverse possession could not avail defendants because plaintiff's cause of action did not accrue until the death of Williams, alias Halford. Said Williams died in 1896, and the action was commenced the same year. We are unable to say that the conclusion of the circuit court upon the issue of title paramount should be supported, upon a review of the testimony, notwithstanding the error of law into which he fell, because the testimony is not set out in the case, and we cannot say that there is no testimony of adverse possession under the issue of title raised. The "case," on the contrary, contains this statement: "There was much testimony on both sides in support of all the issues as raised by the pleadings." We must conclude that the circuit court's findings against defendants on this issue was controlled by his error in holding that the cause of action did not accrue until the death of Williams in 1896.

4. The fifth exception is as follows: "That the presiding judge was in error in holding that where the father of illegitimate children lives with them and their mother, occupying the relation of husband and wife and parent and child, that the presumption would be against compensation for the service and earnings of the mother or children; whereas, he should have held that the mother and children are entitled, as a matter of legal and moral right, to their earnings." The court in this case, 67 S. C. 303, 45 S. E. 207, quoted with approval from *King v. Johnson*, 2 Hill, Eq. 624: "The (illegitimate) child cannot inherit from the father, and the extent to which the father can provide for his illegitimate child is limited by the act referred to. The father is not, therefore, in law entitled to the services of his natural child. It is said, however, that when a father assumes and discharges the duties of a parent, corresponding duties arise on the part of the natural child; and this is true so long as this relation exists. But these relations are merely conventional; and, being voluntary, may be dissolved at pleasure. * * * The right of the putative father to the custody and services of his natural child must, therefore, arise out of contract, in which the parties are at liberty to stipulate for themselves. * * *"

The facts found by the circuit court in this connection, and there is no exception thereto, are as follows: "Here the mother and children in good faith occupied the relationship of wife and legitimate children towards the father and supposed husband, and they thought such relationship in fact existed, and they were cared for and protected as such, and there was no design on the

part of the father and alleged husband to compensate the defendants for their labor up to the time of the acquisition of the property, now sought to be charged with the plaintiffs' equity." Construing the court's holding, to which exception has been taken, in the light of the facts found, it is correct, as it in effect holds that services rendered under such circumstances are presumptively gratuitous. This exception is therefore overruled.

For the error indicated in the second, third, and fourth exceptions, the judgment of the circuit court is reversed, and the case remanded for a new trial on the issue of title paramount and for further proper proceedings.

POPE, C. J., and GARY, A. J., concur, solely upon the ground stated in the second exception.

(124 Ga. 821)

CHANDLER v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. WITNESSES—CREDIBILITY—PERJURY ON FORMER TRIAL.

Though the fear of being convicted of an offense against the penal laws of the state will not excuse a witness for swearing falsely, yet where, upon a succeeding trial, he admits the falsehood of the testimony formerly given and deposes to the contrary of that testimony, attributing his perjury to the fear above set out, it may afford a moral explanation sufficient to account to the jury for the false testimony; and, where the explanation is satisfactory to the jury, the witness may be believed, with or without corroborating circumstances or supporting evidence. See *McCoy v. State*, 3 S. E. 768, 78 Ga. 490; *Burns v. State*, 15 S. E. 748, 89 Ga. 528 (6); *Huff v. State*, 30 S. E. 808, 104 Ga. 521.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1262-1265.]

2. CRIMINAL LAW—TRIAL—REMARKS OF JUDGE.

It is manifestly not harmful error for the court to interrupt defendant's counsel during the cross-examination of a witness for the state, and to suggest that he change the language of his question, when the witness in his answer gives the testimony sought to be elicited by the original question of the attorney.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 8125.]

3. SAME—EVIDENCE.

No error was committed in the charge complained of. The verdict was amply supported by the evidence, and the court properly refused to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

George Chandler was convicted of crime, and brings error. Affirmed.

G. L. Callaway and B. L. Wall, for plaintiff in error. J. S. Reynolds, Sol. Gen., and Jno. M. Graham, for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(124 Ga. 680)

LOCKWOOD v. MUHLBERG et al.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. MUNICIPAL REGULATIONS—USURY—PAWN-BROKERS.

Those sections of the Code of 1895 (Civ. Code, § 2955; Pol. Code, § 755) which give to municipalities the right to define by ordinance the powers and privileges of pawnbrokers, and to exercise over them general control, do not confer upon such corporations the power to allow pawnbrokers to charge usury.

2. USURY—RENEWAL OF USURIOUS DEBT.

A renewal thereof does not divest a usurious contract of its taint, although the illegal interest thereon to the date of renewal be then fully paid.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, §§ 180-185.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by R. P. Lockwood against E. Muhlberg and others. Judgment for defendants, and plaintiff brings error. Reversed.

Simon N. Gazan, for plaintiff in error. Osborne & Lawrence, for defendants in error.

BECK, J. Lockwood brought suit in trover to recover certain articles alleged to be in the possession of Muhlberg. It appears from the record that Muhlberg is a pawnbroker, that the plaintiff had pawned with him the articles mentioned as security for advances of money, and that Muhlberg had charged Lockwood 10 per cent. a month as interest on the sums thus advanced. After paying interest at the rate named until he had more than paid the amount advanced, together with interest on the same at the rate of 8 per cent. per annum, Lockwood demanded the return of his property, and, upon Muhlberg's failure to comply, brought this action. In his defense Muhlberg relied upon an ordinance of the city of Savannah, which is in part as follows: "Sec. 2. Upon all articles of personal or real estate pawned, pledged, or deposited as collateral, the pawnbroker may advance such sum as may be agreed upon with his customer, and charge no more interest than at the rate of seven per cent. per month on loans of twenty-five dollars, and upwards, and ten per cent. on loans of smaller amounts." Upon the trial of the case the facts proved were in substance as set forth above. The plaintiff, however, objected to the introduction of the ordinance in evidence on the ground, among others, that "the second section of said ordinance is a special law in conflict with a general existing law of the state of Georgia which fixes the rates of interest to be charged on money loaned or advanced, and that the city of Savannah, a municipal corporation, had no power to pass such ordinance. The ordinance allows interest at 10 per cent. a month, or 120 per cent. a year, on a dollar, when the general state law allows but 8 per cent. per year, the ordinance thus contravening the general state law, and for that reason is

unconstitutional, inoperative, and void." The court overruled the objections to the ordinance, and admitted it in evidence, whereupon the defendant moved that a verdict be rendered in his favor, and this motion the court granted, to all of which the plaintiff excepted and now assigns it as error. In addition to insisting to the validity of the ordinance, the defendant contends that on August 27, 1904, several months after the articles were pawned, the plaintiff made new contracts of pawn with the defendant, paying to the defendant at the time all interest to that date, and that the contracts as thus made amounted to an accord and satisfaction, and extinguished any cause of action which Lockwood might have for the recovery of usury.

1. The main question for our determination is whether or not a municipality can by ordinance allow pawnbrokers to charge usurious interest under the general terms of the statute giving to municipalities the right to "define by ordinance [pawnbrokers'] powers and privileges, impose taxes upon them, revoke their licenses, and exercise such general superintendence as will insure fair dealing between the pawnbroker and his customer." Civ. Code, § 2955; Pol. Code, § 755. Or, in other words, does the right to "define by ordinance their powers and privileges, * * * and exercise such general superintendence as will insure fair dealing between the pawnbroker and his customer," authorize a municipality to make legal that which the law in plain terms forbids? We think not. It has long been settled that municipalities cannot make a valid ordinance inconsistent with the statutes or general laws of the state without express legislative authority. See Tied. Mun. Corp. § 146; Haywood v. Savannah, 12 Ga. 404. And the rule is general that the powers granted to municipal corporations are to be strictly construed, and, if there is a reasonable doubt of the existence of a particular power, the doubt is to be resolved in the negative. 21 Am. & Eng. Enc. L. (2d Ed.) 950, and citations. "The intent of the Legislature should be sought for in every instance, and carried out, if possible; but the courts have generally favored the common-law rule that municipal grants, like all grants of power from the state, are to be construed in favor of the state, and against the grantee, whenever a reasonable doubt exists." Tied. Mun. Corp. § 110. See, also, Dillon, Mun. Corp. § 88; McQuillin on Mun. Ord. § 48. It could hardly be contended that there does not exist a reasonable doubt of a city's right, under the statute quoted, to allow pawnbrokers to charge usury. Before such construction could be placed upon the statute it must appear that the law has recognized pawnbrokers to be its special wards in the matter of charging interest, who, by long and uninterrupted practice, have acquired the right to demand a rate of interest in excess

of that allowed by law. And this does not appear. We therefore hold that the city had no authority to pass the ordinance with reference to the amount of interest it permitted pawnbrokers to take, and that the ordinance, in so far as it attempts to regulate and prescribe the rate of interest to be charged by pawnbrokers, is void.

2. We entertain no doubt as to the defense of accord and satisfaction. It is wholly without merit. It was shown upon the trial that the contracts executed on August 27, 1904, were simply renewals of the old debts, and that those original debts were tainted with usury. A renewal of a contract infested with usury, and the payment of the illegal interest to the date of renewal, cannot divest the contract of its taint. "Where the original transaction was usurious, the usury infests all the securities given in renewal of the same debt, however varied in form and amount, and the law applies all payments made on the debt to the principal and legal interest." *Archer v. McCray*, 59 Ga. 546.

Judgment reversed. All the Justices concurring.

(124 Ga. 557)

MCGREGOR v. THIRD NAT. BANK OF ATLANTA et al.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. RECEIVERS—SETTLEMENT OF CLAIMS—WRIT OF ERROR.

Where, pending a receivership, application is made to the court by a creditor for leave to effect with the receiver and others a settlement which is represented to be advantageous to all parties concerned, and the receiver is ordered by the court to show cause why the offer of settlement should not be accepted, he may, in the event he is dissatisfied with a judgment directing him to make settlement on the terms proposed, sue out a writ of error assigning error on such judgment.

2. ERROR, WRIT OF—DISMISSAL.

That the evidence introduced on the hearing of the application is not properly brought to this court, and cannot for that reason be considered, affords no reason for dismissing the writ of error.

3. SAME—ASSIGNMENTS OF ERROR—SUFFICIENCY.

A bill of exceptions which recites that the trial judge overruled a demurrer to the plaintiff's petition, and that exception is taken to such ruling and such ruling is assigned as error, presents a legally sufficient assignment of error, when the demurrer is specified as a material part of the record and discloses what objections were urged against the petition.

4. RECEIVERS—SETTLEMENT OF CLAIMS.

When a court of competent jurisdiction has undertaken to exercise exclusive control over the winding up of the affairs of a defunct bank, a creditor may, in behalf of himself and other persons at interest, file an intervention praying leave to effect a settlement with the receiver of a valid claim held against the bank; and if the receiver, as the representative of its stockholders and other creditors, fails to show cause, upon being cited to do so, why the proposed settlement should not be authorized, the court may, in its discretion, order him to accept the terms

of settlement offered by the intervening creditor, to the end that long and expensive litigation may be rendered unnecessary.

(Syllabus by the Court.)

Error from Superior Court, Warren County; Henry C. Hammond, Judge.

Action by the Third National Bank of Atlanta against C. E. McGregor, receiver of the Bank of Warrenton and others. Judgment for plaintiff, and defendant receiver brings error. Affirmed.

The Third National Bank of Atlanta presented to the superior court of Warren county a petition in which the following facts were set forth: On September 30, 1902, the bank brought suit in that court against Peter F. Smith on a promissory note for \$1,500, dated February 11, 1901, payable to J. F. Allen, indorsed by him to the Bank of Warrenton, and by that bank transferred to the plaintiff. The payment of this note was secured by a deed to Allen, concurrently executed by Smith, covering a house and lot in the town of Warrenton known as his "home place." In its suit against Smith, the plaintiff bank asked for a judgment for the amount due on the note, and for a special lien on the premises described in the security deed. At the appearance term Smith filed an answer, in which he admitted the giving of the note, and that the plaintiff was the legal holder thereof, but alleged that the note included usury to the amount of \$150, and that the deed was void because tainted with usury. On July 21, 1902, Smith made to his wife a deed to the premises for an alleged valuable consideration, which deed was properly attested and duly recorded; and she asserts that her title is superior to the claim of the plaintiff bank. It holds the note and deed given to Allen as collateral security for the payment of a note against the Bank of Warrenton, which is indebted to plaintiff in the principal sum of \$889.75, besides interest from April 6, 1904; and plaintiff contends that there was no usury in the note to Allen, that the deed from Smith to his wife is inferior to the security deed previously given by him to Allen, which was duly recorded on February 15, 1901, and that its demand is just and the property is subject to its claim. On February 17, 1902, the Bank of Warrenton became insolvent and executed to James A. Anderson, as assignee, a deed of assignment for the benefit of its creditors. Its indebtedness to the plaintiff now amounts to more than \$1,000, the value of the property covered by the security deed is doubtful, and if plaintiff should prevail in the aforesaid suit, and the property were put up for sale at public outcry, it would bring but little, if anything, more than the amount due plaintiff by the Bank of Warrenton. Smith is insolvent, and plaintiff cannot hope to realize anything on its claim against him save by subjecting the property to the payment thereof; and, should it fail in this, then there would be a complete loss of the debt, falling

both upon the plaintiff and upon the Bank of Warrenton. In that event, plaintiff would have the right to come in and share with the other creditors of the Bank of Warrenton in whatever assets might be in the hands of its assignee, as well as the right to join with them in making a call on the stockholders of that bank to make good whatever amount might be due to its creditors after exhausting its assets. The property in question is worth very little more than enough to pay the debt due plaintiff by the Bank of Warrenton. There is room for long litigation in the matter, and it will be to the best interest of all parties concerned to come to a settlement. With this end in view, plaintiff is willing to accept \$700 in full settlement of its claim against the Bank of Warrenton, this amount to be paid free from any court costs; Mrs. Smith is willing to pay to that bank \$700 and the costs of court in full settlement of its demands on the claim originally held by Allen and now by plaintiff, upon the court relieving the land from any liability therefor; and this compromise of a disputed claim asserted by her will inure to the benefit of the Bank of Warrenton and its creditors and stockholders. The prayers of the petition were: (1) That the Third National Bank be authorized to make the proposed settlement with Smith and his wife, and be relieved from accounting to the Bank of Warrenton, or its assignee or receiver, for the difference between its indebtedness and the amount due on the note executed by Smith; and (2) that C. E. McGregor, the receiver of the Bank of Warrenton, be made a party to the petition of the plaintiff for leave to make this settlement of the controversy.

The court passed an order calling upon the receiver to show cause why the prayers of the petition touching the proposed settlement should not be granted, and he appeared and filed both a demurrer and an answer to the petition. By this demurrer he raised the point that the plaintiff bank had a complete remedy at law, by simply prosecuting its suit against Smith, and that the facts alleged did not warrant a court of equity to grant the relief prayed against him. In his answer he admitted that the Third National Bank was the holder of the note and security deed executed by Smith, the same having been transferred to it as collateral security for the payment of a note given the plaintiff by the Bank of Warrenton, but asserted that the total amount due on this note was only \$992.39, that the house and lot covered by the security deed were worth at least \$2,000, and that the proposed compromise would not operate to the benefit of all parties at interest. The receiver further alleged that if the Third National Bank would continue to prosecute its suit against Smith, and should be successful, he would, as the representative of the Bank of Warrenton, receive the difference between \$992.39, the amount of its in-

debtedness to the plaintiff, and \$1,900, the amount due on the note given it by Smith, and that, if the plaintiff were permitted to settle the litigation, he, as receiver, would be unable to realize any sum whatever on the equity of redemption which the Bank of Warrenton had with respect to that note and the deed given to secure its payment. Mrs. Smith was subsequently made a party to the proceeding, and by consent of counsel the case was presented for determination to Judge Henry C. Hammond, of the Augusta circuit; the judge of the court in which it was pending being disqualified to try it. The demurrer filed by the receiver was overruled, and after a hearing on the merits the presiding judge passed an order authorizing the Third National Bank to effect the settlement in accordance with the terms proposed in its petition. To this order exception is taken by McGregor, in his capacity of receiver and as the representative of the creditors and stockholders of the Bank of Warrenton.

L. D. McGregor, for plaintiff in error. E. P. Davis, Jno. T. West, and E. T. Shirley, for defendants in error.

EVANS, J. (after stating the foregoing facts). A motion was made by the defendants in error to dismiss the bill of exceptions on the following grounds: (1) Because the receiver of the Bank of Warrenton is an officer of court, and his duty is to act under the order of the court; and, the court having ordered him to settle this case, he has no right to appeal to the Supreme Court. (2) Because no brief of evidence was filed in the case, nor is the evidence incorporated in the bill of exceptions, but certain affidavits therein specified as having been used on the hearing are set up in the record, without being identified by the presiding judge. (3) Because there is in the bill of exceptions no legally sufficient assignment of error.

1. The receiver was, indeed, an officer of court; but he was appointed for the express purpose of representing not only the defunct bank, but also all of its creditors and stockholders. It was within the discretion of the court to permit its receiver to be sued. *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426. When he was called on, by order of the court, to show cause why the prayers of the petition filed by the plaintiff bank should not be granted, he became a party defendant to the action, and it was his duty to defend it in behalf of all those of whom he was the duly appointed representative. Not only did he have a right to present his defense, but the very purpose of bringing him before the court as a party defendant was that he might urge any defensive matter to the suit which the creditors or other persons interested in the proper administration of the affairs of the defunct bank could urge, if themselves made parties defendant. Unless he represented them in the litigation, it would be necessary to bring all of them before the

court; else any judgment rendered therein would not conclude or be binding upon them. It was through the receiver that these interested parties had to resist the granting of the relief sought by the plaintiff; and, the judgment being adverse to him, it was his right and duty, as their representative, to except thereto, if he or any of them was not satisfied therewith. Their right of review by the Supreme Court was certainly not cut off merely because he was an officer of court, and was, under ordinary circumstances, subject to its orders without question.

2. That the evidence introduced on the hearing in the court below is not properly brought to this court, and for that reason cannot be considered, affords no cause for dismissing the writ of error. *Southern Mining Co. v. Brown*, 107 Ga. 264, 33 S. E. 73; *Pullen v. State*, 116 Ga. 555, 42 S. E. 774. The case is to be retained in court, in order that such disposition of it as is proper, without having regard to the evidence, may be made. *St. Amand v. Lehman*, 120 Ga. 253, 47 S. E. 949. If the assignments of error cannot be intelligently passed on without a review of the evidence, the judgment of the court below must stand affirmed. *Anasley v. Davidson*, 110 Ga. 279, 34 S. E. 611; *Moore v. Medlock*, 113 Ga. 259, 38 S. E. 825. Aliter where questions are presented for determination which do not involve a consideration of the evidence. *Hathcock v. McGouirk*, 119 Ga. 973, 47 S. E. 563.

3. The present bill of exceptions specifically assigns error on the overruling of a demurrer interposed by the receiver to the plaintiff's petition. The record embraces the demurrer and discloses what objections were therein urged against the petition. So the complaint in the bill of exceptions that the court erroneously overruled the demurrer furnishes a legally sufficient assignment of error. *Johnson v. Porter*, 115 Ga. 401, 403, 41 S. E. 644.

4. It is unnecessary to enter into a discussion of the question whether or not the petition filed in this case is such as can technically be termed a "bill of peace," as it is styled in the bill of exceptions. We have long since departed from the forms and niceties of equitable pleading which were once in vogue. Taking the allegations of the petition as true, the proposed termination of the pending litigation, to which neither the receiver of the bank nor its creditors and stockholders had been made parties, will prove advantageous and beneficial to all persons concerned in a proper administration of the affairs of the Bank of Warrenton. The plaintiff is one of its creditors, and seeks authority of the court, which has assumed exclusive jurisdiction in winding up the affairs of the defunct Bank of Warrenton, to make a settlement of a valid and just claim against it. The relief sought will not prejudice the rights of any other

creditor or any stockholder of that bank. It is hardly to be doubted that the receiver would be permitted to make such a settlement if, upon proper application to the court for leave to do so, the judge, having all parties at interest before the court, should deem the settlement expedient and to the common advantage of all. A creditor of the bank might with equal propriety apply to the court for permission to settle a claim against the receiver, if the former could in this way bring to the attention of the court a feasible plan for properly administering the affairs of the defunct bank, then before the court for direction and adjudgment through its receiver. We may treat the petition, then, as an intervention filed by a creditor who presents to the court his claim against the receiver appointed under a creditors' bill, and asks that the receiver be authorized to settle it on terms which will be beneficial to all parties whom he represents. That the court had jurisdiction to entertain the petition we cannot doubt; for the court had undertaken to administer the assets of the insolvent bank in such way as to best protect and serve the interests of its creditors and stockholders, and certainly had the incidental power, pending the receivership, to call upon them to show cause why its receiver should not be granted leave to effect a settlement to which the judge was willing to give his sanction, believing it preferable to the prosecution of long and tedious litigation, the result of which could not be foretold and might be adverse to them. It is equally clear, we think, that the judge could with propriety order the receiver to accept the offer of compromise, in the event he did not, as the representative of those whose interests might be affected thereby and whose consent to it had not been secured, show cause why it should not be effected at the instance of the petitioners. What reasons he assigned for rejecting the offer of settlement are disclosed by the answer which he filed to the petition; but, since the evidence adduced on the hearing is not before us, we are not informed whether he sustained by proof the allegations of fact upon which he based his objections to the compromise. We accordingly confine our inquiry to the merits of the objections raised by demurrer, and hold that for no reason assigned therein should the prayers of the petitioner have been ignored and the petition dismissed.

Judgment affirmed. All the Justices concurring.

(124 Ga. 537)

KAHN v. HOLLIS et al.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. EXCEPTIONS, BILL OF—PARTIES.

When an action was brought against a number of persons as beneficiaries of a trust, and the relief prayed for was such that all the bene-

ficiaries were interested therein, and the case was in default as to all except three of the defendants, who filed a demurrer to the petition, and upon a hearing the court sustained the demurrer and dismissed the entire case, all of the defendants were necessary parties to a bill of exceptions complaining of the judgment sustaining the demurrer, and dismissing the entire case.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1819.]

2. SAME—RETURN OF SERVICE—RECORD.

The return of service of a bill of exceptions must be entered upon or annexed to the original bill of exceptions, and where such a return is made upon a separate paper, which is not annexed to the bill of exceptions prior to the time that it is transmitted to the clerk of the Supreme Court, the judge of the trial court, while the case is pending in the Supreme Court, has no authority to pass an order declaring such entry of service to be a part of the record in the case and ordering the same to be transmitted to the clerk of the Supreme Court. *Turner v. Collins*, 8 Ga. 252; *Coleman v. Johnson*, 45 Ga. 817.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 105.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; *W. H. Felton, Jr., Judge*.

Action by Valentine Kahn against Paul Hollis and others. Judgment for defendants, and plaintiff brings error. Dismissed.

On January 18, 1901, Valentine Kahn brought an equitable petition against Paul Hollis and William Rice, praying that the title to certain property be declared to be in him, or that a sale of the property be ordered to repay him for certain moneys advanced, and for other relief. It was alleged that Jere Hollis held the title to the property as trustee for Maria A. Hollis and her children, and that Paul Hollis, who was one of the beneficiaries of the trust, had possession of the property by his tenant William Rice. By amendment it was alleged that Jere Hollis died during the year 1900, and that no trustee had been appointed in his place, and plaintiff prayed that Maria A. Hollis, Claude Damour, T. G. Hollis, Jere Hollis, A. H. Simmons, Francis Johnson, Clay Hollis, Julian Hollis, and Olive Hollis, the beneficiaries of the trust, be made parties. This prayer was granted. It appeared that Claude Damour and A. H. Simmons were nonresidents, and service was perfected upon them as provided by law. Paul Hollis, Claude Damour, and T. G. Hollis filed a demurrer to the petition upon the ground that it was prematurely brought, and this demurrer was sustained, and the case was dismissed as to all the defendants.

Prior to the filing of this demurrer Paul Hollis had filed an answer. The other defendants were in default. The plaintiff filed a bill of exceptions, in which he excepted to the judgment of the court sustaining the demurrer and dismissing his petition. Service of this bill was made upon Paul Hollis, T. G. Hollis, and Claude Damour, and upon Jere Hollis, for himself and as guardian ad litem for Olive Hollis and Julian Hollis. On the bill of exceptions is an affidavit of Henry Moran that he served Julian Hollis with a copy of it. While the case was pending in the court, the clerk of the trial court transmitted to the clerk of this court what purports to be an entry of service upon Olive Hollis and Maria Hollis by a deputy sheriff, dated four days after the bill of exceptions was certified, accompanied by an order of the judge, passed while the case was pending in this court, purporting to allow the entry of service to be filed as part of the record. There is nothing to indicate that this entry had ever been upon the original bill of exceptions, or annexed thereto before it was transmitted. Also attached to the record is an affidavit that A. H. Simmons has been dead three years or more. There is no entry of service as to the other defendants.

Crump & Travis and M. W. Harris, for plaintiff in error. Jesse C. Harris and Minter, Wimberly, Hall & Wimberly, for defendants in error.

COBB, P. J. A motion to dismiss the bill of exceptions in this case was made by three of the defendants, Paul Hollis, T. G. Hollis, and Claude Damour, upon the ground that all of the parties had not been served. By reference to the foregoing statement of facts it will be seen that this motion must be sustained. All the parties defendant, with the exception of Rice, were joint owners of the realty which was the basis of the suit. The judgment of the court below dismissing the entire case is a judgment which these parties are all interested in sustaining. They are necessary parties to the bill of exceptions, and each should have been served. *White v. Bleckley*, 105 Ga. 173, 31 S. E. 147; *Civ. Code* 1895, § 5562; *Chason v. Anderson*, 119 Ga. 496, 46 S. E. 629; *Augusta Bank v. Merchants' Bank*, 104 Ga. 857, 31 S. E. 433, and citations.

Writ of error dismissed. All the Justices concurring.

(124 Ga. 563)

GRIFFITH v. LEXINGTON TERMINAL R. CO.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

It appearing from the plaintiff's petition that he voluntarily assumed to perform for his master duties so perilous as to subject him to imminent danger to life and limb, and no facts being alleged which support the charge that the master was responsible for a resulting injury, the defendant's demurrer was properly sustained.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Master and Servant, §§ 845, 846.]

2. SAME.

One who knowingly engages to do what no prudent man ought to risk his life in endeavoring to accomplish cannot, if injury ensues, rely upon the law to throw around him the protection of a fiction that his employer impliedly undertook to take steps to minimize the hazard assumed, at least to the extent of making performance possible.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 562, 574.]

(Syllabus by the Court.)

Error from Superior Court, Oglethorpe County; H. M. Holden, Judge.

Action by Joe Griffith against the Lexington Terminal Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The question presented for determination in this case is whether or not the trial court erred in sustaining a general demurrer to the plaintiff's petition. He alleged that he received permanent physical injuries while in the service of the defendant railroad company in the capacity of fireman and brakeman on its road, which extends from Crawford to Lexington, in this state. He further alleged that he was under the direction and subject to the control of another of the company's employes, who acted both as conductor and engineer upon the only train operated on that road, and that it was his duty to fire the engine, and also to leave it at certain points along the line in order to apply the brakes to the train, which was a train for the carrying of both freight and passengers. As to the circumstances under which he received his injuries, his petition furnishes the following account: In coming from Crawford to Lexington there is, near the latter station, a considerable downgrade, which makes it necessary that the brakes on the train should be applied in order to bring it to a stop at that station without injury to or strain on the engine or other machinery, especially when the train is in part made up of freight cars or cars other than the regular passenger coach; the train not being equipped with air brakes. When freight cars were attached between the engine and the passenger coach, it was the plaintiff's duty to leave the engine at this point while the train was in motion, stepping from the engine to the ground, and then to get upon the platform of the passenger coach while the train was still in motion, and

there apply the brakes. He had been working on the road in the dual capacity of fireman and brakeman for several years. On the day of the injury several heavy cars were attached to the engine in front of the passenger coach, and, when the train was coming down the decline or downgrade near Lexington, the plaintiff, in the performance of his aforesaid duties and in obedience to the orders of his superior, who had charge of the train and authority to give such orders, undertook to alight from the engine to get upon the platform of the passenger coach to apply the brakes. He stepped from the engine to the ground, and then attempted to get on the platform of the passenger coach as it approached, but was thrown violently to the ground, and the coach ran over one of his feet. The "train, when he undertook to board the same, was moving at an unusually high rate of speed at this point, though petitioner was not aware of such unusual or dangerous rate of speed," and "just at that time passengers came out upon the platform of said passenger coach, and even upon the bottom steps of the same, and in the way of petitioner, as he undertook to perform said duties and to obey said orders." The plaintiff alleged that "the failure of said company to equip said train with air brakes, the requiring of petitioner to alight from and to board a moving train, the running of such train at such dangerous rate of speed, knowing that petitioner was required to perform these duties, and the allowing of passengers to occupy the steps of the platform of the passenger coach, under such circumstances, was each gross negligence in said company, and that his said injuries are the direct result of said negligence, and due in no way to any fault or negligence on his part." Plaintiff was a strong, healthy man, 32 years of age.

Haires Cloud and Joel Cloud, for plaintiff in error. Jos. B. & Bryan Cuning and Hamilton McWhorter, Jr., for defendant in error.

CANDLER, J. (after stating the facts). The plaintiff, a man of mature years, had been in the service of the defendant company for a number of years, engaged in performance of the perilous duties assigned to him. If his master wrongfully called upon him "to alight from and to board a moving train" running at an obviously dangerous speed, he should have declined to obey. Having voluntarily assumed the risk incident to the discharge of services which were obviously attended with danger, he effectually cut himself off from holding the company accountable for any injury he may thus have brought upon himself. He cannot excuse his voluntary assumption of the risk on the occasion referred to in his petition by saying that a servant of the company, who was his superior in authority, ordered him to jump from the moving engine and board the passenger coach while

the train was still in motion. He was merely ordered by his superior to do what he had engaged himself to the company to do. Besides, if the order was an improper one because it exposed him to imminent peril, he should have declined to execute it; the danger being as apparent to him as to his superior.

The train was not supplied with air brakes. This omission was not, as matter of law, a negligent failure of duty which the company was, relatively to him, bound to perform. A railway company is under no duty to equip its trains with the latest and most approved appliances, and the plaintiff does not undertake to assert, as matter of fact, that reasonably safe equipment necessarily includes the adoption and use of air brakes. Even were this otherwise, the petition discloses that the plaintiff knew that air brakes were not supplied by his master, and it was for this very reason that he was called on by the company to perform the perilous feat of jumping from the engine in order to apply the hand brakes upon the rear of the train. He remained in its service, well knowing of such increased risk, if any, to which the failure to equip the train with air brakes subjected him, and is therefore not now in a position to complain that the company disregarded its duty to him to furnish reasonably safe appliances. He accepted this increased risk, if there was one, instead of refusing to imperil his life by the continual use of appliances which were inadequate to the emergencies of the enterprise in which he engaged.

Passengers came out upon the platform, even occupying the bottom steps of the coach, and were in the way of the plaintiff when he attempted to board it. That the defendant company was negligent in "the allowing of passengers to occupy the steps of the platform of the passenger coach, under such circumstances," is a bare conclusion of the pleader, unsupported by the allegation of any fact or circumstance going to show wherein the company was remiss in performing any duty which it owed to the plaintiff. It is not negligence per se to fail to maintain such a surveillance over passengers as to render it impossible for them to get in the way of the employes whom a railway company engages to operate one of its trains. What precautions in this regard were, or were not, observed by the defendant, cannot be learned from the pleadings; nor does the petition disclose that the plaintiff was not familiar with the habits of passengers, under the regulations adopted by the carrier, touching their remaining within the coach while en route, nor that he did not have as much reason as did his superior to apprehend that they might leave their seats and go out upon the platform, where they might get in his way when he attempted to board the moving coach. He does not even assert that he did not at the time know of their presence, or

that he had no opportunity of seeing them and noting their position before he undertook to mount the steps; nor does he in any way attempt to negative want of care on his part in assuming the risk of boarding the train while they were standing on the steps in his way. For aught that appears, the company was not responsible for their presence there, and the plaintiff, though aware of their presence, deliberately took the chance of probable injury in voluntarily endeavoring to board the train under the circumstances.

It was, he explains, at that time "moving at an unusually high rate of speed," though he "was not aware of such unusual or dangerous rate of speed." Why he was unaware that the train was running at an unusual and even a dangerous rate of speed is not disclosed. Accustomed, as he was daily, to performing the hazardous task of jumping off the engine onto the rear of the train while it continued its journey, he should have offered at least some excuse for not observing the speed of the train and realizing the danger of attempting to board it. If the engineer was chargeable with knowledge that the train was running at an unusual rate of speed, it would seem that the plaintiff ought as well to have known this fact. The danger present was different only in degree from that which he engaged himself to daily ignore. One who knowingly engages to do what no prudent man ought to risk his life in endeavoring to accomplish cannot, if injury ensues, rely upon the law to throw around him the protection of a fiction that his employer impliedly undertook to take steps to minimize the hazard assumed, at least to the extent of making performance possible. For the reasons above stated, we concur with the trial judge in the view that the plaintiff's petition did not set forth a cause of action.

Judgment affirmed. All the Justices concurring.

(124 Ga. 732)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW—NEW TRIAL—GROUNDS—INSTRUCTIONS.

A ground of the motion for a new trial alleged error because, after the jury had been out deliberating on the case about an hour, they came into the courtroom and one of them asked the judge if they could find the defendant guilty as an accessory, to which the judge replied, "No." He then inquired if there was any other question which they desired to ask, and received a negative answer. The Solicitor General arose and addressed the court, in the hearing of the jury, saying: "Perhaps the jury did not understand what they wanted to find the defendant guilty of. Maybe they want to find him guilty as an accomplice, which they can do"—after which the judge charged the jury "on the law of accomplice." This was alleged to be contrary to law, and calculated to confuse the minds of the jury and prejudice them against the defendant. *Held*, that this ground of the motion set out no reason for

reversal. It failed either to set forth the charge which the court actually gave, or to show why it was contrary to law. There was some evidence indicating that the accused and another person were connected with the crime, and the charge which the court gave may have been appropriate.

2. SAME—APPEAL—EVIDENCE.

The verdict was supported by the evidence. (Syllabus by the Court.)

Error from Superior Court, White County; J. J. Kimsey, Judge.

Bob Williams was convicted of crime, and brings error. Affirmed.

C. H. Edwards, G. S. Kytie, and J. W. H. Underwood, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 775)

BEEBEE v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW—APPEAL—REVIEW—COMPETENCY OF WITNESS.

It is left to the sound discretion of the court to determine whether or not a child of tender years is a competent witness; and where the court examines a child as to its knowledge of the nature and sanctity of an oath, and decides that it is competent to testify, this court will not interfere, where it does not appear that such discretion has been flagrantly abused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3062.]

2. SAME.

The other assignments of error in the petition for certiorari being without merit, there was no error in overruling the same.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Ben Beebee was convicted of crime, and brings error. Affirmed.

W. S. Florence, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and Doyle Campbell, for the State.

BECK, J. Judgment affirmed. All the Justices concurring, except ATKINSON, J., who did not preside.

(124 Ga. 783)

BRITTEN v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW—APPEAL—INSTRUCTIONS.

It has been repeatedly ruled by this court that an attack upon the charge of a court by culling therefrom isolated clauses and sentences, which, if taken alone, would be erroneous, will not be entertained, when, immediately preceding or following such objectionable extracts, they are so qualified by the language of the court as to correctly state the law of the case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1990.]

2. SAME—EVIDENCE.

The verdict was authorized by the evidence, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Munch Britten was convicted of crime, and brings error. Affirmed.

J. B. Hudson, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 783)

PORTWOOD v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. LARCENY—EVIDENCE OF VALUE—NECESSITY.

Upon a prosecution for simple larceny, proof that the thing stolen was of some value is indispensable to a legal conviction. Lane v. State, 39 S. E. 463, 113 Ga. 1040, and cases cited. In this case, there being no evidence whatever upon the subject of value, there could not have been a legal conviction; and hence the verdict was without evidence to support it, and a new trial should have been granted.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 105.]

2. CRIMINAL LAW—APPEAL—REVIEW.

A new trial being required under the ruling made in the first headnote, the other questions made in this case (there being no complaint of any ruling of the court upon questions of law) will not be considered.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Howard Portwood was convicted of larceny, and brings error. Reversed.

O. M. Duke and W. T. Kelly, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

ATKINSON, J. Judgment reversed. All the Justices concurring.

(124 Ga. 787)

ROBINSON v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

HOMICIDE—INVOLUNTARY MANSLAUGHTER—EVIDENCE.

When, on the trial of a murder case, the evidence of the state demands a verdict of murder, and there is no evidence introduced by the accused, but his statement, if credible, establishes a homicide by misfortune or accident, a verdict of involuntary manslaughter in the commission of an unlawful act is unauthorized, and a new trial should be granted on the ground that the verdict is contrary to the evidence.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 540.]

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

John Robinson was convicted of involuntary manslaughter, and brings error. Reversed.

B. F. Harrell and Geo. Y. Harrell, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

COBB, P. J. The accused was indicted for murder. The evidence in behalf of the state, if believed, established a clear case of murder. There was no evidence introduced in behalf of the accused, but he made a statement which, if credible, required a finding that the homicide was the result of misfortune or accident. Under such circumstances a verdict of involuntary manslaughter in the commission of an unlawful act is unwarranted by the evidence, and a new trial should have been granted upon the ground that the verdict was contrary to the evidence. *Hunnicut v. State*, 114 Ga. 448, 40 S. E. 243. See, also, *Kendrick v. State*, 113 Ga. 759, 39 S. E. 286; *Robinson v. State*, 109 Ga. 508, 34 S. E. 1017; *Watson v. State*, 116 Ga. 607, 43 S. E. 32; *Washington v. State*, 36 Ga. 223; *Clark v. state*, 117 Ga. 254, 43 S. E. 853 (6).

Judgment reversed. All the Justices concurring.

(124 Ga. 540)

OLIVER v. WARREN et al.

(Supreme Court of Georgia. Dec. 22, 1905.)

EXECUTION—LEVY—FORTHCOMING BOND—LIABILITIES—ISSUES.

In a suit on a forthcoming bond given by a claimant, where its execution is not denied, the main issue to be decided is whether or not there has been a breach of the bond. Neither the legality of the levy nor the authority of the officer to make it is an issuable fact; these issues being concluded by the judgment in the claim case.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Action by A. S. Oliver against D. H. Warren and others. Judgment for defendants, and plaintiff brings error. Reversed.

A *fi. fa.* in favor of A. S. Oliver and against D. H. Warren, issued from the justice's court for the 202d district, G. M., Elbert county, was placed in the hands of W. H. Irwin, Jr., bailiff of the county court, for the purpose of levy. He proceeded to make a levy on certain cotton as the property of the defendant in *fi. fa.*, who, as the head of a family consisting of himself and four minor children, interposed a claim on the ground that the cotton was exempt from levy and sale, being the proceeds of a homestead taken out for the benefit of his family. In order to retain possession of the property, he also executed and delivered to the levying officer a forthcoming bond, which A. P. Deadwyler signed as security. The claim case resulted adversely to the claimant. Suit was afterwards brought by Oliver in the city court of Elberton upon the forthcoming bond against Warren as principal and Deadwyler as security. The defendants filed a joint answer, in which they set up various defenses, and in which they denied that "any lawful levy was ever made on the property described in the plaintiff's petition under and by vir-

tue of the *fi. fa.*" against Warren. It appeared on the trial that Irwin, the levying officer, had never been sworn in as a constable and did not act as such in making the levy, but as bailiff of the county court. At the close of the plaintiff's testimony, which disclosed the circumstances under which the forthcoming bond was given and the result of the claim case, the presiding judge directed a verdict in favor of the defendants, holding that Irwin, "being bailiff of the county court of Elbert county and levying as such officer, had no authority to levy a justice court *fi. fa.*" To this ruling and judgment the plaintiff excepts. He claims that the court erred in directing a verdict against him: (1) Because the levy was a valid one, made by an officer having authority to make it; (2) because the defendants had recognized the officer's authority and the validity of the levy by prosecuting the claim case, and the bond sued on was at least good as a voluntary bond, and they were bound thereby, even if his acts were to be regarded as those of a *de facto* officer, and his authority to make the levy could have been questioned by filing an affidavit of illegality; and (3) because Warren, when he filed his claim and gave the forthcoming bond, admitted the validity and completeness of the levy, as well as the authority of the officer to make it, and the defendants, having given the bond, were estopped from denying his authority or the validity of the levy.

Z. B. Rogers, for plaintiff in error. Van Duzen & Sutt, for defendants in error.

EVANS, J. (after stating the facts). In the various code sections regulating the practice in a justice's court, there is no specific form of direction of an execution to any particular officer. Mesne process is directed to and served by constables. Civ. Code 1895, § 4116. Final process may be executed by any officer empowered to serve mesne process, unless there is a statutory inhibition. Hence constables may levy executions from a justice's court; and, by Civ. Code 1895, § 4381, sheriffs are also empowered to serve and execute both mesne and final process issued from justices' courts. The regular bailiff of a county court is authorized to levy only the processes of the county court. Civ. Code 1895, § 4190. He has no authority to levy an execution issued from a justice's court. A levy by a county court bailiff of a justice court execution is void, because a levy by an officer without authority of law is no levy at all. *Morris v. Tinker*, 60 Ga. 466; *Collins v. Hudson*, 69 Ga. 684. It is not good as a levy by a *de facto* officer, because the county court bailiff, in making the levy, does not assume to act as constable or as sheriff or lawful deputy. If he did, and his appointment or qualifications were irregular, nevertheless his acts would be good as a *de facto* officer. *Twiggs v. Hardwick*, 61 Ga. 272; *Hinton v. Lindsay*, 20 Ga. 748 (3, 4); *Gunn v. Tackett*,

67 Ga. 725. But where he undertakes to extend the jurisdiction of his office to the execution of process which under the law he has not the power to execute, quoad hoc he is a usurper of the functions of another office, and he is not a de facto officer.

However, it is insisted that the defendants are estopped from denying the legality of the levy, because Warren, the principal on the bond upon which the suit was predicated, obtained possession of the property, and in the bond recited the factum of the levy. It is certainly true that the filing of a claim and the giving of a forthcoming bond estops a claimant and the surety on his bond from denying the completeness and sufficiency of the seizure of the property made by the levying officer. *Cohen v. Broughton*, 54 Ga. 296; *Scolly v. Butler*, 59 Ga. 850; *Connolly v. Atlantic Contracting Co.*, 120 Ga. 216, 47 S. E. 575. The estoppel does not extend to the validity of the process (*Smith v. Lockett*, 73 Ga. 106; *Osborne v. Rice*, 107 Ga. 283, 33 S. E. 54); nor to the authority of the officer to make the levy (*Pearce v. Renfroe*, 68 Ga. 194). In the present case the defendants, by signing the bond, estopped themselves from denying that the county court bailiff made an actual seizure of the property by virtue of the process in his hands. *Id.* 196. But on the trial of the claim case they would not have been precluded from showing that such seizure by the county court bailiff was void, because, as to the act of levy, the bailiff was not an officer, either de jure or de facto, but a mere usurper of the functions of other officers designated by law to execute this particular process. However, in a suit on a forthcoming bond, where its execution is not denied, the only issue to be decided is whether or not there has been a breach of the bond. *O'Neill Mfg. Co. v. Harris*, 120 Ga. 469, 47 S. E. 934. Neither the legality of the levy nor the authority of the officer to make it is an issuable fact. As was said by Bleckley, C. J., in *Anderson v. Banks*, 92 Ga. 122, 18 S. E. 364: "It is not allowable for a claimant to defeat a sale by interposing a claim, and then appropriate the property to its own use or suffer it to be appropriated by his surety on the claim bond, and then contest, not in the claim case (the very case appointed by law for the purpose), but in a suit on the bond, the right of the plaintiff in execution to sell the property." While a regular county court bailiff is limited to serving processes issued from the county court (*Civ. Code* 1895, § 4190), and is without authority to levy a justice court execution, yet, if he does in fact undertake to do so, and a claimant and his surety procure possession of the property seized by giving a forthcoming bond, they cannot defeat a recovery thereon by setting up the defense that the county court bailiff was not such an officer as could lawfully make the levy. The time for them to raise this point is when the claim case comes on for trial. Had the defendants in the pres-

ent case urged this objection at the proper time, it is not improbable that, upon the authority of *Pearce v. Renfroe*, 68 Ga. 194, the levy would have been dismissed. The claimant litigated the question of title in the claim case. It was the levy which brought the claimant into court. If he was improperly brought there by means of a void levy, he should then and there have protested. After an adverse judgment in the claim case—an adjudication that, as between the defendant in *fi. fa.* and himself, he had no title to the property—he was no longer concerned about the authority of the levying officer to make the levy, and nothing remained for him to do except to comply with the obligation of his bond. Upon his failure so to do, he and his surety became liable thereon.

The sole question raised in the present bill of exceptions is whether or not the trial judge properly directed a verdict in favor of the defendants upon the ground that the levying officer, being a bailiff of the county court and acting in that capacity, was without authority to levy a *fi. fa.* issuing from a justice's court. As will have been seen, the defendants were precluded from raising any such objection in a suit upon the bond, and the direction of a verdict in their favor was erroneous. It may not be improper to add that, even had the trial judge been correct in his ruling, he should not have directed a verdict in favor of the defendants; for, as pointed out in *Barnes v. Carter*, 120 Ga. 895, 48 S. E. 387, if a plaintiff fails to make out a *prima facie* case, a verdict for the opposite side should not be directed, but a judgment of nonsuit should be rendered.

Judgment reversed. All the Justices concur.

(124 Ga. 789)

YOUNG v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. MASTER AND SERVANT — CONTRACT FOR SERVICES—FRAUD—BREACH.

The act of August 15, 1903 (Acts 1903, p. 90), entitled "An act to make it illegal for any person to procure money, or other thing of value, on a contract to perform services with intent to defraud, and to fix the punishment therefor, and for other purposes," has reference to contracts for services where the relation of hirer and person hired exists.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 75.]

2. SAME—LIABILITY OF TENANT—AGREEMENT TO CULTIVATE.

It has no application where persons occupy the relation of landlord and tenant; nor is the tenant subject to prosecution under that act, although as a part of the contract of rental he agrees to clear up certain land. *Townsend v. State* (decided November 9, 1905) 52 S. E. 293.

(Syllabus by the Court.)

Error from Superior Court, Chattahoochee County; Wm. A. Little, Judge.

Henry Young was convicted of procuring money under contract to perform labor with

intent to defraud, and brings error. Reversed.

The accused was convicted upon an indictment charging him with a violation of the statute referred to in the headnote, and moved for a new trial, which was refused, and he excepted. The evidence showed that the prosecutor, W. P. Daniel, entered into a contract with him by which Daniel rented to him, for the year 1905, 20 acres of old land and 10 acres of fresh land, for 450 pounds of lint cotton. It was agreed that the accused was to clear the 10 acres of fresh land, and that Daniel was to furnish him \$35 and some guano. Daniel furnished him \$25 in money, and \$36 worth of guano. The accused worked until April 26th, when he and Daniel had a misunderstanding; whereupon the accused left his mule standing in the field and went to his house, saying he would not plow another furrow. Daniel went later to the house and told the wife of the accused to tell him to get off his place, and the accused moved. On being recalled, in reply to the statement of the accused, Daniel testified that he left word with the wife of the accused to leave the place if he was not going to work.

S. T. Pinkston, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

LUMPKIN, J. Judgment reversed. All the Justices concurring.

(124 Ga. 794)

MAHONEY v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

CRIMINAL LAW—APPEAL—REVIEW.

No complaint being made that the accused was not accorded a fair and impartial trial, and the evidence being sufficient to warrant the verdict, his conviction should be allowed to stand.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3075.]

(Syllabus by the Court.)

Error from Superior Court, Hart County; H. M. Holden, Judge.

Bob Mahoney was convicted of crime, and brings error. Affirmed.

J. H. Skelton and A. G. & Julian McCurry, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 794)

ROGERS v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. HOMICIDE—VOLUNTARY MANSLAUGHTER—INSTRUCTIONS.

Where, upon the trial of one charged with murder, the court instructs the jury, "To deliberately kill in revenge of a past injury, however heinous, after reason has had time to resume its sway, cannot be justifiable," and the

jury returns a verdict finding the defendant guilty of voluntary manslaughter, such charge of the court is not error requiring the grant of a new trial, although the only evidence tending to show a past injury was that the deceased and accused had quarreled about a woman a few minutes before the encounter.

2. SAME—INSTRUCTIONS—EVIDENCE.

There was no error harmful to the accused in any of the other charges complained of, the evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Ben Rogers was convicted of voluntary manslaughter, and brings error. Affirmed.

Harry Hill, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 794)

TEASLEY v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

INTOXICATING LIQUORS—ILLEGAL SALE.

Where, in a county in which the sale of liquor was prohibited by law, persons went to the house of the accused about 8 or 9 o'clock at night, and applied to him and another person who was there to sell them whisky, and, after some expression of unwillingness to make the sale, the defendant brought out a bottle containing about three quarts of whisky, which his companion said belonged to them both, and from it a pint bottle was filled and given to the visitors, who laid money on a shelf in payment for it and carried away the whisky, the jury was authorized to find the defendant guilty of making the sale.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 305, 313.]

(Syllabus by the Court.)

Error from Superior Court, Hart County; H. M. Holden, Judge.

Bob Teasley was convicted of a sale of intoxicating liquors, and brings error. Affirmed.

A. A. McCurry and Jas. H. Skelton, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 836)

COMER v. STATE.

(Supreme Court of Georgia. Feb. 16, 1906.)

1. CRIMINAL LAW—EVIDENCE—INSTRUCTIONS.

There was ample evidence to authorize the charge on the law of confessions.

2. SAME—NEW TRIAL.

The verdict was fully warranted by the evidence, and the court did not err in overruling the motion for a new trial.

3. SAME.

The foregoing deals with all the grounds of the motion for a new trial referred to in the brief of counsel for plaintiff in error.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Will Comer was convicted of crime, and brings error. Affirmed.

Jno. B. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(124 Ga. 853)

MAYOR ETC., OF EAST ROME v. LLOYD.
(Supreme Court of Georgia. Feb. 16, 1906.)

1. MUNICIPAL CORPORATIONS — CHANGE OF GRADE—DAMAGES.

Since the adoption of the Constitution of 1877 a municipal corporation is liable to a property owner for consequential damages resulting from raising the grade of a street in front of his premises, thereby impairing or destroying his means of ingress and egress. *City of Atlanta v. Green*, 67 Ga. 386. The measure of damages is the resultant diminution in the market value of his property. *Roughton v. Atlanta*, 39 S. E. 316, 113 Ga. 948.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 925-928, 946.]

2. SAME — ACTION FOR DAMAGES — LIMITATIONS.

A suit for damages instituted within four years from the time the change in the grade of the street was made is not barred by the statute of limitations. Civ. Code 1895, § 3898; *Atkinson v. Atlanta*, 7 S. E. 692, 81 Ga. 625; *Holmes v. Atlanta*, 39 S. E. 458, 113 Ga. 961, and citations.

3. SAME—EVIDENCE.

Notwithstanding a conflict in the testimony with regard to the time when the raising of the grade of the street in front of the plaintiff's premises occurred, the jury were authorized to find that it was made within four years next preceding the filing of her action, and the evidence supported the recovery of damages assessed in her favor.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by L. A. Lloyd against the mayor and council of East Rome. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Louche and M. B. Eubanks, for plaintiff in error. McHenry & Maddox, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(124 Ga. 853)

MURPHEY et al. v. MORELAND.

(Supreme Court of Georgia. Feb. 16, 1906.)

APPEAL—REVIEW—NEW TRIAL.

No error was complained of. The only assignment of error is the overruling of the motion for a new trial, based upon the general grounds only. The evidence was conflicting, and while the preponderance seems to be against the verdict there was some evidence to support the finding, and as it has been ap-

proved by the trial judge the judgment refusing the new trial will be affirmed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3928-3934, 3948-3950.]

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

Action between D. B. Murphey and others and W. C. Moreland. From the judgment Murphey and others bring error. Affirmed.

J. P. Shattuck and Z. D. Harrison, for plaintiffs in error. H. B. Lumpkin and Peoples & Jordan, for defendant in error.

COBB, P. J. Judgment affirmed. All the Justices concur.

(124 Ga. 862)

CAVERLY v. HEATON.

(Supreme Court of Georgia. Feb. 16, 1906.)

APPEAL—NEW TRIAL.

The evidence was conflicting, and authorized a finding in favor of either plaintiff or defendant. The trial judge has approved the verdict, and this court will not interfere with the exercise of his discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3928-3934, 3948-3950.]

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action between C. E. Caverly and W. W. Heaton. From the judgment, Caverly brings error. Affirmed.

Head & Head and Ellis, Wimbish & Ellis, for plaintiff in error. Jno. M. & H. J. McBride, for defendant in error.

COBB, P. J. Judgment affirmed. All the Justices concur.

(124 Ga. 862)

JAMES v. AYER.

(Supreme Court of Georgia. Feb. 16, 1906.)

1. APPEAL—REVIEW—EVIDENCE.

Whether or not the evidence would have authorized a different finding, and whether or not this court, if it had occupied the position of the jury, would have returned the same verdict, there being sufficient evidence to authorize the verdict which was rendered, and the presiding judge having approved it by overruling the motion for a new trial, this court will not interfere.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3928-3934, 3948-3950.]

2. SAME—HARMLESS ERROR.

The jury having found in favor of the plaintiff for the full amount of principal of the notes sued on, with interest as specified in them, and sustained the claim of a lien upon the land under the security deed involved in the controversy, and thus negated the existence of usury in the transaction, it will not require a new trial, even if certain charges as to attorney's fees, in case the jury reduced the

amount claimed and in case they found that there was usury, were inaccurate.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4219-4228.]

3. SAME.

No error requiring a reversal appears. (Syllabus by the Court.)

Error from Superior Court, Monroe County; B. J. Reagan, Judge.

Action between Gus James and L. R. Ayer. From the judgment, James brings error. Affirmed.

Cabaniss & Willingham, for plaintiff in error. Hardeman & Jones, Persons & Persons, and E. P. Johnston, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(124 Ga. 553)

COOK v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. WITNESSES—IMPEACHMENT—CORROBORATION.

A witness, sought to be impeached by proof of contradictory statements, cannot be supported by proof that he made elsewhere other statements consistent with his testimony on the stand.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1260, 1281.]

2. INTOXICATING LIQUORS—ILLEGAL SALE.

A sale on a credit is a complete sale; and a sale of whisky without a license, on an agreement that the purchaser will pay for it with a hog, is contrary to the criminal law.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 160.]

3. CRIMINAL LAW—EVIDENCE—ADMISSION.

An admission or confession which apparently has reference to the matter under investigation is admissible in evidence, although it does not in terms state the time and place to which it refers.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1202-1211.]

(Syllabus by the Court.)

Error from City Court of Wrightsville; Wm. Faircloth, Judge.

Handy Cook was convicted of selling liquor without a license, and brings error. Reversed.

Handy Cook was tried in the city court of Wrightsville, under an accusation charging him with selling whisky without a license. After conviction, he moved for a new trial, which was refused, and he excepted.

Z. B. Hicks and E. L. Stephens, for plaintiff in error. B. B. Blount, for the State.

LUMPKIN, J. (after stating the facts). 1. The principal witness on behalf of the state was Charles Bennett, who testified that he bought whisky from the defendant in July, 1905. In the course of the examination it was developed that he had made to another person a statement conflicting with his evidence on the stand, and denying that he had bought whisky from Cook. Thereupon the

state, over objection, introduced evidence to show that he had stated to two other witnesses that he had bought whisky from Cook and owed him for it. This was error. It has sometimes been held that, where an effort has been made to impeach a witness by proof of statements inconsistent with his testimony given on the stand, it is admissible to sustain him by showing that on other occasions he made statements consistent with such testimony. But other courts hold the contrary position. 1 Greenl. Ev. (16th Ed.) § 469 (b). The latter ruling, in our opinion, rests upon the sounder basis of reasoning. As said by Mr. Greenleaf, in referring to statements consistent with the testimony of the witness as being explanatory of statements not consistent with it, made at other times: "But, on the other hand, the latter in no sense explain away the former. The inconsistency on that occasion is just as damaging, even though the other story has been repeated a score of times." In this state the point has been directly passed upon in several cases. Georgia R. Co. v. Oaks, 52 Ga. 410 (7); Fussell v. State, 93 Ga. 450, 21 S. E. 97; Knight v. State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17 (3); Atlanta, Knoxville & Northern R. Co. v. Strickland, 116 Ga. 439, 42 S. E. 864. The circumstances under which such evidence might become admissible were discussed in McCord v. State, 83 Ga. 521, 531, 10 S. E. 437. If it were sought to show that the witness in a certain conversation made statements inconsistent with his testimony, it would be competent to prove all that he said in that conversation which would throw light on the question of whether his statements were in fact inconsistent or not.

2. Error is alleged on the ground that the court charged that if the accused delivered to one Bennett whisky at an agreed price, and Bennett promised to pay for it by delivering to the accused a hog, the sale would be complete, although the purchaser may not have made the payment. We cannot assent to the proposition that the sale of whisky on a credit is no sale at all. It would introduce an innovation into the law to declare that nothing was sold until paid for. Nor can we perceive that the fact that the medium of payment agreed upon was a hog would alter the principle. Selling liquor without a license is none the less prohibited because payment is to be made in pork. The accused apparently labors under the delusion that he ought not to be convicted for an illegal sale of whisky because the purchaser has violated his promise to pay for it. Not having reaped the reward which he anticipated as a result of the unlawful sale, he appears to entertain the view that he should be relieved from punishment. The criminal law does not make an equitable adjustment with one who violates it, so as to excuse him if his crime has not been as profitable as he anticipated. The failure to receive the hog stipulated for, however disappointing to the ven-

dor of the whisky, will not prevent his conviction for selling it without a license. The case of Crabb v. State, 88 Ga. 584, 15 S. E. 455, relied on by counsel for plaintiff in error, is not in point. There whisky was sent by express "C. O. D.," and the sale was not complete until it was paid for and delivered. But the Case of Cook and the Case of Crabb are different. McGruder v. State, 83 Ga. 616, 10 S. E. 281.

3. A witness testified as follows: "I know Handy Cook. I heard him make a free and voluntary statement about selling whisky, on the 29th of October, at Charles Bennett's house. He [meaning Handy Cook, defendant] then said old man Charles Bennett owed him for some whisky he had sold him, and that he was going to have his pay that day or die and go to hell. He did not say when or where he had sold Charles Bennett whisky. I am related to Charles Bennett. I went to Chas. Bennett's, and Handy was there. He asked me if it was not right for a man to pay his debts. I told him, 'Yes.' I asked Handy if I owed him anything. He said: 'No; but these God damn negroes owe me for whisky and won't pay me. Old man Bennett owes me a black sow pig, and I am going to have it today or die and go to hell.'" This was objected to "because defendant did not specify in said statement any time or place when he sold Charles Bennett whisky." The court overruled the objection and admitted the evidence. If there is enough to indicate that the admission or confession has reference to the transaction under investigation, it is admissible, although the defendant fails to confess with complete specification.

As a new trial will be had we refrain from expressing any opinion as to the evidence. Judgment reversed. All the Justices concurring.

(124 Ga. 688)

WITHAM v. ATLANTA JOURNAL.

(Supreme Court of Georgia. Jan. 13, 1906.)

1. LIBEL—PLEADING—INUENDO.

Although in the headline over a newspaper article, wherein a named bank is stated to have made an assignment, owing to its failure to meet its obligations, the surname of an individual having no connection with such bank may be used as an adjective descriptive of the bank named in the body of the article, yet if the publication, in plain and unambiguous terms, refers to the bank, and does not refer to such individual, or his trade, profession, or business, except by thus using his surname, the meaning of the published words cannot be enlarged or extended by innuendo, so as to give him a cause of action for alleged libel, in the absence of an allegation of special damage.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 103, 205-208.]

2. SAME—WHAT CONSTITUTES.

To falsely publish of another that there are criminal cases pending against him is libelous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 22.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. S. Witham against the Atlanta Journal. Judgment for defendant, and plaintiff brings error. Reversed.

This was an action for libel, brought by W. S. Witham against the Atlanta Journal. After a jury had been impaneled, and before any evidence was introduced, the defendant made an oral motion to dismiss the petition, which was sustained, and the plaintiff excepted. The alleged libelous language declared on constituted an article in a newspaper published by the defendant in Atlanta, and, including headlines, was as follows:

"Witham Bank at Barnesville Assigns.

"People's Bank has Made an Assignment Following Failure to Pay Deposit Certificates.

"(Special Dispatch to The Journal.)

"Barnesville, Ga., Jan. 6.—The People's Bank has made an assignment to Mr. E. Rumble and A. A. Murphy, following its failure to meet the certificates which fell due January 1, given on its plan of reorganization in January, 1902. The records show that the assignment was filed with the clerk of Pike superior court at Zebulon, Saturday, January 3, 1903, at 11:30 o'clock p. m. After all efforts had failed Saturday to secure money with which to pay the bank's obligations, as per promise of its reorganizers, the assignment was decided upon by the bank officials after a consultation with some of the creditors. It is understood that the assignment is satisfactory to the holders of the certificates. While everybody here regrets the new turn affairs have taken, there is little excitement over it. Efforts will be made to yet reach a settlement without having any extensive litigation, as all the parties at interest seem to be satisfied to have as little litigation as possible. Judge Howard Van Epps, of Atlanta, and Col. R. L. Berner, of Forsythe, were in the city to-day representing W. S. Witham, and it is understood that a proposition has been made looking to a settlement of the civil [and] criminal cases pending against Witham, growing out of his connection with the old Barnesville Savings Bank."

It was alleged that all of this publication was false, malicious, and libelous, and that it was "of and concerning petitioner." It was further alleged that at the time of the publication in question the plaintiff, Witham, was president of 19 banks located throughout the state of Georgia, and financial agent of 11 other such banks; that all of these banks were commonly known as "Witham Banks," and that no other Witham in Georgia is connected in the public mind with the term "Witham Bank." The publication complained of meant, and intended the public to understand, that the People's Bank therein referred to was a "Witham Bank," and that this one of the Witham banks had

made an assignment on account of its failure to meet the demands of holders of certificates of deposit, when as a matter of fact plaintiff had no connection whatever with the People's Bank, owned no stock in it, held no office in it, and had no interest in its success or failure; and the charge in the newspaper article that it was a "Witham Bank" was recklessly false, malicious, and libelous, and, owing to the large circulation of the newspaper, has worked irreparable damage to the plaintiff, "subtle and intangible in its nature, and not capable of accurate itemization, or of special proof." Plaintiff is connected, either as president or financial agent, or both, with 30 banks doing business in Georgia, all of which are known by the public and commonly designated as "Witham Banks," and, by reason of his financial connection with banks in New York and other money centers he is enabled freely to command the necessary funds for the use and protection of his banks, all of which are upon a solid foundation and being successfully operated, "save that their confidence in petitioner will necessarily be impaired and the public favor withdrawn from him by reason of said publication." Such a publication, in a newspaper of such extensive circulation as the one published by the defendant, "naturally and inevitably tends to shake public and general confidence in the system of banks operated and controlled by petitioner in the state of Georgia, or with which his name is connected, and to deter depositors from depositing in any one of the Witham Banks, or to cause them to withdraw their deposits already made, and to create suspicion and distrust in the minds of creditors, such as to incline them to precipitate and press their claims," and by reason of petitioner's financial connection and business employment "the publication by the defendant of the false and malicious article aforesaid tends naturally and inevitably to impair his credit, impair or destroy the public confidence in him, and in part at least to injuriously affect and destroy his ability to retain his present employment, or to receive remunerative compensation for his labor in the future, to petitioner's general damage in the sum of \$50,000."

Howard Van Epps, for plaintiff in error.
Rosser & Brandon, for defendant in error.

FISH, C. J. (after stating the facts). We think it clear from the language of the publication that, with the exception of the concluding sentence, no statement of fact therein was made of and concerning the plaintiff as an individual, and that it contained no charge on the plaintiff in reference to his business or trade. The use of the plaintiff's surname as an adjective descriptive of the particular bank which was alleged to have assigned was merely incidental to the charge made in the article against the bank. It was not charged that the plaintiff had assigned, which

might have amounted to a libel, if he had been engaged in business as a private banker or otherwise, where his success was dependent upon his financial credit. Nor was it alleged that the plaintiff's bank had assigned, which, if he owned and operated a bank, might be construed to be a charge on him in reference to his trade or business. But the charge was that "Witham Bank at Barnesville Assigns", and there is nothing in the petition which shows that Witham owned any bank at Barnesville, or even elsewhere. The effect of the allegations in the plaintiff's petition is that he was connected, either as president or financial agent, with 30 banks in this state, the use in a newspaper publication of his surname to describe the Barnesville bank alleged therein to have assigned was a charge on him in reference to his business, which naturally tended to impair his credit and destroy public confidence in him as a business man. Granting, as the innuendo alleges, that the publication that a bank at Barnesville, of which the plaintiff was either president or financial agent, had failed, still it seems to us clear that the charge in the publication was against the bank, and not against the plaintiff, either personally or in reference to his business. We apprehend that if the plaintiff had been president of this very bank, and the allegation as to its having made an assignment had been untrue, the right of action for the libel would have been in the corporation, and not in the plaintiff. The libel would be on the corporation, and not on its president. There would be no charge on the person who happened to be president of the bank, in reference to his trade, office, profession, or business. How, then, can the mere written intimation that the plaintiff was president, financial agent, or otherwise closely connected with, a bank alleged to have failed, amount to a charge on him in reference to his trade or business? Suppose that the charge had been that "the People's Bank at Barnesville, of which W. S. Witham is president," or "the People's Bank at Barnesville, of which W. S. Witham is financial agent, has assigned," would Witham have had a cause of action based upon the falsity of the statement that he was president, or financial agent, of this bank, unless he had suffered special damage by reason of the publication? We think not. Words to be actionable per se, as tending to injure the plaintiff in his trade, profession, or business, must contain a charge made on him in reference to such trade, profession, or business. Civ. Code 1895, § 3837; Van Epps v. Jones, 50 Ga. 240. The language which we are now discussing contains no charge made on Witham of any character whatever. For these reasons, we do not think that the plaintiff had any cause of action upon that portion of the newspaper article in reference to the alleged assignment of the People's Bank at Barnesville. While it is alleged in the petition that the defendant "falsely and mali-

ciously did publish of and concerning petitioner" the language in question, yet, as the demurrer only admitted what was well pleaded, and this allegation is not well pleaded in reference to this portion of the publication, which is not legitimately susceptible to this construction, such allegation is not aided by the demurrer.

2. But while the petition fails to show that the portion of the newspaper article in reference to the assignment of the People's Bank at Barnesville contains a libelous charge on the plaintiff in reference to his trade, profession, or business, it does show that the statement in reference to the plaintiff, with which the publication concludes, if false, as the petition alleges, is libelous per se, as it in effect charges that there are "criminal cases pending against Witham, growing out of his connection with the old Barnesville Savings Bank." This equivalent to imputing to the plaintiff crimes punishable by law, and under our Code such an imputation, if false, is actionable per se. Civ. Code 1895, § 3837. It matters not that the article failed to mention what particular crimes were charged against the plaintiff in the criminal cases alleged to be pending against him. The charge that there were "criminal cases pending against Witham, growing out of his connection with the old Barnesville Savings Bank," necessarily implied that there were crimes charged against him which were punishable by law. "To render words actionable per se, it is not necessary that they should in express words charge another with a crime punishable by law. It is sufficient, if they impute a crime, that the hearers understand that this is what is meant." *Lewis v. Hudson*, 44 Ga. 568. Besides, this is an action for libel, which, according to the definition given by our Code, "is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule." Civ. Code 1895, § 3832. "A publication coming within this definition is actionable without any averment of special damage." *Holmes v. Clisby*, 118 Ga. 820, 822, 45 S. E. 684. It is clearly apparent from the language now under consideration that the statement therein contained tended to injure the reputation of the plaintiff and to expose him to public hatred or contempt; and it was, therefore, actionable without any allegation of special damage arising therefrom.

Counsel for the defendant in error state, in their brief, that this last paragraph of the publication "is not claimed by petitioner to be libelous," and that he "bases his entire cause of action on the fact that the People's Bank of Barnesville was also designated as the 'Witham Bank.'" While it is true that the argument of counsel for the plaintiff in error in this court has been directed to establishing the proposition that the plaintiff had a cause of action for the publication of the por-

tion of the article in reference to the assignment of the People's Bank, and nothing has been directly said by him as to a cause of action arising merely from the last paragraph of the publication, yet as the whole of the article is alleged to be libelous, and this portion thereof is referred to by counsel for plaintiff in his brief, we cannot say that the plaintiff has admitted that he does not rely for a recovery upon the language of this paragraph. We have, therefore, felt bound to deal with it in deciding the question raised by the demurrer. It follows that the petition was not, as a whole, subject to a general demurrer, and the court, therefore, erred in sustaining the motion to dismiss it.

Judgment reversed. All the Justices concurring, except BECK, J., not presiding.

(124 Ga. 576)

MOORE v. C. L. KING MFG. CO.

(Supreme Court of Georgia. Jan. 9, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—INSTRUCTIONS.

The evidence authorized a charge as to the duty of an employé to pursue the safe method for the performance of his work where there were two methods, one safe, the other dangerous.

2. SAME—FELLOW SERVANTS.

The instructions based on the theory that the defendant's foreman was assisting the plaintiff in the work in which he was engaged when injured, and that the foreman at the time was doing an act which was ordinarily within the scope of the duty of a fellow servant, were not authorized by the evidence.

3. SAME.

Nor did the evidence warrant a charge on the fellow servant rule.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by Rufus J. Moore against the C. L. King Manufacturing Company. Judgment for plaintiff, and defendant brings error. Reversed.

Rufus J. Moore brought his action against the C. L. King Manufacturing Company to recover damages for injuries alleged to have been sustained by him while he, as an employé of the defendant, was repairing and adjusting a gang saw in its machine shop, which he alleged was suddenly and negligently put in motion by John L. Shellenberger, general superintendent and principal managing agent of the defendant company. The defendant, in its answer, denied that Shellenberger put the gang saw in motion, and further denied that plaintiff was injured in consequence of any negligence on the part of the defendant. The trial resulted in a verdict for the defendant, and the plaintiff's motion for a new trial having been overruled, he excepted. With reference to the position which Shellenberger occupied in the shop relatively to the plaintiff and the defendant company, plaintiff testified: "Mr. Shellenberger was superintendent and gen-

eral manager, in charge of the business in every way." While Shellenberger testified: "C. L. King was president of the mill. C. L. King was general manager. I did not work regularly on any of those machines. Occasionally, when it was necessary to do anything that did not require any length of time, I did work on them. I did not have much time to work on machinery, because it takes most of my time to direct the employes and to see that they have work to work on. I was foreman. My duties as superintendent are to employ hands and set them to work, to lay out and plan work, and direct the employes to do whatever there was to do. I had general charge of the shop. Mr. King had authority above me in the shop. In the shop work I was subject to Mr. King's orders, in the shop or anywhere else. Sometimes Mr. King stayed in the shop, and generally in the office; but I superintended the shop work. He directed me, and I directed the employes. The directions to the employes were all given through me." He further testified that he employed the plaintiff. The case made by the evidence for the plaintiff was to the effect that on the day his injuries were received he was at work on a machine known as the "planer," when Shellenberger directed him to turn over the work he was doing to another employe, and that plaintiff should adjust a gang saw that was in the shop; that in order to do the work directed it was necessary for him to stop the machine, that was running the gang saw, in order for him to adjust the saws then on the machine; that while readjusting them Shellenberger negligently started the machine in motion, and plaintiff was, in consequence, injured as set out in his petition. It was admitted by the defendant company that Shellenberger directed plaintiff to readjust the gang saw; but the evidence in its behalf was to the effect that at the time plaintiff was injured Shellenberger was some 12 feet away from the gang saw, and that he had nothing to do with starting it in motion. It appeared from the evidence that the gang saw was affixed to a table, which was $3\frac{1}{2}$ by 5 feet. There was an open space for the bed in this table, 4 inches wide, $1\frac{1}{2}$ inches deep, and 18 inches long, through which the saws projected; there being slots through it for the saws to run in. The bed was fitted in this open space and made the top of the table solid, so that lumber could pass smoothly over it. Different beds had to be adjusted to the saws as the spaces between them were changed for ripping different sizes of lumber. There were tenons on each end of the bed, which fitted in corresponding notches in the bed space. There were three saws on the mandril. To start them, the belt had to be shifted from a loose pully called the "idler," to a tight one, and to stop them, from the tight one to the idler, by means of a stick called the "shifter," at the right-hand corner of the table, and in

easy reach of the operator of the machine. On the occasion when plaintiff was injured, he was told by Shellenberger to adjust the saw to cut pieces $\frac{1}{2}$ by $\frac{3}{4}$ of an inch. Plaintiff put three smaller saws on the mandril and smaller collars between the saws, then made a bed of oak timber of the size above stated and placed one end of it in the notch in the table, in front of the saws, put his right hand on that end, and, for the purpose of cutting the slots in it, pressed the pieces on the other end over the saws with his left hand; and he testified that while in this position Shellenberger suddenly and negligently started the saws, causing the injury. The defendant, as already stated, contended that Shellenberger did not start the gang-saw, and that the plaintiff's injury was caused by his own negligence in selecting a dangerous method of doing the work in which he was engaged, instead of the proper and obviously safe method of doing it; that is, by preparing a plank long enough to reach over and beyond the saws, so that while cutting the slots he could hold it down with his right hand, in front, against the cleat, and press it beyond the saws with his left, so that his hands would be out of the way of the saws, and that the slots should have been finished with the hand saw and the timber then fitted in the space in the table. Evidence was submitted by the defendant tending to show that this was a proper and safe method of doing the work on which plaintiff was engaged when injured.

Dean & Dean and C. E. Harris, for plaintiff in error. J. Branham, J. F. Hillyer, and McHenry & Maddox, for defendant in error.

FISH, C. J. (after stating the facts).

1. The court instructed the jury: "When an employe is confronted with two methods of doing a certain thing, the one safe, and the other dangerous, he owes the duty to his employer to pursue the safe method, and any departure from the safe method will prevent his recovery in the event he is injured; that is, any intentional or conscious departure, any departure that was inconsistent with ordinary care." Error was assigned on this charge, because there was no evidence to authorize it. As set forth in the preceding statement of facts, the defendant contended that the method adopted by the plaintiff in adjusting the saws was very dangerous, and that there was a safer way of doing it, and submitted evidence tending to prove such contention; so there was no merit in this assignment of error.

2. The court further instructed the jury: "If you find from the evidence that John Shellenberger was foreman in defendant's shop, or boss of the shop, but that he was helping and assisting the plaintiff in his efforts to repair and adjust that gang saw, I charge you, notwithstanding he was foreman, he is in that transaction a fellow

laborer; and if the plaintiff was injured in that way the defendant would not be liable to the plaintiff for such negligence." One of the exceptions to this charge was that there was no evidence that Shellenberger "was helping or assisting the plaintiff in his efforts to repair and adjust the gang saw." The defendant's witnesses denied that Shellenberger had anything to do with the machine in question, beyond instructing the plaintiff to adjust the saws; while the plaintiff's evidence was merely to the effect that after giving such instruction Shellenberger negligently started the gang saw. So it is clear there was no evidence to authorize the jury to find that Shellenberger was assisting the plaintiff in the actual work of adjusting the gang saw, and the exception is well taken.

3. Another charge excepted to is as follows: "I charge you again that if you find from the evidence that John Shellenberger was the foreman or boss of defendant's shop, subject with the plaintiff to the orders of a general manager, and that he did an act which is ordinarily in the scope of a laborer, and which resulted in the injury of the plaintiff, then he (Shellenberger) would be a fellow servant, and the plaintiff would not be entitled to recover." One of the exceptions to this charge was that there was no evidence that Shellenberger did an act which was ordinarily within the scope of a laborer or fellow servant. We think the charge was open to this exception. The evidence disclosed that the gang saw, which the plaintiff was adjusting when injured, was affixed to a table which was 3½ by 5 feet; that the shifter used for starting and stopping the machine which operated the gang saw was at the right-hand front corner of the table and within easy reach of the person operating the saw; and it is at least clearly inferable that it was the duty of the operator of the saw to start and stop the machine which ran it. Certainly there was no evidence that it was the duty of any other employé than the one operating the saw to start or stop such machine, or any circumstance from which it could be inferred that the starting or stopping of the machine was ordinarily within the scope of duty of any employé other than the operator of the saw.

4. The court also instructed the jury as follows: "I charge you that, when one enters the service of another, he assumes the usual and ordinary risks incident to the employment, such as the carelessness and negligence of a fellow laborer"—and that: "If you find, within the rule that I have given you, that John Shellenberger at the time was a fellow servant of the plaintiff, then, irrespective of what he did, or whether he was or was not negligent, the plaintiff could not recover." The error assigned upon these instructions was that there was no evidence that Shellenberger was a fellow servant of the plaintiff. The plaintiff, as we have set out in the state-

ment of facts, testified that Shellenberger was superintendent and general manager of the defendant's business in every way. Shellenberger, the only other witness on this subject, testified that King was president and general manager of defendant's business; that, while he (Shellenberger) did not work regularly on any of the machines in the shop, he occasionally, when it was necessary to do something that did not require any length of time, did work on them; that he had little time to work on machinery, as most of his time was required in directing the work of the employés, that he was foreman, and as such his duties were to employ hands, to lay out and plan work for them and set them at it, and to direct them what to do. He had general charge of the shop, and superintended the work therein. King directed him, and he directed the employés. Under this evidence, we are quite clear that Shellenberger was the representative or vice principal of the defendant company, and the mere fact that he occasionally worked on a machine when it was necessary to do something that required but little time did not constitute him a fellow servant of the plaintiff, if he, while not engaged in assisting the plaintiff to operate the saw or the machine which ran it, negligently started the machine without waiting for the plaintiff to start it himself.

The present case differs essentially in its facts from the cases of *McDonald v. Eagle & Phenix Mfg. Co.*, 67 Ga. 761; *Id.* 68 Ga. 839; *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227, 5 S. E. 492; *Cates v. Itner*, 104 Ga. 679, 30 S. E. 884; *Hamby v. Union Paper Mills Co.*, 110 Ga. 1, 35 S. E. 297; *Gunn v. Willingham*, 111 Ga. 427, 36 S. E. 804, and *Shepherd v. Southern Pine Co.*, 118 Ga. 292, 45 S. E. 220—in all of which it appeared that the boss or foreman, whose negligence caused the injury complained of, although having direction of the job, was actually laboring with and aiding the laborer injured by the boss's negligence, and it was consequently held that he was, while thus engaged, a mere fellow servant of the one injured. The rule that a servant is a vice principal of his master only when executing the absolute or nonassignable duties of the master has not been established in this state. See *Atlanta Cotton Factory v. Speer*, 69 Ga. 187, 47 Am. Rep. 750; *Taylor v. Georgia Marble Co.*, 99 Ga. 512, 27 S. E. 768, 59 Am. St. Rep. 238, and *Blackman v. Thomson-Houston Co.*, 102 Ga. 64, 29 S. E. 120.

Judgment reversed. All the Justices concur, except BECK, J., not presiding.

(124 Ga. 663)

SAVANNAH ELECTRIC CO. v. BELL.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. DEATH—ACTION—EVIDENCE—SUPPORT.

An action by a mother under Civ. Code 1895, § 3828, for the homicide of a child who contributed to her support and upon whom it was claimed that she was dependent, will not be defeated by proof that a tract of land, title

to which is in another child, is charged with the support of the mother, when, under the evidence, the jury were authorized to find that neither the income which might be derived from the use of the land, nor the sum which would probably be derived from an investment of the proceeds of a sale of the land, would place the parent in a condition of independence.

2. SAME—PARTIAL DEPENDENCE.

In a suit under the section of the Civil Code cited above, it is not necessary, in order for the plaintiff to recover, that she show by the evidence that she depended alone upon the deceased child for her entire support. It is sufficient if she established partial dependence upon the child's labor, accompanied by contributions therefrom to her maintenance.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 20, 43.]

3. SAME—INSTRUCTIONS.

When the charge of the judge is taken in its entirety, it presents a full and fair exposition of the law of the case. The extracts therefrom upon which error was assigned were not erroneous for any reason assigned, and the requests for instructions, which were refused, so far as legal and pertinent, were covered by the language of the charge.

4. SAME—EVIDENCE—DAMAGES.

The evidence authorized the verdict, and the amount assessed as damages cannot as matter of law be said to be excessive.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. S. Cann, Judge.

Action by Mary Bell against the Savannah Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. Mary Bell brought suit against the Savannah Electric Company, and alleged that a pole belonging to the company, and maintained by it, on the corner of St. Julian and Bull streets, in the city of Savannah, had been allowed to decay and become in a defective condition; that while the plaintiff's daughter, Mamie Bell, was passing by the pole, it fell to the ground, striking and killing her; and that she contributed to the plaintiff's support, and that the plaintiff was dependent upon her. The jury returned a verdict for the plaintiff of \$6,141.96. The defendant made a motion for a new trial upon the general grounds, and upon various special grounds containing exceptions to certain portions of the charge of the court and exceptions to refusals of the court to charge. The motion was overruled, and the defendant excepted.

Osborne & Lawrence, for plaintiff in error. Travis & Edwards and Adams & Adams, for defendant in error.

COBB, P. J. (after stating the foregoing facts). The following request in writing to charge was refused by the court, and is one of the grounds in the motion for a new trial: "If you should find from the evidence that the plaintiff conveyed a tract of land to her daughter Nancy M. Futch, the consideration of the same being the support of the plaintiff for and during the term of her natural life, and that Nancy M. Futch accepted the same, and you should find that in consideration of

the conveyance to her by James I. Bell of a tract of land in Bulloch county, Ga., the said Nancy Futch further agreed to support plaintiff for and during the term of her natural life, and that said tract of land was charged in said conveyance with the support of the said plaintiff, and that said Nancy Futch has never broken her contract, and that the said tract of land has never been subjected by the plaintiff to her support, and that said Nancy Futch has never given plaintiff cause to subject the same, but that same remains intact and still charged with the support of the plaintiff, June 25, 1904, then you should find in favor of the defendant." We do not think that this would have been a proper charge to give to the jury. The statute gives the parent a right of recovery for the death of a child upon whom she was in part dependent, and who contributed to her support. There may have been another source of revenue from which the parent derived a benefit, but this would not necessarily defeat the parent's right of action. *Daniels v. Railway Co.*, 86 Ga. 236, 12 S. E. 365. There may have been some person, other than the deceased, who was charged with the legal duty of supporting the parent, and against whom, in case of failure to render such support, an action would lie. But it was not the purpose of the statute to require, as a condition precedent to a parent's recovery for the homicide of a child, that such parent should exhaust every legal right she possessed against every person or all property charged with her support. The right of action consists in the contribution by the child and the fact that, under the circumstances as they existed at the time of the homicide, the parent was dependent upon such child in whole or in part for her support. *Central Ry. Co. v. Henson*, 121 Ga. 462, 49 S. E. 278; *Richmond & Danville R. Co. v. Johnston*, 89 Ga. 561, 15 S. E. 908; *Smith v. Hatcher*, 102 Ga. 160, 29 S. E. 162. We do not, of course, mean to hold that a parent possessed of property from which an ample support could be derived, but who, for reasons satisfactory to him, does not see fit to use this source of income as a means of support, and uses it for other purposes, and permits a child to contribute to his support, would be dependent in the meaning of the statute. But the mere fact that a parent is in a position where he has the legal right to call upon another person for support, and when in response to this call only a partial support would be the result, the parent would be dependent upon the contribution of the child which would be necessary in any event to complete the amount required for the maintenance of the parent. The fact that the parent does not call upon the other source of income would not under such circumstances bar a recovery. The present case is one where the rule which we now promulgate is peculiarly applicable. The jury were authorized to find under the evidence that the

land chargeable with the support of the plaintiff was not producing a sufficient amount for that purpose, and they were also authorized to find that, if this land had been sold at the highest proved value, this amount invested would not produce an income sufficient for the support of the parent. While the income in the one instance derived from the operation of the farm, or the income in the other instance derived from the investment of the purchase price, would have materially aided in the support of the plaintiff, it would not have rendered her independent of the contributions of the child, which were necessary in order to bring about a state of independency. It is not necessary, under the statute, that the child contributing to the support of the parent should be under any legal obligation to make the contribution. It is the fact of contribution, and not the legal obligation to make it, that the statute makes the ingredient of the cause of action. *Daly v. New Jersey Co.*, 155 Mass. 5, 29 N. E. 507.

2. Error is assigned upon an extract from the charge which instructed the jury that plaintiff would be entitled to recover if she were partially dependent for her support upon the deceased. A request upon the subject of dependency was refused in the language in which it was written; the word "partially" being interpolated before the word "dependent." Error is also assigned upon this. Under the ruling in *Central R. Co. v. Henson*, 121 Ga. 462, 49 S. E. 278, there was no error in the charge as given, nor in the refusal of the request in the language in which it was submitted.

3. Error was assigned upon the following extract from the charge: "The care of a prudent man varies according to circumstances, dependent upon the degree of danger. What is the precise legal intent of the term 'ordinary care' must, in the nature of things, depend upon the circumstances of each individual case. It is a relative, and not absolute, term. The degree of care and foresight which is necessary to use in any given case must always be in proportion to the nature and magnitude of the injuries which will be likely to result from the occurrence which is to be anticipated and guarded against." The objection to this charge was that under it the degree of care in a given case was declared to be in proportion to the nature and magnitude of the injury likely to result; it being contended that the true rule is that the degree of care is to be proportioned to the probability or improbability of the happening of the injury. This charge seems to have been compiled from the language used in the case of *Central R. Co. v. Ryles*, 84 Ga. 430, 11 S. E. 499, and the part which is objected to is in the language of *Chancellor Walworth*, in the case of *Mayor v. Bailey*, 2 Denio, 433, which was approvingly quoted by this court. Even if the criticism made by the counsel of this lan-

guage is well founded, we do not think that any error which might have been committed in the use of the language would be a sufficient reason for granting a new trial, when this extract from the charge is taken in connection with the entire charge on the subject. There were assignments of error upon other portions of the charge in reference to the duty resting upon the defendant and the degree of care that it was required to exercise; it being contended that the effect of the instructions complained of was to impose upon the defendant the exercise of extraordinary care. Of course, the defendant was not bound to this high degree of diligence. All that it was required to do in the erection and maintenance of its poles for the protection of travelers upon the street was that degree of care which would be ordinary care under the circumstances. When the charge of the judge is read as a whole, it is apparent that the instructions only required this degree of care to be exercised. The charge was full and fair, and, even if there were inaccuracies of expression therein, they were not of such a character as to mislead the jury on this controlling and important branch of the case. We find no error in any of the charges complained of. The requests to charge, so far as legal and pertinent, were covered by the charge.

4. It only remains to be determined whether there was evidence sufficient to authorize a finding against the defendant on the question of liability, and whether the damages assessed were excessive. The evidence on the question of liability was conflicting, and was of such a character as that a verdict for either party would have been authorized. It may be that the preponderance of the evidence was against the verdict; but viewing the evidence in its most favorable light for the plaintiff (which we are required to do at this stage of the case) we are not prepared to say that the verdict is entirely unsupported. According to the testimony of some witnesses, the pole was in an extremely rotten condition, and had been in use for some 15 years previous to the injury. If the pole was in the condition described by some of the witnesses who saw it after it fell, we think a jury would be authorized to find that its condition should have been discovered by the exercise of ordinary care; that is, the care which the law requires the defendant to exercise under all of the facts and circumstances of the case. The verdict was for \$6,141.96. It is claimed that this is excessive. The deceased was 34 years of age at the time of her death. She had an expectancy, according to the mortality tables, of nearly 32 years. She was earning from \$30 to \$35 per month at her regular work, and from \$2.50 to \$4 per week from the work done during the hours she was not engaged in the labor of her regular occupation. Using these figures, and calculating according to

the annuity table, the value of her life would be about \$6,300. Her capacity to earn money would increase during the first years of her expectancy, and would diminish during the latter years of that period. Her employer testified that as she grew more proficient her earning capacity would increase. The jury had a right to take this fact into consideration, and, as they seem to have done so, we do not feel authorized to hold as a matter of law that the verdict is excessive, simply because it is so near the amount which, according to the tables, she would be entitled to if her earnings continued the same during her expectancy, and her capacity to earn remained stationary. It may be that the jury acted upon the probability that the diminution in her capacity to earn during the latter period of her expectancy would be more than offset by her increase of capacity during the years of strength and activity. The verdict was full; but, as the jury in estimating the value of her life were authorized to take into consideration the matters above referred to, we do not feel justified in holding that as a matter of law the finding is excessive.

Complaint is made of the charge instructing the jury that "the present worth of a given sum is derived at by dividing the given sum by \$1, plus the legal rate of interest, 7 per cent, for the given time." This was recognized in *Kinney v. Folkerts* (Mich.) 48 N. W. 283 as a correct rule for estimating the present value of a sum payable in the future. But even if this were not a correct rule, the defendant is not in a position to complain of the instruction; for, if this rule had been applied, the finding for the plaintiff would have necessarily been a smaller sum. The plaintiff might well have complained of the instruction if the instruction did not contain the correct rule, but it furnished no ground of exception to the defendant. It was said, in the argument, that this case puts the statute contained in section 3828 of the Civil Code of 1895 to its severest test, inasmuch as the expectancy of the plaintiff was only nine years, and consequently the actual value of the life of the deceased to her was only a portion of the amount received. If the statute were one which was purely compensatory in its nature, this criticism would be well founded. The statute is, however, one that it intended to inflict a punishment upon wrongdoers who bring about the death of a human being by negligence. Lord Campbell's act and the various statutes in this country based upon it are nothing more than a method of punishing negligence by civil action.

The multiplication of fatal accidents and the practical impossibility of securing the punishment of mere carelessness by means of criminal proceedings were the causes which brought about the passage of Lord Campbell's act, as well as those which have followed it. 1 *Shearman & Redfield on Negligence* (5th Ed.) § 125. The General Assembly could have inflicted this punishment either by indictment or by *qui tam* action where the recovery would go to the public, but for reasons satisfactory to the lawmaking power the punishment is inflicted through the means of a civil action, and the penalty resulting is bestowed by the public upon those who have suffered directly by the act of the wrongdoer. The General Assembly has a right to impose upon a wrongdoer any penalty suitable as a punishment for the wrong he has committed, unless such punishment is prohibited by some constitutional provision. It is within the province of the General Assembly to impose double damages, treble damages, and the like upon one who has by his wrongful conduct damaged another. The different laws above referred to authorize certain persons to recover damages from one who wrongfully takes the life of another related to them in some way; the amount of damages being a specific sum, as is the case in some of the states, or a sum to be ascertained by a certain rule, as is the case of the statute in this state. This is nothing more nor less than a legislative imposition of a penalty upon the person who causes the death of another by negligence, the penalty to go to the person injured. While such legislation is punitive so far as the defendant is concerned, it is compensatory so far as the plaintiff is concerned, but exact compensation for the loss sustained is not the primary object of the statute, though in many cases this result may be brought about. That the Legislature may in such cases impose double damages seems to be unquestioned. *Littlewood v. N. Y. Ry. Co.*, 89 N. Y. 24, 27, 42 Am. Rep. 271. The damages recovered by the plaintiff in this case are intended incidentally to compensate her for the loss she has sustained, but primarily to punish the defendant for its negligence in bringing about the death of a human being. It may be that in this case exact compensation to the plaintiff would not have been an adequate punishment upon the defendant for the wrong it committed.

Judgment affirmed. All the Justices concurring.

(105 Va. 226)

WALKER'S ADM'R v. POTOMAC, F. & P. R. CO.

(Supreme Court of Appeals of Virginia. March 22, 1906.)

NEGLIGENCE—INJURIES TO CHILDREN—TURN-TABLES.

Under the common-law rule that a landowner owes no duty to a trespasser or bare licensee to have his land in a safe condition, a railroad company is guilty of no negligence in maintaining an unlocked and unfastened turntable on its premises, at a distance of 50 to 300 feet from public grounds, resulting in an accident causing the death of a child 12 years old, who trespassed thereon.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 84.]

Error to Circuit Court, Orange County.

Action by the administrator of Bernard Lee Walker against the Potomac, Fredericksburg & Piedmont Railroad Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Morton & Shackelford and Meredith & Cocke, for plaintiff in error. St. Geo. R. Fitzhugh and J. G. Williams, for defendant in error.

BUCHANAN, J. This action was instituted by the plaintiff in error against the defendant company to recover damages for the death of his intestate, caused by the alleged negligence of the defendant.

The evidence shows that the defendant has a turntable on its own premises near Orange Courthouse, located about 220 feet from its station or depot; about 360 feet from the public road, which runs from the depot to the village of Orange Courthouse; close by a millroad, which is not public; 50 or 60 feet from what is known as the "Horse Show grounds"; and about 340 feet from any inhabited house; and in an open and unoccupied field; that boys were in the habit of playing ball on the Horse Show grounds, between which and the railway land there was no fence; that boys frequently rode on the turntable, and had once been seen riding on it by the depot agent; that some years before the accident two boys had been injured in playing with the turntable, which was of the ordinary kind in use, and was neither locked nor fastened; that on the Sunday evening of the accident, the plaintiff's intestate, who was a little over 12 years of age, with two other boys of about the same age, was pushing the turntable around the track preparing to jump on it and as he did so one of his feet was caught between the rails and mashed, causing lockjaw, from the effects of which he died.

Upon the trial of the cause, there was a verdict and judgment in favor of the defendant. To that judgment this writ of error was awarded.

The only question involved in this writ of error is whether or not under the facts of the case, which are not disputed, the defendant was guilty of negligence in leaving the

turntable in the place where it was, on its own premises, unfenced and unfastened.

The general rule is that a landowner does not owe to a trespasser (and the same is true of a bare licensee) the duty of having his land in a safe condition for a trespasser to enter upon. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes, and he takes upon himself the risks of the condition of the land, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant being present could have prevented the injury by the exercise of ordinary care after discovering the danger. *Norfolk & Western Ry. Co. v. Wood*, 99 Va. 156, 158, 159, 37 S. E. 846; *Hortenstein v. Va.-Carolina Ry. Co.* 102 Va. 914, 918, 47 S. E. 996; *Williamson v. Southern Ry. Co.*, 104 Va. —, 51 S. E. 195; *Bishop on Non-contract Law*, § 845; *Cooley on Torts* (2d Ed.) 791-794.

It is not denied, as we understand the counsel for the plaintiff, that such is the common-law doctrine as to adult trespassers and bare licensees; but his contention is that under certain circumstances, such as are disclosed by this record, it is not the rule as applied to children. To sustain that contention, he relies upon the case of *Sioux City R. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and the cases which follow it.

While these cases, which are known as "The Turntable Cases," fully sustain the plaintiff's contention, there is a remarkable conflict of authority upon the subject. The doctrine announced in the *Stout Case* has been discussed in numerous cases, by the appellate courts of many of the states of this country, with the result that there are many authorities sustaining the doctrine in its broadest sense; while many utterly repudiate it, and others give it a qualified recognition, and practically limit it to railroad turntable cases. A question or problem, which has given rise to such a wide divergence of opinion, is not of easy solution.

As this is the first case involving this precise question which has ever come to this court, so far as the reported decisions show, we are at liberty to follow that line of decisions which, in our judgment, is more nearly in accord with settled principles of law, and is sustained by the better reason.

In order for the plaintiff to recover in this case, it must appear that the defendant company owed his intestate some duty which it failed to discharge; for where there is no duty there can be no negligence. *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 158, 159, 37 S. E. 844; *Hortenstein v. Va.-Car. Ry. Co.*, 102 Va. 914, 918, 47 S. E. 996; *Carson Lime Co. v. Rutherford*, 102 Va. 252, 46 S. E. 804.

As before stated, the common law imposes no duty upon a landowner to use care to keep his premises in such condition that trespassers and bare licensees going thereon

may not be injured. This is unquestionably the rule as to adults, and the weight of authority, as it seems to us, shows that it is the rule as to children.

The cases cited in the case of *Sloux City R. Co. v. Stout*, to sustain the opposite view, do not, as it seems to us, do so. Those cases come within other rules, or within well-defined exceptions to the general rule that a landowner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger. This is clearly shown, we think, by the Supreme Judicial Court of Massachusetts, in the case of *Daniels v. N. Y. & N. E. R. Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 249, 26 Am. St. Rep. 253, and by Judge Peckham (now of the Supreme Court of the United States), in delivering the opinion of the Court of Appeals of New York, in *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615.

The conclusion reached in those cases is fully sustained by the following cases (and many more might be cited), which are all "Turntable Cases," or cases in which the doctrine of those cases was involved: *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Delaware, etc., Ry. Co. v. Reich* (N. J.) 40 Atl. 682, 41 L. R. A. 837, 68 Am. St. Rep. 727; *Uttermohlen v. Boggs Run, etc., Co.* (W. Va.) 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884; *Ryan v. Towar* (Mich.) 87 N. W. 644, 55 L. R. A. 810, 92 Am. St. Rep. 41; *Paolino v. McKendall* (R. I.) 53 Atl. 268, 60 L. R. A. 183, 96 Am. St. Rep. 736; *Dobbins v. Missouri, etc. Ry. Co.* (Tex.) 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856; *Savannah, etc., Ry. Co. v. Beavers* (Ga.) 39 S. E. 82, 54 L. R. A. 314.

The same conclusion was reached by this court in *Clark v. City of Richmond*, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281. The city had made an excavation upon the land of another, into which a child of six years fell and was injured. In denying the child the right to recover in that case it was said, that were the excavation is so near the highway that a traveler, by making a false step or being affected by sudden giddiness, might be thrown into the excavation and injured, there would be a liability. "But if, in order to reach the place of danger, the party injured must become a trespasser upon the premises of another, the case will be different; for, in such a case, there is no breach of duty from which the liability to respond in damages can result."

But in some of the "Turntable Cases" the right to recover is maintained upon the doctrine of constructive invitation; that is, that if a person is allured or tempted by some act of a railroad company to enter upon its lands, he is not a trespasser, and it is held that leaving a turntable unfastened or unguarded, under circumstances similar to those disclosed by this record, is such an act.

One of the cases cited and relied on to sustain this contention is the case of *Bird v. Holbrook*, 4 Bing. 628. The defendant in that case, for the protection of his property, some of which had been stolen, set a spring gun without notice in a walled garden some distance from his house. The plaintiff, who climbed over the wall in pursuit of a stray fowl, having been injured, it was held that the landowner was liable. The express object in setting the spring gun was to inflict injury—to do an intentional wrong.

Another case relied on is that of *Townsend v. Wathen*, 9 East, 277. That was a case where a landowner had set traps on his premises near the highway, and baited them with decaying meat, so that its scent would extend not only to the highway, but beyond to the private premises of the plaintiff, whose dogs, scenting the meat, came upon the defendant's premises and were caught in a trap and thereby killed. It was held in that case that a man had no right to set traps of a dangerous description in a situation to invite, and for the very purpose of inviting, his neighbor's dogs, as it would compel them by their instinct to come into his traps. The act of the defendant in that case was not in the prosecution of his legitimate business; but, as the court said, was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his premises.

The gravamen of both these actions was the wrongful intention of the defendants. To liken the case of a railroad company erecting a turntable on its own premises for its own necessary purposes in the regular conduct of its business, with no desire or intention to injure any one, to the case of a landowner setting spring guns or traps on his land for the express purpose of doing an unlawful or malicious injury, is as it seems to us to lose sight of the difference between negligence and intentional wrongdoing. *Walsh v. Fitchburg, etc., R. Co.*, supra; *Dobbins v. Mo. Kansas & Tex. Ry. Co.* (Tex.) 41 S. W. 62, 38 L. R. A. 573, 576, 66 Am. St. Rep. 856.

"The viciousness of the reasoning," said the Court of Appeals of New Jersey, in the case of *Delaware, etc., R. Co. v. Reich*, supra, in discussing this question. "which fixes liability upon the landowner because the child is attracted, lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As said by Mr. Justice Holmes (now a member of the Supreme Court of the United States), in *Holbrook v. Aldrich*, 168 Mass. 16, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. 364, 'Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass, because there is a temptation to commit it,' or hold parties bound to contemplate infraction of property rights, because the tempta-

tion to untrained minds to infringe them might have been foreseen."

No landowner supposes for a moment that by growing fruit trees near the highway, or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a landowner, as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children, and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises.

This doctrine of constructive invitation is not sustained, as it seems to us, by the English cases cited to sustain it, and has been utterly rejected by the highest courts of New Hampshire, Massachusetts, New York, New Jersey, Rhode Island, Michigan, and West Virginia. In several other states it is limited in its operation to turntable cases. See *Frost v. Eastern, etc., Ry. Co.*, supra; *Daniels v. N. Y. & N. E. R. Co.*, supra; *Walsh v. Fitchburg, etc., R. Co.*, supra; *Delaware, etc., Ry., Co. v. Reich* supra; *Uttermohlen v. Boggs Run, etc., Co.*, supra; *Ryan v. Towar*, supra; *Paolino v. McKendall*, supra; *Dobbins v. Missouri, etc., Ry. Co.*, supra; *Savannah, etc., Ry. Co. v. Beavers*, supra.

The maxim, "*Sic utere tuo ut alienum non lædas*," has been quoted in some of the "Turntable Cases," and relied on as affording a decisive reason, or ground, for establishing a duty upon the railway company, and as per se justifying a recovery against it. There may be more, but there is one conclusive answer to the argument based on that maxim, and that is, that it refers only to acts of the landowner, the effects of which extend beyond the limits of his property.

In *Deane v. Clayton*, 7 Taunton, 489, Gibbs, J., said: "I know it is a rule of law that I must occupy my own so as to do no harm to others, but it is their legal rights only that I am bound not to disturb, subject to this qualification I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of [their] wrongs that I am bound to regard."

In *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478, 479, where an effort was made to apply the maxim to sustain an action by the owner of cattle, which had trespassed upon the lands of another, and had been injured by reason of the unsafe condition of the property, Chief Justice Gibson said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors, who do not uninvited interfere with it, or enter upon it. * * * If it

were not so, a proprietor could not sink a well, or a saw pit, dig a ditch or mill race, or open a stone quarry or a manhole on his land, except at the risk of being made responsible for consequential damage from it, which would be a most unreasonable requirement." *Ryan v. Towar*, at page 314, 55 L. R. A., page 648, 87 N. W. (92 Am. St. Rep. 41). See article by Judge Smith on Landowners' Liability to Children, etc., 11 Harvard Law Review, 349-373, 434, 448, in which there is a valuable discussion of that whole subject.

Upon neither of the grounds relied on do we think that the common law makes it the duty of a landowner to have his premises in a safe condition for the uninvited entry of adults or children, nor to take affirmative measures to keep them off of his premises or to protect them after entry; and this view is strengthened by the fact that so many of the courts which have adopted the doctrine of the "Turntable Cases" restrict it as far as possible to turntables, and refuse to follow it to its natural and logical consequences. For if it be a rule of the common law that a landowner, who in the reasonable and lawful use of his property, makes changes thereon which have the double effect of attracting young children to the land, and at the same time exposing them to serious danger, is guilty of negligence, unless he exercises reasonable care for their safety, either in keeping them off the land, or in protecting them after their entry thereon, the rule would apply, not only to railroad companies and their turntables, but to all landowners, who in the use of their land, maintain upon it dangerous machinery, or conditions which present a like attractiveness and temptation to children. The common law applies alike to all landowners under like conditions, and it would be an anomaly to hold that a doctrine or rule of the common law, which had its origin before there were either railroads or turntables, applies only to railroad companies in the use of their lands upon which they have dangerous machinery. While the courts should and do extend the application of the common law to the new conditions of advancing civilization, they may not create a new principle or abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of the needed laws is the province of the legislature, and not of the judicial department of the government. *Connelly v. Western Union Tel. Co.*, 100 Va. 59, 40 S. E. 618, 53 L. R. A. 663, 93 Am. St. Rep. 919. The Legislature can change the common law as far as may be necessary to regulate the use of turntables and other dangerous appliances, and leave untouched the common-law rights of the ordinary landed proprietor.

The Court of Appeals of New Jersey, in refusing to follow the doctrine of the "Turntable Cases," said, that the doctrine would re-

quire a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them, which presented a like attractiveness and furnished a like temptation to children. "He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water; * * * he who leaves his mowing machine, or dangerous agricultural implement, in his fields; he who maintains a pond in which boys may swim in summer, and on which they may skate in winter—would seem to be amenable to this rule of duty. Climbing, playing at work, swimming, and skating, are attractions almost irresistible to children, and every landowner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them, the Turntable Cases, if correct, would charge the owner * * * with the duty of taking care to preserve young children thus tempted on his farm from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, causes strong suspicions of the correctness of the doctrine, and leads us to question it." Delaware, etc., *R. Co. v. Reich*, supra; *Turess v. N. Y. etc., R. Co.*, 61 N. J. Law, 314, 40 Atl. 614; *Uttermohlen v. Boggs Run, etc., Co.*, supra.

The Supreme Court of Minnesota, which was one of the first to give its adherence to the turntable doctrine (*Keffe v. Milwaukee etc., Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393) in the subsequent case of *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597, through its Chief Justice said: "The doctrine of the 'Turntable Cases' is an exception to the rule of nonliability of a landowner for accidents from visible causes to trespassers on his premises, and if the exception is to be extended to this case [a dangerous excavation filled with water on a city lot, in which a little boy had been drowned],—then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises child-proof."

We will conclude this opinion, with the following extract from the very able opinion of Judge Denman, speaking for the Supreme Court of Texas (another of the states which had followed the turntable doctrine) in the case of *Dobbins v. Missouri, etc., Ry. Co.*, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856, as expressing our views: "The difficulty," he said, "about those cases [Turntable Cases] is that they either impose upon owners of property a duty not before imposed by law, or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In those cases the courts yielding to the hardships of individual instances where owners have been guilty of moral, though not legal wrongs, in

permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities, to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law, and assumed legislative functions, imposing a duty where none before existed. As a police measure the law-making power may, and doubtless should, without unduly interfering with or burdening private ownership of land, compel the inclosure of pools, etc., situated on private property in such close proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal or civil liability, or both, for failure to comply with the requirements of such law. When such a duty is imposed the courts may properly enforce it or allow damages for its breach, but not before."

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

CARDWELL, J., absent.

(33 W. Va. 262)

STATE v. LOWE et al.

(Supreme Court of Appeals of West Virginia.
March 6, 1906.)

TAXATION—SALE BY STATE—REDEMPTION—CONTEST.

In a suit by the state to sell land as forfeited in the name of a certain owner, if another adverse claimant resists redemption asked by the owner of the forfeited land, on the ground that it is within his land, *held*, under an older grant from the state, the burden of proof rests on such contestant of redemption to prove that the land of the person asking redemption lies within the bounds of his land.

(Syllabus by the Court.)

Appeal from Circuit Court, Wayne County.

Bill by the state against Mary O. Lowe and others. Decree for the state, and E. W. Clark and others appeal. Affirmed.

Vinson & Thompson, for appellants. Campbell, Hefley & Davis and William Fry, for the State.

BRANNON, J. The state filed a bill in the circuit court of Wayne county for the sale of a tract of 500 acres of land conveyed to M. J. Ferguson as forfeited for nonentry on the taxbooks, stating that the tract was claimed by the Guyandotte Coal Land Association, and claimed also by William Fry. Clark and others as trustees for said association, filed an answer denying forfeiture of the tract, and setting up title to it. The trustees claimed the 500 acres as included in a tract of 31,000 acres patented to Samuel Smith, 29th June, 1797, which vested in said trustees by regular chain of conveyances from said patentee. William Fry filed a petition asserting that the 500 acres was granted by Virginia, by patent, 1st August, 1857, to Milton J. Ferguson and Hurston Spurlock, and that he was

the owner by regular chain of conveyances from the patentees, and admitting forfeiture of the 500 acres, and praying to be allowed to redeem the land from such forfeiture. The grant to Smith was an inclusive grant; that is, there were included within its exterior bounds, and excepted from its operation, 24,502 acres, in addition to the 31,000 acres. A decree was entered allowing Fry to redeem, from which the trustees appeal.

The question is whether Fry showed a good title to redeem, under that clause of section 16, c. 105, Code 1890, demanding of a redeemer full and satisfactory proof that "at the time the title to said land vested in the state the said former owner had a good and valid title thereto, legal or equitable, superior to any other claimant thereof." *State v. Jackson*, 58 W. Va. 538, 49 S. E. 465, Syl., point 7. The trustees resist redemption of the Fry land by saying that the Fry land is covered by the Smith grant, the elder grant, and that Fry has not good title. On which side of this contest between Fry and the trustees lies the burden of proof? Must Fry prove that his tract does not lie inside the Smith grant? Or must the trustees prove that Fry's tract lies inside the Smith grant? Fry, having shown title from the state, admitted, as an agreed fact, to be a title superior to any other, if it does not lie inside the older Smith grant, has shown right to redeem, unless his land is covered by the Smith grant. The trustees resist this redemption. They must defeat this right of redemption. If their right does not defeat redemption, it must be granted. We hold that the trustees must locate both the Smith grant and the Fry land, as without so doing it cannot be found that the Smith grant covers the Fry land. If the contest were between the state and the trustees, if the trustees were resisting the sale of the 500 acres as forfeited land because they had the better title, they must show it by proving that their title covers the 500 acres. It is the same title which the state seeks to sell that Fry seeks to redeem, and thus it seems that the trustees, to defeat redemption, must prove what they would have to prove to defeat a sale. If the trustees were suing Fry in ejectment, they would have to show that his land lies within their grant. The trustees are resisters of redemption. Can they resist this plain right without showing cause against it? They argue that the statute demands that Fry show valid title in order to redeem; that he asserts good title, and holds the affirmative position. The answer is that Fry has shown a grant from the fountain of title, the state, clearly good, unless a better one is shown. Besides, it is an agreed fact that this grant confers a title superior to any other, unless it is included in the Smith grant. He who would defeat the right of redemption must show

that Fry's land does lie within the Smith grant.

The burden thus resting on the trustees to identify and locate both tracts, they have utterly failed to do so. They prove not one corner monument of the Smith survey or line monument. Not a tree, corner, or line tree is proven as belonging to the survey. Not a witness says that he ever tested or even looked upon a tree marking this old survey. Not a word from the lips of an old man, living or dead, who saw or knew of any corner or line tree, or other monument, is proven. No tree or monument is shown to bear a reputation as a corner to the survey. No word from any one having peculiar means of knowledge, or interest in knowing the boundary, is shown. Not even hearsay is proven. Two witnesses say the 500 acres lies within the Smith grant; but, when cross-examined, they say they so understand from some maps, modern ones, made by the trustees showing what lands they held or claimed, for the purpose of taxation. Of course, they were not admissible, because self serving and hearsay, and for other reasons. When the witnesses referred to were asked whether they, of their personal knowledge, knew the 500 acres to be within the land claimed by the trustees, they answered "No." In short, the only two witnesses of the trustees do not pretend to know, as a matter of fact, the location of the old survey of Smith. The same may be said as to the 500 acres. There is a total failure to locate the tracts. This location is a necessity. He who sues for land must locate its bounds on the ground. *Logan's Heirs v. Ward*, 52 S. E. 398, 57 W. Va. —. This ends the case. It is useless to discuss the question whether, if the 500-acre tract were shown to be inside the exterior bounds of the Smith grant, the burden would lie on Fry or the trustees to prove that it is, or is not, within the land excluded by the Smith grant for prior claims.

We therefore affirm the decree, allowing the redemption to have such force as the law gives it.

(59 W. Va. 197)

STATE v. DILLARD.

(Supreme Court of Appeals of West Virginia.
March 6, 1906.)

1. HOMICIDE — SELF-DEFENSE — BURDEN OF PROOF.

Upon a trial for murder, where the killing is admitted, and the defendant relies upon self-defense, the burden is upon him to establish such defense to the satisfaction of the jury.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 278.]

2. SAME.

Where, upon a trial for murder, the evidence introduced by the state to establish the homicide tends to show extenuating circumstances, this does not relieve the defendant of the burden of establishing self-defense, if it is relied on, to the satisfaction of the jury; but

the circumstances so shown are proper to be considered by the jury in arriving at their verdict.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, § 154.]

8. SAME—INTOXICATION AS A DEFENSE.

Upon a trial for murder, it is not error to refuse to instruct the jury that, if they believe the prisoner, at the time of the killing, was so intoxicated as to be incapable of deliberation and premeditation, he should not be found guilty of murder in the first degree, where there is evidence tending to show that the defendant had previously designed the killing, and became voluntarily intoxicated for the purpose of committing the offense. The instruction should also present this theory to the jury.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 45, 605.]

4. CRIMINAL LAW—INSTRUCTIONS.

Where the jury are instructed upon the law relating to a particular subject, it is not error to refuse to give other instructions to the same effect, as the court need not repeat instructions already substantially given.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

5. HOMICIDE—APPEAL—REVIEW.

It is peculiarly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of a jury adverse to that defense will not be set aside, unless it is manifestly against the weight of the evidence.

(Syllabus by the Court.)

Error to Circuit Court, Mercer County.

Lewis Dillard was convicted of murder, and brings error. Affirmed.

A. M. Sutton, for plaintiff in error. C. W. May, Atty. Gen., and Frank Lively, for the State.

SANDERS, J. This a writ of error to a judgment of the criminal court of Mercer county, convicting the defendant, and sentencing him to the penitentiary for the term of 10 years, for the murder of Bob Banner. The prisoner, upon his trial, asked the court to give to the jury 11 instructions, 4 of which were given; but the court refused to give instructions 5 to 11, which ruling of the court, in refusing said instructions, is assigned as error.

While the refusal of instruction No. 3 is assigned as error in the petition, still counsel for the defendant, in his brief, does not advance any reason in support of this assignment; in fact, it is not insisted that it was error to reject this instruction, and, inasmuch as it appears to have been properly refused, it will not be further referred to.

As instructions 6 and 8 present practically the same question, they will be dealt with collectively. The defendant admits the killing, and relies upon self-defense to excuse him, and these instructions present the theory that, if there is a reasonable doubt as to whether or not the killing was done in self-defense, the jury should acquit. It has always been the law in this state, which has been reiterated time and time again, that, where a homicide is proven and the prisoner

relies upon self-defense, the burden is upon him to establish such defense by a preponderance of the evidence. There is no principle of criminal law better settled and more firmly intrenched than this, and to have given these instructions would have been a violation of this fundamental rule. But, in justice to counsel for the defendant, it is proper to say that in his brief he admits the stability of this doctrine, but claims that it is inapplicable here; that it only applies where the homicide has been proven, and where nothing else appears from the evidence of the state; and that it has no application where the state, in proving the homicide, presents facts which negative malice, and which go to show that the act was justifiable. We fail to appreciate the distinction undertaken to be drawn. The fact that the state, in proving the homicide, shows facts from which it may be concluded that there is no malice, or that the killing was justifiable, cannot alter the rule that, where self-defense is relied upon, it must be established by a preponderance of the evidence. But these facts introduced by the state in proving the corpus delicti, and which at the same time show, or tend to show, want of malice, or that the killing was in self-defense, are to be considered in determining whether or not the evidence does preponderate in favor of self-defense. When the homicide is shown or admitted, it is then for the jury to determine from all the facts whether or not self-defense has been shown, and it is immaterial whether the evidence relied upon to show such defense is disclosed by the witnesses for the state or those for the defendant; for the jury, at last, must say, from all the evidence, whether or not such defense has been established by a preponderance of the testimony. State v. Cottrill, 52 W. Va. 363, 43 S. E. 244; State v. Johnson, 49 W. Va. 684, 39 S. E. 665; State v. Hatfield, 48 W. Va. 561, 37 S. E. 626; State v. Staley, 45 W. Va. 792, 32 S. E. 193; State v. Jones, 20 W. Va. 764.

Instruction No. 7 tells the jury that the evidence that the defendant was reputed to be a peaceable and quiet citizen is not to be lightly disregarded by them, and that the production of such evidence will be sufficient upon which to base a reasonable doubt as to the guilt of the accused. One fault we find in this instruction is that it invades the province of the jury by telling them the weight which should be given to the evidence. They are told that the evidence is not to be lightly disregarded. As to how the evidence should be regarded, and what weight it should have, should be left entirely with the jury. To be by them taken and considered in connection with all the other facts and circumstances of the case. Then it assumes that the good character of the defendant has been shown, and states that the mere fact that one accused of crime produces evidence of good character may be sufficient evidence on which to base a reasonable doubt as to his guilt.

A court should not invade the province of the jury by telling them what weight should be given to the evidence. It is the duty of the jury to consider such evidence in connection with all the other evidence and circumstances of the case, and to give it just such bearing and weight as it should have. It is peculiarly within their province to determine its true weight and credibility. To have given this instruction would have been tantamount to telling the jury that the defendant had shown good character, and therefore it of itself is sufficient to create a reasonable doubt as to his guilt.

It is undertaken to be presented by instructions Nos. 9 and 10 that if the defendant, at the time of the killing, was in such condition from intoxication as to render him incapable of deliberation and premeditation, he should not be found guilty of murder in the first degree. When there is evidence tending to show that one who is charged with murder was so intoxicated at the time of the killing as to render him incapable of deliberation and premeditation, he is entitled to an instruction presenting this theory to the jury. It is the law that, where one is so intoxicated as to be incapable of deliberation and premeditation, he cannot be guilty of murder in the first degree. But this rule does not apply to one who has formed a willful, deliberate, and premeditated design to take the life of another, and, in pursuance of such design, voluntarily makes himself drunk for that purpose, and while in that condition accomplishes the act which he previously designed. *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *State v. Davis*, 52 W. Va. 224, 43 S. E. 99. The evidence of the state shows that, just before the killing, the defendant had been drinking, and that, just after the killing, he was very much intoxicated. He denies that he was intoxicated at all, and in his testimony does not rely upon the fact that he was incapable of deliberation or premeditation, but seeks to justify the act upon the ground of self-defense. This is a binding instruction. By it the jury are told that, if they believe from the evidence that the defendant, at the time of the killing, was so intoxicated as to render him incapable of deliberation and premeditation, they should not find him guilty of murder in the first degree. This proposition would be correctly presented, if there were no facts or circumstances showing that the defendant had previously designed to take the life of the deceased, and had voluntarily become drunk for that purpose; but where there is any evidence to show that he become intoxicated for this specific purpose, after having previously designed the killing, then such an instruction would not be proper without presenting this theory also. In other words, this instruction practically says that under any and all circumstances, where one charged with murder is shown to

have been, at the time of the killing, so intoxicated as to destroy his capacity for deliberation and premeditation, a first degree verdict cannot be found, while it is only true if these facts, only, exist, and it does not appear that the defendant became drunk voluntarily, for the purpose of committing the act. Then, is there any evidence which would call for this additional theory to be presented by this instruction? The facts are that an intense unfriendly feeling had, for some time, existed between the defendant and the deceased. That it was so bitter that each had frequently threatened to take the life of the other, and that on the day of the killing the defendant, in company with another, went to the town of Pocahontas and procured whisky, and on his return went to the home of the deceased and took his life. These facts are sufficient to call for the embodiment, in this instruction, of this additional provision. And, moreover, the refusal of this instruction, assuming that the defendant was entitled to it, is certainly not prejudicial error, because the verdict is for murder in the second degree, and the only purpose of the instruction is to reduce the grade of the offense from murder in the first to murder in the second degree.

By instruction No. 11 it is attempted to define extenuating circumstances. This instruction tells the jury that extenuating circumstances, in order to reduce the degree of criminal guilt, as contemplated in law, are such circumstances as would lead a reasonable man, in self-defense, to repel an attack by an enemy, or of entering into a combat under hot blood and provocation. This instruction was properly rejected. In the first place, it is clearly misleading, and, in the second place, it was completely covered by instruction No. 4, given for the defendant. The court, in that instruction, told the jury that, if the defendant was attacked by another in such manner as to place him in danger of his life or great bodily harm, and he believed, and had good reason to believe, that he was in danger of death or great bodily harm by reason of such attack, he had a right, under the law, in repelling such attack, to use such force as was necessary, even to the taking of life.

The defendant also assigns as error that the court gave five instructions for the state, but in argument there is no objection pointed out to instructions 1 and 2, which, we think, were clearly proper, and the objection to 4 and 5 is that the burden of proof never shifted to the defendant, and that the presumption of malice was negatived by the state's own evidence, or, at least, that it left the question of maliciousness and criminal intent uncertain. What was said in reference to instructions 6 and 8, offered by the defendant, and refused, is a sufficient answer to the objection pointed out to these instructions.

Instruction No. 3 is complained of, because

It is merely an abstract definition of a reasonable doubt, and is not limited to the case. This instruction tells the jury that a reasonable doubt is not a mere vague or fanciful doubt, but that it is one for which a reason can be given, and that, if they doubt as men, they should doubt as jurors, and that, if they do not doubt as men, they should not doubt as jurors. This instruction is not subject to the criticism advanced. It seems to present to the jury a proper definition of a reasonable doubt. This the state was entitled to ask, and the jury to have, at the hands of the court. An instruction of practically the same import was held good in *State v. Kellison*, 56 W. Va. 697, 47 S. E. 166.

Complaint is made that the court, over the objection of the defendant, permitted the witness J. H. Mitchell to testify that the deceased, on the morning of the day he was killed, told him that he had been injured in the mines, and would go home and not return to work that day. This evidence was not material, but, at the same time, it could not have in the slightest affected the finding of the jury. And, then, again, the fact that he was injured that morning, and was not working that afternoon on account of the injury, was proved by Mary Coleman, a witness for the state, and the fact that Banner said he was hurt and would not work was simply a reiteration of that fact, and that he was hurt is not controverted or attempted to be disputed.

It is claimed that the court should have allowed Dr. J. P. McNutt to testify as to the seriousness of the wound given by the officer Huff to the defendant when he was arrested, to show the feeling or prejudice of the officer, who was introduced as a witness. We cannot see how the seriousness of the wound would tend to show the feeling of the witness toward the defendant. The fact that the officer shot him twice is in evidence. If the purpose of this testimony is to show that Huff entertained a hostile feeling toward the defendant, and if it could be used for this purpose, the fact of the shooting would be that which would demonstrate it, and not the seriousness of the wound. This evidence was properly rejected. And, even though this evidence was admissible on the ground that the defendant had the right to show it for the purpose of establishing the fact that the officer entertained an ill feeling toward him, yet its rejection could not be prejudicial to him, because the evidence of the officer has no bearing on the case. He only states that he was summoned to assist in arresting the defendant; that they went to Simmons, found the defendant in some weeds, and that he was lying down on his right side, with his feet toward the officer, and with his pistol pointed toward him. This evidence could in no possible way have any bearing upon the question at issue.

As the case now stands, we have only to

inquire whether the verdict is supported by the evidence, as the refusal of the trial court to set it aside is assigned as error. This was peculiarly a jury question; they being the triers of the facts and invested with the power to weigh the evidence and test the credibility of witnesses. *State v. Newman*, 49 W. Va. 724, 39 S. E. 655. They have the right to believe or disbelieve witnesses, and possessing this power, and having found a verdict against the defendant, which was approved by the trial court, it will not be disturbed, unless it be very plain that it is erroneous. The killing is admitted, and the defendant relies upon self-defense to excuse him. He presented this theory of his case to the jury, which was discredited by them, after having heard all the evidence, and having seen the witnesses. They listened to the defendant's version of the affair, and, having found against him, this court cannot, under the well-settled legal rules, disturb their finding.

We not only conclude that the verdict cannot be set aside, because of a lack of sufficient evidence to support it but are constrained to view it as eminently just; and the judgment of the criminal court is therefore affirmed.

(59 W. Va. 188)

STATE v. DORR et al.

(Supreme Court of Appeals of West Virginia.
March 6, 1906.)

1. BAIL—FORFEITURE.

A recognizance given in a criminal proceeding, conditioned for the appearance of the accused before a circuit court on the first day of a certain term thereof, and that he will not depart thence without leave of court, can only be forfeited by calling the accused upon the recognizance at some time during the term, and if he fails to appear, by entering his default of record.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Bail, § 337.]

2. SAME.

If the term at which the accused is recognized to appear adjourns without his default having been entered of record, the recognizance cannot thereafter be forfeited, and the recognizers will be discharged from liability thereunder.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Bail, § 338.]

3. SAME—PROCEDURE BY SCIRE FACIAS.

In a proceeding by scire facias upon a recognizance given in a criminal proceeding, oyer of the recognizance and of the record upon which it is founded, may be demanded.

(Syllabus by the Court.)

Error to Circuit Court, Webster County.

Action by the state against C. P. Dorr and P. M. McElwain. Judgment for defendants, and plaintiff brings error. Affirmed.

C. W. May, Atty. Gen., Frank Lively, E. H. Morton, and W. L. Wooddell, for the State. Hall Bros. and W. S. Wysong, Jr., for defendants in error.

SANDERS, J. William Kesler, being charged with a felony, had his preliminary hearing

before Vincent Hamrick, a justice of Webster county, on the 23d day of August, 1904, which resulted in the prisoner being committed to jail to await the action of the grand jury. On the 1st day of September next thereafter, a recognizance in the penalty of \$500 was executed by Kesler, with the defendants, C. P. Dorr and P. M. McElwain, as his sureties, conditioned for the appearance of the prisoner before the judge of the circuit court of said county on the first day of the next term thereafter, and not to depart without leave of court, and to answer the action of the grand jury upon such charge. At the term of court at which the prisoner was recognized to appear, which was on the 11th day of November, 1904, an indictment was found and returned against Kesler upon the charge for which he was examined and committed by the justice. At the next term of court thereafter, which was on the 11th day of January, 1905, Kesler was called upon his recognizance, and he not appearing, his default was entered, and a scire facias awarded against the defendants, C. P. Dorr and P. M. McElwain, his sureties, requiring them to appear before the court on the first day of the next term, to show cause why judgment should not be entered against them upon the recognizance. The scire facias being issued and returned, the defendants appeared and craved oyer of the recognizance and record, which it was claimed showed the forfeiture thereof, and of the indictment, and record showing its finding, and thereupon demurred to the scire facias, which demurrer was sustained, and the action dismissed, to which judgment the state applied for and obtained a writ of error.

There are several reasons advanced by the defendant in error to support the action of the court in sustaining the demurrer and dismissing the action; one of which is that the bond was given for the appearance of Kesler at the next term of the circuit court thereafter, which was held in November, 1904, and at that term he was not called upon his recognizance, and his default entered of record, and not having been so called, the fact that he was called at the succeeding term, held in January, 1905, and his default entered, could not operate to forfeit the recognizance. In disposing of this question, it will be necessary to know what the circuit court, in passing upon the demurrer, should have considered, as it does not appear from the scire facias when the default of Kesler was entered, and the writ awarded. While it is not assigned as error in the petition, yet in the argument, upon behalf of the plaintiff in error, it is insisted that the defendants in error could not claim oyer of the record showing the forfeiture of the recognizance, and the indictment and the record showing its finding, but that in determining the sufficiency of the scire facias upon demurrer, the writ itself, together with the recognizance, after oyer claimed, could only be looked to.

Chitty's Pleading, 441, says: "Oyer is not demandable of a record; nor of a recognizance." And in Andrews' Stephens' Pleading, 160, it is also said: "Oyer was formerly demandable, not only of deeds, but of records alleged in pleadings, and of the original writ also; but by the present practice it is not now granted either of a record or an original writ." And 2 Saunders, Pl. & Ev. 839, says: "Oyer is not demandable of a writ, nor of a record." But whatever question there may be elsewhere as to this mode of procedure, it seems to be the law, in this state and in Virginia, that oyer is demandable of a record and recognizance. In *State v. McCown*, 24 W. Va. 625, oyer was claimed of the record upon which the scire facias was founded, which was granted, and the demurrer overruled. Judge Green, in delivering the opinion of the court, said: "The record on which the scire facias was awarded, is a part thereof, as oyer was claimed by the defendant." And in *Wood v. Commonwealth*, 4 Rand. (Va.) 320, it is said: "A party may plead nul tiel record, and if upon inspection by the court, the record is not such as is described in the pleadings, he will have judgment; or he may claim oyer of the record, which makes the record a part of the pleadings in that case; 18 Vin. Abr. 184, pl. 20, 21, and when it is spread upon the record by oyer, if the party admits that the record of which oyer is given him is the true record, and relies that it does not support the pleadings or scire facias, it seems to me that he should not deny that there is such a record, by plea; but, that he ought to demur, upon the ground that it varies from the pleadings or scire facias." And, also, in the case of *Hutsonpiller's Adm'r v. Stover's Adm'r*, 12 Grat. (Va.) 579, a scire facias was brought to revive a judgment, and defendant pleaded payment, and objection was made by the defendant, that the court improperly permitted the judgment sought to be revived to go in evidence, because it appeared that the judgment was against Hutsonpiller alone, while the scire facias set out a judgment against him and Paulser Huber, jointly, and the court, by Lee, Judge, after saying that it was difficult to determine whether the office judgment was set aside as to both defendants or Hutsonpiller alone, says: "But the question of variance does not in fact arise in this case. To raise it, the party should have pleaded nul tiel record, which would have put the plaintiff in the scire facias to the production of a record such as was alleged; or he should have craved oyer of the record, and demurred"—citing *Wood v. Commonwealth*, supra. *Commonwealth v. Fulks*, 94 Va. 586, 27 S. E. 498, is where a recognizance was taken by the circuit court, which was subsequently declared forfeited and a scire facias awarded thereon, and upon its return the recognizers appeared and craved oyer of the recognizance, and demurred to the scire facias. A recognizance taken either by a justice or by the

circuit court, is a matter of record, and we think, under the authorities cited, over is mandamable of it.

We have, throughout this opinion, referred to the writing in question as a recognizance, but while we have so referred to it, it is because it has been proceeded upon by *scire facias*. It is not in the common-law form of a recognizance, but is a bond with conditions, signed by the parties and approved by the justice of the peace. It does not even appear that the parties signed in the presence of the justice, or acknowledged it before him. A recognizance is where the prisoner and his recognizers appear before the court or justice and acknowledge themselves to be indebted to the state in a certain sum, upon a certain condition, which is entered upon the record, and thereby becomes a part of it. While the writing may not be in the form of a recognizance, yet, under our statute, if it possesses the essentials of a recognizance, it cannot be quashed simply for informality. Code 1899, c. 156, § 20: "No recognizance shall be quashed, or in any manner affected or impaired by reason of any informality therein, if it sufficiently appear therefrom what was intended thereby." And then it is provided in section 10, c. 162, of the Code 1899, that no action or judgment or recognizance shall be defeated or arrested by reason of any defect therein, if it appear to have been taken by the court or officer authorized to take it, and be substantially sufficient. But while these sections thus provide, yet it must be remembered that they speak of a recognizance, and it would seem that it should, at least, have the essentials to constitute it such. A recognizance certainly, whether it assume the form of a bond, or the usual form of a recognizance, should be acknowledged before the court or officer taking it. "A recognizance is an obligation of record, entered into before some court or magistrate duly authorized to take it, with condition to do some particular act. In criminal cases the usual condition is for the accused to appear and stand trial. A bail bond is an obligation under seal given by the accused with one or more sureties, and made payable to the proper officer, with condition to be void upon performance by the accused of such acts as he may legally be required to perform. A recognizance differs from a bail bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation." 3 Am. & Eng. Ency. Law, 686, 687. But the question as to whether or not the bond sought to be recovered upon here should be treated as a recognizance upon which a *scire facias* could be awarded, is not raised by counsel, and we deem it unnecessary to decide this question, because, even putting it upon the ground that it is a recognizance,

under our statute, regardless of its informality, still the action of the circuit court in sustaining the demurrer will have to be upheld for another reason.

Code 1899, c. 156, § 16, provides that where a justice considers that there is sufficient cause for charging one with an offense, that the commitment shall be for trial, and the recognizance be for the appearance in the circuit court on some day of the term then being held, or on the first day of the next term thereof, and under section 3 of chapter 162 of the Code 1899, it is provided that the bond shall be conditioned for the appearance of the accused before the court, judge or justice before whom the proceeding on such charge will be, at such time as may be prescribed by the court or officer taking it, to answer for the offense with which such person is charged, and shall not depart thence without leave of the court, judge or justice. The recognizance in this case is conditioned: "Now if the said William Kesler shall appear before the judge of the circuit court of Webster county on the first day of the next term thereof, and not depart thence without leave of the court, and shall answer the said action of the grand jury, then this obligation to be void, else of force." It is claimed by the defendant in error that the recognizance required the appearance of Kesler at the November, 1904, term of the circuit court, and it became the duty of the court at that term to call the prisoner upon his recognizance, and if he failed to appear, to enter his default upon the record, and declare the recognizance forfeited, and unless this was done, it operated to discharge the recognizers. It appears, as we have observed, that at the November term, 1904, no order was entered showing that Kesler was called upon his recognizance, and that he failing to appear, his default was entered of record, and his recognizance declared forfeited; but that at the succeeding term, January, 1905, he was called upon his recognizance, and failing to appear, it was declared forfeited, and a *scire facias* awarded thereon. In determining this question, it will be necessary to consider that part of section 7, c. 162, Code 1899, which says: "When a person, under recognizance in a criminal case, either as a party or witness, fails to perform the condition thereof, if it be to appear before a court, his default shall be recorded therein."

In *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930, it was held to be necessary to call the accused upon his recognizance, and to enter his default of record, in order to charge the recognizers, and that the record is the only evidence as to whether or not this has been done. But the question as to when the accused should be called upon his recognizance, and his default entered of record, has not been decided in this state, but, from the very terms of the recognizance, it would seem that this should be done at the term of court at which he is recognized to appear. In this

case, the undertaking of the recognizors was that the accused should appear on the first day of the next term of court thereafter, and not depart thence without leave. Did he appear, and did he depart without leave? There is nothing upon the record which answers this question. If he did not appear, and his case was not disposed of, he should have been required to enter into a new recognizance. Who knows but what the party was present in court every day of the term to answer to any indictment returned against him. He was not called to answer, and the court adjourned without his having been called. Now, can it be said that this provision of the recognizance, which says he shall not depart thence without leave of court, means that the recognizors stipulate that they should be bound, not only that he would appear on the first day of the term, and during the remainder of that term, but that they should be bound for his appearance from term to term to respond to the indictment, until it was finally disposed of. This certainly cannot be the meaning of this provision, because the condition is that the accused shall appear on the first day, and not depart thence without leave of court; that is, not depart the court at that term without leave. And when the court adjourned, without the prisoner having been called upon his recognizance, it would seem that he was given leave to depart.

In *State v. Mackey*, 55 Mo. 51, it was held that where, pursuant to the terms of a recognizance, a prisoner presented himself at the term of court therein named, and remained in court during the term, ready to obey its order, and no measures were taken to commit him, or otherwise secure his appearance at any subsequent term, on adjournment the bond would be discharged, and could not be forfeited by the failure of the prisoner to present himself at a subsequent term. It may be said that in the case at bar, the prisoner did not present himself. There is nothing to show that he did; neither is there anything to show that he did not, do so. We may presume that he did, inasmuch as he was not declared to be in default. An indictment was returned against him at that term, but he was not called to answer it. This was the time that the defendants in error obligated themselves that he should appear and answer. They did not agree to be bound for his appearance at a subsequent term. The state is the moving party. It is the duty of the state to call for the prisoner to answer the charge if any should be preferred against him. The prisoner has a bond to appear there at that time, and he is supposed to be there, and when his presence is desired, he should be called upon to appear, and if not called and his default entered at that term, his bond cannot be forfeited at a subsequent term. See, also, *State v. Moore*, 57 Mo. App. 662. If a recognizer fail to appear at the term to which he is recognized, and forfeit is not then taken, it

cannot be taken at a subsequent term. The recognizance, in such case, is inoperative, and the bail discharged. The recognizance in this case was conditioned for the appearance of the accused on the first day of the next term of the circuit court of his county, to answer the state of an indictment for forgery, and abide the order of the court, and not to depart therefrom without leave thereof. This recognizance is equally as broad in its terms as the one we are considering, and there the court held that default must be entered at the term to which the defendant was recognized to appear.

To the same effect, see *McGuire v. State*, 124 Ind. 536, 23 N. E. 85, 25 N. E. 11. And, also, in the case of *Swank v. State*, 3 Ohio St. 429, it is held: "A recognizance in a criminal case conditioned 'that the prisoner appear at the next term and thereafter, from day to day, and abide the judgment of the court, and not depart the court without leave,' binds the surety for the appearance of the prisoner during the first term of the court only, and if the court adjourns without making any order, the sureties are exonerated from their recognizance," and, speaking in this case, the court said: "Before the expiration of the term, it is the duty of the state to have the prisoner called, require a new recognizance for his appearance at the next term thereafter, and on failure of the prisoner to enter into the new recognizance, he should be committed to jail."

In the case of *Keefhaver v. Commonwealth*, 2 Pen. & W. (Pa.) 241, Chief Justice Gibson says: "Recognizances, being for the appearance at the next, and not at any succeeding term, are to be discharged at the end of the term by committing the prisoners, delivering them on bail, or setting them at large. But to avoid the trouble of renewing the security, it is sometimes the practice, when the bail consent, to forfeit the recognizance, and respite it until the next term; and this answers the purpose perfectly well."

In the case of *People v. Derby*, 1 Parker Cr. R. (N. Y.) 392, it was held: "A recognizance, conditioned for the appearance of M. at the next court of sessions, to be held in the courthouse at the city of H., to be tried by a jury on two indictments for forgery, is to be construed as requiring the appearance of M. at the next court of sessions to be held in the city of H., and not at the next court of sessions to be held at which a jury shall be summoned. And where such a recognizance was taken in January, 1851, and, at a court of sessions, held in June following, M. was defaulted, and his recognizance declared forfeited and ordered to be prosecuted, and in an action on the recognizance, it appeared that a regular term of the court of sessions had been held at that place in March of the same year, though no jury had been summoned to attend at such March term, it was held, that no breach of the condition of the

recognizance had been shown, and judgment was given for the defendant."

In *People v. Hainer*, 1 Denio (N. Y.) 454, it is said: "Where, in a declaration on a recognizance entered into by a party and his sureties for the appearance of the former at the next general sessions, to answer, etc., and to obey the order of the court and not depart without leave, etc., the plaintiffs averred that at the then next term of the sessions, the recognizance was respited and continued until and to a succeeding term, and assigned for a breach, that at such succeeding term the defendant made default in appearing; held, that no sufficient breach of the condition was shown, and that the declaration was insufficient."

In *Goodwin v. Governor*, 1 Stew. & P. (Ala.) 465, it is held, that where a party has been recognized to appear at a particular term to answer for a breach of the peace, and the state takes no steps toward a forfeiture of the recognizance (no indictment or presentment being preferred or continuance had) such failure operates as a discontinuance, and discharges the accused. And, also, in *State v. Murdock*, 59 Neb. 521, 81 N. W. 447, it is held: "A recognizance in a bastardy proceeding, conditioned that the accused 'shall be and appear before the district court on the first day of the next term thereof, and appear thereat from day to day to abide the order of the court' is limited to the term at which it exacts the appearance. A continuance of the cause to a subsequent term of court is not within the contract of the recognizance, and, if made, a nonappearance of accused at the term to which the continuance carries the cause is not a breach of such recognizance." The Supreme Court of Georgia holds: "Before bail in a criminal case can be made liable, the record must show that the principal was called and did not appear." *Park v. State*, 4 Ga. 329.

In view of the conclusion we have reached, it is not necessary to refer to the other grounds assigned in support of the demurrer.

There being no error in the judgment complained of, it is affirmed.

(58 W. Va. 629)

HI WILLIAMSON & CO. v. NIGH et al.
(Supreme Court of Appeals of West Virginia.
Jan. 30, 1906.)

1. PLEADING—FILING AFFIDAVIT WITH DECLARATION—PLEA.

Where the plaintiff has filed with his declaration the affidavit provided for by section 46, c. 125, Code 1899, no plea shall be filed unless the defendant file with it the affidavit required by that section. But where in such case a plea not accompanied by such affidavit is filed without objection, and the case proceeds to trial, the provision of the statute requiring such affidavit will be treated as having been waived.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1414-1416.]

2. SAME—JOINDER IN ISSUE.

Where a plea concludes to the country, and the formal addition of the similiter is omitted,

the parties may proceed to trial as though issue had been formally joined.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 203, 207.]

3. JUDGMENT — SETTING ASIDE — EFFECT OF PLEADING TO ISSUE.

Pleading to issue will operate to set aside an office judgment, and no formal entry, setting such judgment aside, is required.

4. PARTNERSHIP—DEFINITION.

A partnership is a contract relation between two or more competent persons, who have combined their money, effects, labor, and skill, or some or all of them, in a lawful joint enterprise or business, for the purpose of joint profit.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 1-6, 13-23.]

5. SAME—SCOPE OF BUSINESS.

A partnership may be formed for the purpose of dealing in timber generally, or it may be limited to a speculation upon a single venture, being, like any other contract of partnership, an agreement to share in the profit and loss of a certain business transaction.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 2, 13-16.]

6. TRIAL—DIRECTION OF VERDICT.

A motion to exclude all the plaintiff's evidence and direct a verdict for the defendant should be sustained, when the plaintiff's evidence does not prima facie entitle him to recover; but otherwise, if a prima facie case is made.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 381-383.]

(Syllabus by the Court.)

Error to Circuit Court, Mingo County.

Action by Hi Williamson & Co. against S. H. Nigh and others. The court directed a verdict for defendants, and plaintiffs bring error. Reversed.

O. H. Jones, for plaintiffs in error. Holt & Duncan, for defendants in error.

SANDERS, J. This is an action of assumpsit, brought in the circuit court of Mingo county against the defendants, S. H. Nigh and T. F. Duncan, upon an account assigned to the plaintiffs by Varney, Williamson & Co. At the trial, after the plaintiffs had introduced their evidence, the court, upon motion of the defendants, excluded it from the jury and directed a verdict for the defendants, to which judgment a writ of error and superseas was allowed by this court.

The affidavit provided for by section 46, c. 125, Code 1899, was filed with the plaintiffs' declaration, and the defendant S. H. Nigh appeared and filed his plea of non assumpsit, which, the plaintiffs claim, was not accompanied by the affidavit required by said section 46, and assign this as error. The defendants, however, claim that the required affidavit did accompany the plea; that the affidavit and plea were both prepared upon the same paper, and filed at the same time. We find the affidavit copied in the record immediately following the plea, and it probably was filed along with the plea; but the record fails to so show, and it is by this that we must be guided. Therefore, as the order shows the filing of the plea, and it nowhere appears that the affidavit was filed, we must

conclude that it was not done. Where the affidavit provided by section 46, c. 125, Code 1899, is filed with the declaration, no plea shall be filed in the case, either at rules or in court, unless the defendant file with it the affidavit required by that section. This statute, obviously, was passed for the benefit of the plaintiff, and, while the affidavit is required, still this provision is such as can be waived by him, and where a plea is tendered, unaccompanied by such affidavit, and he makes no objection to its filing, but proceeds to trial, as was done in this case, the provision of the statute requiring the affidavit will be considered as having been waived. It was held in the case of *Lewis' Adm'r v. Hicks*, 96 Va. 91, 30 S. E. 463, that, where the plaintiff joins issue after defendant has pleaded limitations without verifying his plea, he waives the statutory provision requiring defendant to verify his plea, if plaintiff brings suit upon a verified account. Judge Keith, in delivering the opinion of the court in this case, says: "The statute, having provided that plaintiff might verify his account by affidavit and have his case placed upon the office judgment docket, requires of the defendant that his defense shall be presented by a plea verified by an act of equal solemnity, and that it shall not be received unless accompanied by an affidavit; but this requirement of the statute was manifestly imposed for the benefit of the plaintiff, and may be waived by him either expressly or by implication, or he may by his conduct be estopped to take advantage of it."

It is assigned as error that the case was tried without an issue. This assignment is without merit. The defendant Nigh filed his plea of non assumpsit in writing, which is good in form, and to which there was no objection. The plaintiffs complain that the plea does not conclude to the country, and that they replied generally thereto, instead of adding the similiter. The order shows the filing of the defendant's plea of non assumpsit, which does conclude to the country, but, instead of adding the similiter, makes the plaintiffs reply generally. The plea of non assumpsit concludes to the country, and, when filed, it tenders an issue in which the plaintiff is compelled to join, and the plaintiff has the right to proceed to trial without the addition of the similiter. "When the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed as if there were a similiter or joinder in demurrer." Section 25, c. 125, Code 1899. And by section 3, c. 134, Code 1899, it is provided that no judgment shall be reversed for the want of a similiter, or any misjoinder of issue. Hogg's Pleading and Forms, p. 224, speaking on this subject, says: "If, however, a plea concludes to the country, as non assumpsit or payment, the plaintiff may proceed to trial without the formal addition of

the similiter, as though issue had been formally joined." Long ago this matter has been specifically decided by this court. In *First National Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555, Judge Green, in delivering the opinion of the court, uses this language: "In the present case the verdict of the jury was responsive to all the issues, being a general verdict for the defendants. I say, responsive to all the issues, for, though no formal issues were taken on the pleas of non assumpsit and payment, yet, as both these pleas properly conclude to the country (see *Douglass v. Central Land Co.*, 12 W. Va. 512), the plaintiff had a right, without the formal addition of a similiter, to proceed to trial on them as though issues had been formally joined upon them. * * * But it is otherwise if the plea concludes with a verification." *B. & O. R. Co. v. Faulkner*, 4 W. Va. 180; *Brewer v. Tarpley*, 1 Wash. (Va.) 363.

Complaint is made that the court erred in directing a trial without setting aside formally the office judgment. The filing of the plea of non assumpsit operated to set aside the office judgment, and no formal action to that effect is necessary. As we have seen, the plea was not such as entitled the defendants to have the office judgment set aside, if it had been objected to. But, no objection being made, this provision of the statute was waived, and the plea, when filed, served to set aside the office judgment, the same as if the required affidavit had accompanied it.

The action of the court in sustaining the motion of the defendants to exclude the plaintiffs' evidence and direct a verdict for the defendant is assigned as error. "On a motion to exclude all the plaintiff's evidence and direct a verdict for the defendant, the court should be guided by what its action would be if the case were submitted to the jury, and they should find a verdict in favor of the plaintiff upon such evidence. If it would be the duty of the court to set aside the verdict of the jury because without sufficient evidence, then the court should sustain the motion to exclude and instruct the jury to find for the defendant. But if, on the other hand, the evidence is such that under the law the court should refuse to set aside the verdict, the motion to exclude the evidence should be overruled." *Cobb v. Glenn Boom & Lumber Co.* (W. Va.) 49 S. E. 1005. This assignment involves a consideration of the evidence, and it will therefore be necessary to review briefly the facts.

In 1899, the defendant T. F. Duncan entered into a contract with J. M. & J. H. Fraley, by which they agreed to sell and deliver on Big Creek, in Pike county, Ky., to Duncan, a certain lot of oak logs. Shortly after or about the time of this contract, Duncan entered into a contract with the defendant Nigh, by which Duncan was to have the management, and do all the work in looking

after the logs, and delivering them at Catlettsburg, Ky., and Nigh was to provide the money to pay for them, and they were to share equally in the profits and losses resulting from the transaction. The logs were delivered according to contract, and were paid for by Duncan with money furnished by Nigh, except a balance of \$468.12, the amount of the plaintiff's claim, for which the order hereinafter referred to was given. J. M. & J. H. Fraley, while engaged in getting out and delivering these logs, ran an account with Varney, Williamson & Co., merchants, until they became indebted to them in the sum of \$468.12, for which amount, on September 11, 1900, they gave the following order: "Mr. T. F. Duncan, White Post, Ky.—Dear Sir: You will please pay Varney, Williamson & Co. four hundred sixty-eight and 12/100 dollars for balance on two notes executed to them for merchandise furnished us in our log job. This order to be paid when timber is delivered at Catlettsburg, Ky. Given under our hand, this 11th day of Sept., 1900. J. M. & J. H. Fraley." This order was accepted by Duncan, as follows: "This order accepted to be paid when oak logs is delivered to S. H. Nigh & Bro., Catlettsburg, Ky., this Sept. 11th, 1900. T. F. Duncan." This order was never paid to Varney, Williamson & Co., nor to the plaintiffs, although, upon settlement with the Fraleys, this amount was deducted by Duncan from the sum owing to them for the logs. There was an effort to show that Duncan, instead of being interested with Nigh, had his contract with S. H. Nigh & Bro. It is true that Duncan states he believes the checks furnished by S. H. Nigh were signed S. H. Nigh & Bro., and that the acceptance of the order was that he would pay it when the logs were delivered to S. H. Nigh & Bro., at Catlettsburg, Ky. Yet he states emphatically that upon this particular job his contract was with S. H. Nigh individually.

The contention of the plaintiffs that Nigh is liable because he promised Varney, Williamson & Co. to pay the debt is not tenable, because, in the first place, the evidence fails to show the promise, and, secondly, if shown, it would be a promise to pay the debt of another, and, not being in writing, would be in violation of the statute of frauds, and not enforceable. Code, c. 98, § 1. Therefore the real question is, was there a partnership between Duncan and Nigh, and, if so, is Nigh liable on account of the order given by the Fraleys and accepted by Duncan? While the agreement between Nigh and Duncan was made shortly after Duncan had entered into the agreement with the Fraleys for the purchase and delivery of the logs, yet the contract between Duncan and the Fraleys was executory, and before the delivery of the logs it was agreed between Nigh and Duncan that Nigh was to pay for the logs, and that they were to

sell them and share equally in the profits and losses. This contract has all the elements of a partnership—one to make the purchases and to furnish all the labor necessary for conducting the business, and the other to furnish the capital, with the understanding that they shall share equally in the profits and losses. A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business, as principals, for the purpose of joint profit. "The true test, to be determined by looking at the agreement and all its parts and provisions, as well as its general character, is: Did the supposed partner acquire by his bargain any property in, or control over, or specific lien to, the profits while they remained undivided, in preference to other creditors? If he did, he is liable to third persons; and, if otherwise, not." *Chapline v. Conant*, 3 W. Va. 507, 100 Am. Dec. 766. And in the opinion of the court in this case it is announced: "The principles of the law of partnership lead to the conclusion that, if a trader makes an arrangement in regard to a commercial business with another, by reason of which that other becomes interested as owner, precisely as the firm is interested as owner, in the resulting profits, whatever be their respective proportions, while they are undivided and remain as profits, these two are certainly partners. And the same principles lead us directly to the other conclusion that a mere payment of, or promise to pay, out of the profits, a sum of money as a specific proportion of the profits does not necessarily constitute the payee a partner, and gives him no lien in the profits, and no right to the profits, but only a personal claim for such share of the profits after they are ascertained and may be divided." Apply these tests, and we find that Nigh became interested as owner, precisely as did Duncan, in the resulting profits, and in sharing the losses. The property was paid for by Nigh, under an agreement that it was to be shipped to Catlettsburg and sold, and the profits divided equally. "An agreement to share in the profit and loss of a business or adventure shows an intention to create a partnership, unless such evidence of intention is controlled by stipulations or interpreted by conduct inconsistent with it." *Bates, Partnership*, § 25. And in same book (section 28): "If one person is to furnish the property, or the money with which to procure it, and the other is to give his services in disposing of it under an agreement by which they are to divide profit and loss, it is a partnership inter se, for a sharing of loss is generally inconsistent with a mere employment." The fact that this was a contract to purchase a certain lot of logs, or what may be termed a single transaction, and not a general partnership, does not alter the rule. "A partnership may exist in a single transaction of purchasing land with a view of selling it

for profit." *Spencer v. Jones* (Tex. Sup.) 50 S. W. 118, 71 Am. St. Rep. 870. And we find the same doctrine in *Jones v. Davies* (Kan.) 56 Pac. 484, 72 Am. St. Rep. 354: "Partnership may exist for a single venture or undertaking, such as the purchase of land for speculation." A partnership may be formed for the purpose of dealing in land by buying and selling generally, or it may be limited to a speculation upon a single venture. *Bates v. Babcock* (Cal.) 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 134; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Demarest v. Koch*, 129 N. Y. 218, 29 N. E. 296; *Insurance Co. v. Ross and Lennan*, 29 Ohio St. 429; *Ludlow's Heirs v. Cooper's devisees*, 4 Ohio St. 1. "Persons, without being partners generally in trade, may be partners in a particular adventure." *Collyer's Partnership*, § 58.

Having determined that Duncan and Nigh are partners, then the question arises: Is Nigh liable for the plaintiffs' debt, on account of the order given by the Fraleys and accepted by Duncan? Nigh, being a partner in the purchase of the logs, of course, became liable to the Fraleys for the purchase money, although they may not have known of the partnership relation existing between him and Duncan. A silent or dormant partner is liable for the debts of the partnership. *Bates, Partnership*, §§ 156, 157. "A secret partner is therefore liable upon all of the acting partner's contracts made within the usual scope of the partnership business, whether such contracts are really on partnership account or not." *Parsons, Contracts*, § 81.

The order given by the Fraleys operated as an assignment of their claim, and, while it was drawn on Duncan, yet it was an assignment of a claim for which, as we have seen, both Duncan and Nigh were liable, and, this being so, the assignees are entitled to all the rights of the assignors. And Nigh, being liable to the Fraleys, is liable to the plaintiffs, the holders of the Fraley claim.

Inasmuch as this case must be remanded for another trial, it is proper to remark that what has been said as to the sufficiency of the plaintiff's evidence is for the purpose of showing the impropriety of sustaining the motion to exclude, and is not in any way affect a subsequent trial before the jury.

For these reasons, the judgment of the circuit court is reversed, the verdict of the jury set aside, and a new trial awarded.

(141 N. C. 722)

STATE v. JARRELL.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

Defendant and H., after passing deceased and B., who were riding in company, ran down the road toward deceased and B. with the evident purpose and common design of attacking them, during which either defendant or H. said, "We will whip you in a minute," whereupon

H. drew a knife with which he killed deceased. *Held*, that the declaration so made was admissible against defendant as *res gestæ* and as evidence of a common purpose on the part of both defendant and H. to attack deceased and B.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 815.]

2. CRIMINAL LAW—PRINCIPALS.

Where two persons aided and abetted each other in the commission of a crime, both being present, they were both principals.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 71-73.]

3. SAME—CONVICTION OF PRINCIPAL—PRINCIPALS IN FIRST AND SECOND DEGREES.

The rule that an accessory cannot be tried and convicted before the principal has no application as between principals in the first and second degrees.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 96-102.]

4. SAME—EVIDENCE.

Where defendant was not only present while his companion killed deceased, and, though he must have seen such companion draw his knife, made no effort to stop the murderous assault, but, on the contrary, after deceased had been struck, turned to deceased's companion and said, "If you get off your horse, I will eat you up," the evidence was sufficient to charge him as a principal guilty of the homicide.

Appeal from Superior Court, Warren County; Long, Judge.

Burton Jarrell was convicted of murder in the second degree, and he appeals. Affirmed.

The defendant and one Garfield Hicks were jointly indicted and tried at the special term, December, 1905, of Warren superior court, as co-principals in the murder of W. G. King. The jury failed to agree as to Hicks, and were discharged. They rendered a verdict of murder in the second degree as to Jarrell, and from the judgment pronounced he appealed.

J. C. L. Harris & Son, for appellant. The Attorney General, for the State.

BROWN, J. There was evidence tending to prove that the deceased and one Barnes were riding in company on the public road in Warren county, when they were accosted by some one in a buggy, who said, "Look out, give us the road." The persons in the buggy were the prisoners, Hicks and Jarrell. After some words the deceased said, "You can pass," but he would like to know what they were fussing about. Each prisoner at once jumped out of the buggy. Both ran down the road towards the deceased and Barnes, and at the same time one of the defendants said, "We will whip you in a minute." When Hicks got in four or five steps he drew his knife, and turned to the deceased, and said "no damn white man could run over him." He had the knife in his hand. The deceased struck him with the lash of his buggy whip. Hicks struck the deceased with his knife and cut his throat, from which wound the deceased shortly afterwards died. In the meantime Jarrell said to Barnes: "If you get off your horse, I will eat you up."

The defendant Jarrell excepted to the ruling of the court admitting the statement, "We will whip you in a minute," upon the ground that it was not proved which one of the defendants made it. We think this exception without merit. At the time the threat was made the two defendants were together. Both were running down the road towards the deceased and Barnes with the evident purpose and common design, if the evidence is believed, of making an attack on them. This declaration made, as it was, at the time of the attack, was not only a part of the *res gestæ* (the essential circumstances surrounding the transaction), but, being made in the hearing of both defendants, it was competent evidence of a common purpose on the part of both to attack Barnes and the deceased. There is nothing in *Matthews' Case*, 78 N. C. 535, cited by defendant's counsel, which controverts this.

The principal exceptions relied upon by Mr. Charles Harris, in his well-considered argument and brief for the defendant Jarrell, relate to the insufficiency of the evidence to convict Jarrell of any participation in the offense, and also to the defendant's contention that, inasmuch as Hicks has not been convicted as yet, Jarrell cannot legally be convicted and sentenced for murder in the second degree. We will first consider this last contention, for if it is sound there would be no need to examine the other. If Jarrell had been indicted as an accessory before or after the fact, there would be much in the contention. But he is indicted as a principal. There is practically now no degree as to principals, as *Bishop*, *Wharton*, and other writers state. One principal can be convicted when the other has not been tried. 1 *Bishop*, Cr. Law (8th Ed.) § 604. Where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty. A principal in the second degree is not an accessory but a co-principal. *Whitt's Case*, 113 N. C. 716, 18 S. E. 715. *Wallace's Case*, 1 Salk. 334, is exactly in point, where Chief Justice Holt ruled that, where one principal was acquitted at a former trial, it was no bar to the trial of the others in the indictment. See, also, *Brown v. State*, 28 Ga. 199. The rule that an accessory cannot be tried and convicted before the principal has no application as between principals in first and second degrees. 1 *McClain*, § 216.

As to the other contention so earnestly pressed by counsel, we are of opinion that there was evidence sufficient to go to the jury that Jarrell was present at the time of the homicide for the purpose of aiding and abetting Hicks, and is consequently a co-principal. The learned judge who tried the case in the court below presented this feature of the case to the jury with clearness. The evidence tends to prove that the defendant Jarrell jumped out of the buggy

simultaneously with Hicks and ran with him towards the deceased; that he either heard or made the remark, "We will whip you in a minute." If he heard it, he was made aware of Hicks' purpose. He must have seen Hicks draw his knife, if the evidence is believed, and he made no effort to stop the murderous assault. On the contrary, he threatened Barnes, and said, "If you get off your horse, I will eat you up." He thereby endeavored to prevent Barnes going to the rescue of his companion, and made no effort himself to stop the homicidal assault with the knife. It is a fair inference from the evidence that the presence of Jarrell at the homicide was not accidental, but that he was purposely there. That fact itself is evidence, but no more than evidence to go to the jury. 1 *Wharton*, Cr. Law, § 211. There is much in the conduct of Jarrell, according to the evidence, which indicates a design to encourage and aid Hicks in the assault. "When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as encouraging." *Wharton*, Cr. Law, § 211a, who cites many cases in support of the text. Jarrell was in a situation to be able readily to go to Hicks' assistance if necessary. The knowledge of this was calculated to give additional confidence to Hicks. In contemplation of law this is aiding and abetting. *Id*; *Thompson v. Com.*, 1 Metc. (Ky.) 13; *State v. Douglass*, 34 La. Ann. 523; 15 Cox, Cr. Cases, 51, 52. "If A. comes and kills a man, and B. runs with intent to be assisting him, if there should be occasion, though de facto he doth nothing, yet he is principal, being present." *Hale*, P. C. 439.

We have examined the other exceptions relating to the admission of evidence and think they are without merit.

No error.

(141 N. C. 764)

STATE v. WORLEY et al.

(Supreme Court of North Carolina. March 13, 1906.)

1. HOMICIDE — EVIDENCE — HARMLESS ERROR.

Where the highest offense of which either defendant was convicted was murder in the second degree, error, if any, in the admission of evidence offered to prove premeditation, was harmless.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3137, 3143; vol. 26, Cent. Dig. Homicide, §§ 709, 713.]

2. CRIMINAL LAW—EVIDENCE—RES GESTÆ—DECLARATIONS OF DECEASED.

In a prosecution for homicide, evidence of declarations of deceased in relation to a prior difficulty with one of the defendants, not shown to contain any threat communicated to either of the defendants, was inadmissible, being a mere narrative of a past transaction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 814, 937.]

3. HOMICIDE — SECOND DEGREE MURDER — DEADLY WEAPON—USE—IMPLIED MALICE.

A killing with a deadly weapon implies malice, and, when admitted or proved, the prisoner is at least *prima facie* guilty of murder in the second degree.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 18, 269.]

4. CRIMINAL LAW—INSTRUCTIONS—FAILURE TO CHARGE.

An omission to charge on a given point is not error, in the absence of a prayer to instruct thereon.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1996.]

5. HOMICIDE—APPEAL—HARMLESS ERROR.

Where accused were acquitted of murder in the first degree, they were not prejudiced by instructions relating to such offense.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3161; vol. 26, Cent. Dig. Homicide, § 720.]

6. HOMICIDE—AIDING AND ABETTING—INSTRUCTIONS.

Where deceased was struck and killed with a deadly weapon, an instruction that, if defendant, W., aided and abetted his codefendant in an assault on deceased, then he would be guilty of murder in the second degree, manslaughter, or excusable homicide, according to whether such codefendant was guilty or excusable, but that, to convict defendant so "aiding," the jury must be satisfied beyond a reasonable doubt that he "aided and abetted" his codefendant, and if his purpose was to extricate the latter he would not be guilty of any offense, was correct.

Appeal from Superior Court, Lenoir County; O. H. Allen, Judge.

Thomas F. Worley was convicted of murder in the second degree, and Clem Worley was convicted of manslaughter. They appeal. Affirmed.

N. J. Rouse, Wooten & Wooten, and Aycock & Daniels, for appellants. E. M. Land, G. V. Cowper, and the Attorney General, for the State.

BROWN, J. In the consideration of this appeal we have been greatly aided by most carefully prepared briefs filed by the defendant's counsel, as well as by the Attorney General, who in the investigation of state cases never fails to be of great assistance to the court. The defendants were charged with the murder of one Ed. Warters on April 22, 1905, in the county of Lenoir. There was evidence on the part of the state tending to show that the deceased and the Worleys were in Kinston on the day of the homicide and left there in the afternoon; the deceased and Cully Williams leaving first in a cart; and the Worleys following soon thereafter in a buggy. On the way the parties reached a stock-law gate. Thomas Worley got out of the buggy and, speaking to Cully Williams, said: "Mr. Williams, was that you spoke to me back yonder?" Williams replied, "Yes," and Thomas said, "I thought so; I do not speak to that fellow you are with, for he is a d—d coward." About this time it appears that the deceased and the other Worley had alighted from their vehicle and were standing near the gate cursing each other.

The deceased had a pistol in his hand, and, as the Worleys started towards him, fired four shots, injuring no one, and then threw his weapon on the ground. When the firing ceased, the Worleys rushed up and a struggle ensued. The deceased broke away and ran down the road, Thomas and Clem following 35 or 40 steps, and in the pursuit Thomas drew a knife and inflicted a number of wounds upon the person of the deceased, from the effect of which he died in a few minutes. Evidence was introduced by the defendants tending to prove that the homicide was committed in self-defense. They contended that the deceased fired at them four times, and that they rushed up for the purpose of disarming him in order to save themselves from death or serious bodily harm.

The defendants being indicted for murder in the first degree, it became necessary for the state to prove premeditation. There was evidence admitted by the court tending to prove premeditation, such as prior threats, and the like. There was also evidence offered by the defendants tending to rebut the charge of premeditated killing, and to prove that, although the defendants and the deceased had a difficulty four months before, they had become reconciled. Practically all of the exceptions to testimony relate to alleged errors in admitting or rejecting this species of evidence. We find no error in his honor's rulings, but we refrain from discussing them, as the record shows that there was no conviction for murder in the first degree, and such testimony was unnecessary to support a conviction for the crimes of which the defendants stand convicted.

Exception 7 relates to the rejection by the court of the declarations of the deceased in relation to a prior difficulty which Thomas Worley and the deceased had some time before the homicide. The evidence was clearly inadmissible. It contained no threat, and was a narrative of a past transaction. Had the language contained a threat, there is no evidence that it was ever communicated. *State v. Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *State v. Sumner*, 180 N. C. 718, 41 S. E. 808.

Exception 8: In apt time the defendants in writing requested the judge to instruct the jury: "The presumption of innocence which the law raises in behalf of every defendant, and the presumption of malice arising against Thomas Worley by his admission of the use of a deadly weapon, are both evidence and are to be considered in connection with the other evidence, and if, after considering all of said evidence, the jury have a reasonable doubt of the guilt of Thomas Worley of murder in the second degree, they will find him not guilty of murder in the second degree, and then consider whether he is guilty of manslaughter, or whether he acted in self-defense." The judge refused to so instruct the jury.

Exception 9: In apt time the defendants

requested the judge to instruct the jury that, while the law presumes malice from the use of a deadly weapon, there also arises a presumption of innocence where good character is proved, and the burden is upon the state to prove beyond a reasonable doubt the guilt of the defendants.

It must be admitted that these prayers for instruction present some novel views of the law. But, as the briefs of counsel disclose, they do not expect us to entertain them unless we are prepared to overrule a long and unbroken line of decisions of this court. Counsel admit that: "Our courts are committed to the rule that the use of a deadly weapon implies malice, and under the rule it would be murder in the second degree; nothing further appearing." No principle in our criminal law is better settled than that a killing with a deadly weapon implies malice, and, when admitted or proved, the prisoner is guilty of murder in the second degree, and the burden rests upon him to prove the facts upon which he relies for mitigation or excuse, to the satisfaction of the jury. *State v. Booker*, 123 N. C. 713, 31 S. E. 376; *State v. Hicks*, 125 N. C. 636, 34 S. E. 247; *State v. Capps*, 134 N. C. 622, 46 S. E. 730; *State v. Clark*, 134 N. C. 608, 47 S. E. 36; *State v. Exum*, 138 N. C. 599, 50 S. E. 283.

Exception 10 is based upon the failure of the judge below to instruct the jury as to the application and effect of threats. No request along this line was submitted by the defendants. An omission to charge on a given point is not error, unless there is a prayer to instruct thereon. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850; *State v. Scott*, 19 N. C. 35; *State v. Varner*, 115 N. C. 744, 20 S. E. 518; *State v. Groves*, 119 N. C. 822, 25 S. E. 819.

Exception 11 is directed to the language of the court in charging the jury. It is perfectly apparent, and could not be misunderstood, that the judge was stating only the contentions of the state, as he likewise did those of the defendants, and there is evidence in the record tending to support such contentions. But, suppose there was not, they relate to murder in the first degree, and the defendants have been acquitted of that crime.

Exception 12: The court charged that, if Clem Worley aided and abetted Thomas Worley in an assault on the deceased, then he would be guilty of murder in the second degree, manslaughter, or excusable homicide, accordingly as Thomas was guilty or excusable, adding: "But to convict Clem the jury must be satisfied beyond a reasonable doubt that he aided and abetted his brother. If his purpose was to extricate his brother, he would not be guilty of any offense." We find no error in this instruction. *State v. Gooch*, 94 N. C. 987; *State v. Whitt*, 113 N. C. 716, 18 S. E. 715; *State v. Finley*, 118 N. C. 1161, 24 S. E. 495; *State v. Jarrell* (at this term) 53 S. E. 127.

There is also lack of merit in the remaining exceptions, 13, 14, and 15, and it is useless to discuss them. A careful study of the record and of the judge's charge convinces us that the defendants have been in no wise prejudiced by any error on the part of the court, and that they have been fairly tried. The judge correctly stated the law as to murder in its two degrees, as to manslaughter, and as to excusable homicide, and the verdict of the jury is supported by abundant evidence.

No error.

(140 N. C. 402)

HOOKER et al. v. BRYAN et al.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. WILLS—CONSTRUCTION—VESTING OF ESTATE.

Testatrix devised the residue of her real estate to H. "upon his becoming 21 years of age," and lent the same to her sister until such event. She also lent to such sister her personal property, in trust for H. until he became 21 years of age. *Held*, that the clause "upon his becoming 21 years of age" should be construed merely to postpone the enjoyment of the estate, which was a remainder vesting in H. from the date of testatrix's death.

2. REMAINDERS—DEATH OF REMAINDERMAN—EFFECT.

Where the enjoyment of a vested remainder devised to H. was postponed until he attained the age of 21, and he died before attaining such age, the previous dispositions of the interest immediately terminated, and the right of immediate enjoyment of the property passed at once to the remainderman's heirs at law and next of kin.

Appeal from Superior Court, Beaufort County; Ward, Judge.

Submission of controversy between Ella B. Hooker and others and Elizabeth Bryan and others. A judgment was rendered in favor of plaintiffs, and defendants appeal. Affirmed.

Controversy submitted on a case agreed. The pertinent facts presented by the record are as follows: Caroline Bonner died, having made her last will and testament, disposing of certain real and personal property and the parties plaintiff and defendant are claimants under said will. The rights of the parties depend upon the following items in said will: "(5) I give the residue of my real estate to my beloved nephew, Roscoe Hooker, upon his becoming 21 years of age, and lend the same to my beloved sister, Ella Bonner, until my nephew, Roscoe Hooker, is 21 years old. (6) I lend to my beloved sister, Ella Bonner, the mule and other personal property upon the farm, in trust for Roscoe Hooker until he becomes 21 years old. (7) I give to my beloved nephew, Roscoe Hooker, the mule and any other personal property that may be upon the farm." Roscoe Hooker, the nephew, died after the death of Caroline Bonner, and before becoming 21 years of age, and the plaintiffs

are the heirs at law and personal representatives of said Roscoe Hooker. The defendants are the heirs at law and personal representatives of Caroline Bonner, the testatrix, including Ella Bonner, who is one of the heirs at law and next of kin of Caroline Bonner, and is also the Ella Hooker mentioned in the items of said will. On these facts the question submitted was as to the ownership of the real property in item 5, and of the personal property mentioned in items 6 and 7, of the will, and thereupon the court adjudged that the plaintiffs, the heirs at law of Roscoe Hooker, are the owners of the real property in item 5, and the personal representatives of said Hooker are the owners of the personal property in items 6 and 7, from which judgment the defendants excepted and appealed.

Ward & Grimes for appellant. W. C. Rodman for appellee.

HOKE, J. (after stating the case). The words "on or upon," when affecting the quality of an estate in reference to the time of its vesting or enjoyment, are substantially synonymous with "when." *Adams v. Williams*, 2 Watts & S. (Pa.) 227; *Womrath v. McCormick*, 51 Pa. 504. In bequests of personal property these words usually import a condition, and, unless explained or controlled by some expressions or other provisions of the will, they are annexed as conditions precedent to the substance of the gift and render the interest contingent. This has been the doctrine in the English courts since the case of *Hansom v. Graham*, 6 Vesey, 239, and is well established here. *Giles v. Franks*, 17 N. C. 521; *De Vane v. Larkins*, 58 N. C. 377. While several modern text-writers of approved excellence and many decisions seem to give these words the same significance in reference to devises of real and bequests of personal property, the older authorities hold that in respect to realty "when and upon" import usually a condition subsequent determinative of the estate according to the terms of the condition, and that in the meantime the estate would vest. *Lewis*, Blk. 513, note 144; *Roper on Legacies*, vol. 2, p. 386.

The distinction has no practical bearing on the case before us and it is therefore not desirable to dwell upon it, nor is it necessary to determine if the same now exists; for all of the authorities are agreed that both as to real and personal property "when and upon" may be so explained and controlled by other expressions and provisions of the will that they do not import a condition at all, but simply refer to the time of enjoyment, and that the interest conferred will vest at the testator's death to be possessed and enjoyed at the time indicated. In 1 *Roper on Legacies*, 386, the doctrine is thus expressed: "But all these and similar words may be so explained and

controlled by the context of the will as not to prevent the legacies from vesting before the happening of the events upon which they are payable. In such instances, the intention of the testator's will predominates over technical words and expressions, when it is declared and appears from a sound rational construction of the will." And the decisions in this and other jurisdictions support the doctrine as stated. *Guyther v. Taylor*, 38 N. C. 323; *Fuller v. Fuller*, 58 N. C. 223; *Sutton v. West*, 77 N. C. 429.

In pursuance of the principle above stated, the decisions have established that where an estate or interest is bequeathed or devised to one upon his becoming 21 years of age, or when he becomes 21, and in the meantime the property is given to a parent, guardian, or trustee for the legatee's benefit, in such case the interest will vest at the death of the testator. *Roper*, 387; *Green v. Green*, 86 N. C. 547. "For," says Mr. *Roper*, "since the whole interest in the fund is given in one way or the other to or for the benefit of the legatee, it could not be the testator's intention to make it contingent whether the legatee should have the absolute interest. That interest is split into two parts. Till one period it is given to the guardian or trustee, and at the other it is given to the legatee. The reason why it was not given sooner to the legatee was from regard to his convenience, because under age. Hence it is apparent that the words were annexed only to the payment, and not to the gift." And so, when the property is given beneficially to a stranger, the same result follows. "For," says the same author (page 392), "in such case the person to whom the absolute property is limited will take an immediate vested interest in the subject, since such bequests are in the nature of remainders, the rule as to which is that the interests of the first and subsequent takers vest together. It is clear that the testator intended to give immediately the capital to the person in remainder, postponing the enjoyment only till the arrival at a particular age." 2 *Underhill on Wills*, § 896; *Fuller v. Fuller*, and *Guyther v. Taylor*, *supra*; *Perry v. Rhodes*, 6 N. C. 142; *Roome v. Phillips*, 24 N. Y. 465. In *Perry v. Rhodes* it is said: "And it has been held that, where the immediate interest is given either to a stranger or the legatee himself, such a case proves an exception, because it explains the reason why the time of payment was postponed and is perfectly consistent with an intention in the testator that the legacy should immediately vest." And in *Guyther v. Taylor* it is said: "To these considerations is to be added another important one, which is that the testator disposes of the negroes until the period at which they are to be divided, consequently the whole subject, the corpus, is given away for different purposes, so that the interests given to the children are in the nature of

remainders, and the term thus, though generally a word of condition, makes in this case only the commencement of the remainder."

Applying these principles to the case at bar, they are decisive in favor of the ruling of the lower court. As to the personal property, the entire intervening interest is given to a trustee for Roscoe Hooker until he becomes 21 years of age, and then to him absolutely; and to the real estate, the intervening interest is given to Ella Bonner until, etc. Transposing the words in item 5 of the will, the reading of the same would be, "I lend my real estate to Ella Bonner until my nephew, Roscoe Bonner, is 21 years of age, and upon his becoming 21 years of age the property is devised to him," and constitutes a vested remainder. In Words and Phrases Judicially Defined, vol. 8, p. 7493, the principle is stated as follows: "When used as a devise of a remainder limited upon a particular estate and terminable on an event which may necessarily happen, 'when' will be construed to relate merely to the time of enjoyment of the estate and not to the time of vesting"—citing numerous authorities. The facts stated in the case agreed do not disclose whether the period has arrived when Roscoe Hooker would have attained the age of 21, had he lived; but the authorities seem to hold that in a case like the present, on the death of the remainderman, the previous disposition of the interest terminates, and the heirs at law and next of kin of the remainderman have a right to the immediate enjoyment of the property. 1 Fearn on Remainders, 244; Mansfield v. Duggard, 1 Eq. Abridged Cases, 195, cited with approval in Johnson v. Baker, 7 N. C. 318, 9 Am. Dec. 605.

There is no error, and the judgment of the court below is affirmed.

Affirmed.

BROWN, J., did not sit on the hearing of this appeal.

(140 N. C. 365)

LIPSCHUTZ v. WEATHERLY & TWIDDY.
(Supreme Court of North Carolina. Feb. 27, 1906.)

1. EVIDENCE—BEST AND SECONDARY—CORRESPONDENCE.

Where, in an action for the price of goods sold, defendants introduced plaintiff's telegram calling for an answer, one of the defendants was properly required to answer as a witness whether he sent plaintiff a telegram in answer to the one so introduced, in the language required by plaintiff's telegram.

2. SALES—AGREEMENT FOR RESCISSION—CONSIDERATION.

Plaintiff contracted to sell cigars on certain terms exclusively to defendants in certain territory. Defendants having failed to make payments within 10 days as required, plaintiff notified them of his election to rescind, and refused to make further sales to defendants except on different terms specified in the notice

of rescission, and on defendants agreeing to the cancellation of the previous contract. Held, that defendants' consent to such rescission in order to obtain further shipments of cigars, instead of relying on a suit for an alleged breach of plaintiff's contract, was based on a sufficient consideration, and was therefore binding on them.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 259.]

3. SAME—ACTION FOR BREACH.

The contract having been rescinded by mutual consent, defendants could not thereafter recover thereon damages sustained prior to the breach.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 260.]

Appeal from Superior Court, Pasquotank County; Shaw, Judge.

Action by B. Lipschutz against Weatherly & Twiddy. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff sued for the recovery of the price of cigars sold and delivered to defendants on July 10, 1904. Defendants admitted the sale and price, and set up a counterclaim for damages for breach of contract. The evidence material to the establishment and breach of the contract was in writing. On September 2, 1901, plaintiff and defendants entered into a contract whereby plaintiff agreed to sell to defendants cigars of a certain brand at \$30 per thousand, in lots of 5,000. "Terms of sale, cash in ten days from shipment, less 2 per cent. discount. I agree to give said W. & T. exclusive contract of the 44 cigars in all territory in North Carolina lying east of the Atlantic Coast Line R. R. Any orders received by me from that territory shall be turned over to said W. & T. The said W. & T. agree to advertise said cigars, I furnishing matter. This contract shall be binding so long as said W. & T. push the sale of said cigars." On May 28, 1904, plaintiff, by his attorneys, wrote defendants that by reason of noncompliance with the terms of the contract on their part he "has repudiated same, and in future will only sell such cigars to you as you may order, on the same terms and conditions as they will ship the same to any other persons in your territory." The breach alleged by plaintiff was the failure by defendants to make payments in 10 days. On June 2, 1904, plaintiff wrote defendants, referring to the letter of his attorneys of May 28th, saying, "and therefore, of course, we will make you no more shipments under that contract. We shall be more than pleased at any time in the future to sell you any of our cigars which you may desire. However, you can no longer have absolute territory, and in the future we will sell goods to whomsoever we please in the territory formerly controlled by you. * * * If you care to handle our cigars on these terms, we shall be pleased to fill any orders which you may furnish. We will not, however, in the future give you any commissions on any goods ordered by any parties

in the territory formerly controlled by you, and we reserve the right to ship and sell to whomsoever we please." After some further correspondence plaintiff, on June 6, 1904, declined to fill an order of defendants until defendants sent to him a telegram dictated by plaintiff, in these words: "We agree to cancellation of previous contract. Ship goods as per terms of your last letter to us." Defendant Weatherly was asked, on cross-examination, whether he sent plaintiff telegram in language above quoted. The telegram was not produced, nor was its absence accounted for. Defendants' objection being overruled, he answered affirmatively, to all of which defendants duly excepted. Defendant Weatherly testified that prior to May 28, 1904, they had complied with the contract; had advertised the cigars; gave up handling other cigars; that they were wholesale dealers in groceries, cigars, and tobacco; had salesmen on the road selling to their customers; furnished them with sample boxes to give away; worked this cigar almost exclusively; had built up a good trade. On a few occasions checks were not sent in 10 days; heard no complaint from plaintiff. Defendants sold the cigars for \$35 per thousand. Telegram was sent in reply to one from plaintiff of June 9, 1904. Defendants introduced evidence showing sales of cigars by plaintiff's salesmen within the territory east of the Atlantic Coast Line Railroad prior to May 28, 1904. Plaintiff introduced no evidence. The court charged the jury that if they believed the evidence they should answer the second issue "Yes," and the fifth and sixth "Nothing." Defendants excepted. The jury having answered the issues as directed by the court, judgment was signed for plaintiff to which defendants duly excepted and appealed.

Aydlett & Ehringhaus for appellant. Pruden & Pruden, Shepherd & Shepherd, and W. A. Carr, for appellee.

CONNOR, J. (after stating the facts). Defendants' first exception, pointed to the submission of the second issue, is presented upon their exception to his honor's charge, and will be considered in that connection. The second exception to the admission of defendant Weatherly's statement that he sent the telegram in reply to plaintiff's of June 9, 1904, cannot be sustained. The defendants having introduced plaintiff's telegram, calling for an answer, it was clearly competent to elicit from him whether or not he answered the telegram. There is no rule of law requiring the agreement to rescind or cancel such a contract as existed between the parties to be evidenced by any writing. Certainly the defendant, having shown a notice on the part of plaintiff that he had elected to rescind, could have been asked the general question whether defendants assented to the rescission. If any question had arisen in regard to the terms or lan-

guage of the telegram, it would have been necessary to produce it or to account for its absence. The testimony simply showed, by the admission of defendant Weatherly, that he sent a telegram in the language suggested by plaintiff. The exception cannot be sustained.

The real controversy between the parties is presented by defendant's contention: (1) That, conceding the facts to be as shown by the correspondence, there was no valid rescission of the original or substitution by new contract, for that the agreement to rescind is not supported by any valuable consideration. (2) That, if there was a rescission by mutual consent, their right to recover damages sustained prior to the breach was not waived or surrendered. It is well settled that a contract may be discharged by an express agreement that it shall no longer bind either party. This is usually and correctly termed a rescission. It is equally well settled that such an agreement to operate as a discharge, must be supported by a valuable consideration, which may be either a payment in money, something of value, or by a release of mutual obligations incurred in making the contract. In *Brown v. Lumber Co.*, 117 N. C. 287, 23 S. E. 253, it is said: "When the contract is wholly executory, a mere agreement between the parties that it shall no longer bind them is valid; for the discharge of each by the other from his liabilities under the contract is a sufficient consideration of the promise of the other to forego his rights. * * * If a contract has been executed on one side, an agreement that it shall no longer be binding, without more, is void for want of a consideration. Clark on Cont. 418. Of the several methods by which a contract may be discharged, one is by substitution of a new contract, the terms of which differ from the original. In such cases the release of the obligation of the old and the substitution of new obligations constitute valuable considerations." "It is also now well settled that ordinarily a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether." *Hastings v. Lovejoy*, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462. In *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793, Andrews, J., says: "The agreement annulling the prior contract is supported by an adequate consideration. The new obligation which G. assumed under the contract of October 25, 1882, was alone a sufficient consideration. There was a consideration, also, in the mutual agreement of the parties to the prior contract which was still executory, although in the course of performance to discharge

each other from reciprocal obligations thereunder and to substitute a new and different agreement in place thereof." The principle is well illustrated in *Dreifus Block Co. v. Salvage Co.*, 194 Pa. 475, 45 Atl. 370, 75 Am. St. Rep. 704.

Assuming that the determination of the plaintiff to rescind the contract, as communicated by him to defendants on May 28th, was a breach of its terms, the defendants may have stood by their rights under the contract and sued for such damages as they sustained. Instead of doing so, they desired to continue purchasing cigars from plaintiff, who refused to sell on any other terms than an assent to the rescission. The defendants elected to assent to plaintiff's terms, deeming it conducive to their interests to do so. The status of the parties at this time is well illustrated by what is said by Mr. Justice Dean in *Dreifus Co. v. Salvage Co.*, supra. In speaking of the breach of a contract by defendant to deliver steel at a fixed price, he said: "Assume * * * that there was a distinct declaration that the company would not perform its contract; still, if anything can be clear, it is that above all things plaintiff did not want a lawsuit for damages. At that stage, their damages were wholly uncertain, depending on the fluctuating price of steel. They did know they wanted the steel. What damage they might want by reason of defendant's breach, or what they might sustain, they did not know. In this dilemma they sought for and obtained a new contract expressly canceling the old. * * * They agreed to accept a fixed quantity and quality of merchandise at fixed times and prices, instead of the uncertain event of a lawsuit." In *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723, plaintiff had made a contract to furnish defendant, who was a brewer, ice during the season at a fixed price. During the life of the contract he notified defendant that he would not furnish any more ice unless defendant paid a very much larger price. Defendant, after protesting, assented to the change in price, and purchased the ice at the price for which the action was brought. He set up, as a defense, that the note for the price of the ice was without consideration, etc. Cooley, J., said that the defendant had a right to refuse to buy ice at the advanced price and sue for damages for the breach of the contract. "But defendants did not elect to take that course. They chose, for reasons which they must have deemed sufficient at the time, to submit to the company's demand and pay the increased price rather than rely upon their strict rights under the existing contract." We are of the opinion that the defendants elected to consent to the cancellation or rescission of the original contract, in consideration of the substituted contract by which plaintiffs agreed to sell them cigars upon the terms set out in the letters of May 28 and June 6, 1904,

and the telegram of June 9th, and that this consent was based upon a valuable consideration.

The defendants say that, conceding this to be true, their right to recover damages which had accrued prior to such rescission was not affected thereby. Certainly after a contract is discharged, either by rescission or substitution of a new contract, no action can be maintained on the original contract. For any benefits accruing to either party by part performance of the contract, unless expressly released, an action as upon a quantum meruit if it be labor performed, or quantum valebat if property received, may be maintained. It is not upon the contract, but upon an implied assumpsit. In *Dreifus Co. v. Salvage Co.*, supra, it is said: "The term 'cancellation of a contract' implies a waiver of all rights thereunder by the parties. If, after a breach by one of the parties, they agreed to cancel it and make a new contract with reference to its subject-matter, that is a waiver of any cause growing out of the original breach; and this is the rule, even though the original contract was under seal."

We have discussed the case upon the assumption that the plaintiff made the first breach of the contract. It is by no means clear that, upon the admitted failure by defendants to pay the bills for cigars within 10 days, plaintiff was not released from further performance on his part. It is often difficult to say when, in a bilateral contract such as this, stipulations are of the essence of the contract and the failure to perform them releases the other party from further performance. However this may be, there was certainly sufficient doubt to sustain the agreement to rescind or substitute a new contract. It is well settled that the release of controverted claims constitutes a valuable consideration. It may well be that defendants preferred to enter into the new contract for the purpose of securing the cigars with which to supply their trade, rather than engage in litigation of doubtful result. However this may be, they did so elect, and, having procured the cigars upon their express agreement to rescind the original contract, they have no just right to complain if required to do so. If they intended receiving any demand for damages, common fairness required them to say so. Upon an examination of the entire record, we find no error.

The judgment must be affirmed.

(140 N. C. 437)

JOHN L. ROPER LUMBER CO. v. ELIZABETH CITY LUMBER CO.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—RIGHT TO DAMAGES.

In an action for trespass by cutting lumber, the complaint alleged ownership of the locus, while the answer averred ownership in defend-

ant. The court submitted the issues of title and the further issue of whether defendant cut timber "on the lands described in the complaint." Counsel agreed, by stipulation, that if the jury should answer the issue as to title in the affirmative, the fact of the trespass should be taken as admitted, and the amount of the damages should be ascertained by reference. The jury answered the first two issues in the affirmative and the third in the negative. It was adjudged that plaintiff was entitled, upon the agreement of counsel and the verdict of the jury, to nominal damages and costs. *Held*, that the decision was a bar to a motion by plaintiff for the assessment of the damages, occasioned by the cutting of timber by defendant on the same land subsequent to the commencement of the action.

2. SAME.

A verdict to the effect that defendant had not cut timber on land described in the complaint, followed by a judgment of the court thereon, is conclusive, though there was a report in the case made by the defendant that timber had been cut on the land in question.

Appeal from Superior Court, Camden County; Shaw, Judge.

Action by the John L. Roper Lumber Company against the Elizabeth City Lumber Company. From an order denying a motion for the assessment of damages, plaintiff appeals. Affirmed.

This cause was before us, on appeal by both parties, at February term, 1904 (135 N. C. 742, 744, 47 S. E. 757) and again, on petition to rehear, at February term, 1905 (137 N. C. 431, 49 S. E. 946). We held in the first of the above-reported cases that the plaintiff was not entitled to judgment declaring it to be the owner of the land, as the recovery of the land was not the object contemplated when the suit was brought, and was not within its intended scope, but only the recovery of damages for a trespass in cutting and removing timber. A simple judgment dismissing the action was directed to be entered for the defendant. Plaintiff filed a petition to rehear the case, and we then held that there was error in the former judgment, and that plaintiff was entitled, upon the agreement of counsel and the verdict of the jury, to nominal damages and costs. The judge, on plaintiff's motion, had enjoined the defendant from cutting timber on the land in dispute, unless it should give bond to pay all damages the plaintiff sustained by reason of the modification of the order for the injunction. The bond was given and the defendant was thereupon permitted to continue the cutting of timber on the land. When the case was again called in the lower court, the plaintiff's counsel moved that judgment be entered for nominal damages and costs, according to the mandate of this court, and, further, that the damages sustained by the cutting of the timber since the suit was brought be inquired into and assessed by a jury or ascertained by a reference, as was proper, and that it have judgment for the amount so ascertained. This motion was denied, and plaintiff excepted, and the case is again brought here by ap-

peal of the plaintiff from the order denying its motion. The facts are so fully stated in the former reports of the case that it is unnecessary to reproduce them here.

W. M. Bond and W. B. Rodman, for appellant. Aydlett & Ehringhaus, for appellee.

WALKER, J. (after stating the facts.) The motion of the plaintiff, as stated in the argument before us, is based upon the contention that the former judgment for nominal damages and costs does not preclude a recovery of damages accrued since the action commenced, as in an action of trespass, such as this is, damages can only be assessed to the date of issuing the writ or summons, and not to the time of the trial, and therefore no inquiry was made in the former trial as to any damage sustained since the action commenced. He relies on the case of *Jones v. Kramer*, 133 N. C. 446, 45 S. E. 827, in support of this position. We do not think that decision has any application to the facts of this case. Counsel, as it appears, agreed, before the trial in the court below, that if the jury should answer the first issue, as to title, "Yes," the fact that defendant had trespassed should be taken as admitted, and the amount of the damages should be ascertained by a reference under the Code. The jury did give affirmative answers to both the first and second issues, which related to the title, or ownership of the land; but Judge Justice, who presided at the trial, submitted a third issue as follows: "Has the defendant cut timber or committed other acts of trespass on the lands described in the complaint and inside the Weeks and Valentine grants?" To this issue the jury responded in the negative. In referring to this phase of the case, this court, by Douglas, J., in 135 N. C., at page 743, 47 S. E. 757, said: "The plaintiff brought a civil action in the nature of trespass, alleging its ownership of the land in question and the defendant's trespass thereon. The jury found in substance that the plaintiff owned a part of the lands described in the complaint, but that the defendant had not trespassed upon those particular lands. This was the practical result of the verdict." And the learned justice, for the court, then added: "And its legal effect was to entitle the defendant to a judgment that it go without day and recover its costs." On the rehearing we practically affirmed what was first said by the court as to the legal effect of the answer to the third issue, but we held that the other part of the decision, which we have just quoted, did not give proper force and effect to the agreement of counsel, and the general result was declared to be that plaintiff was entitled to recover nominal damages, under the agreement and the finding of the jury upon the first and second issues, but that it was not entitled to any substantial damages, as it was perfectly apparent, from the judge's

charge and the response to the third issue, the jury had found that plaintiff had failed to show that its paper title covered the locus in quo, or that any actual trespass had been committed by cutting timber or otherwise.

As said by Justice Douglas for this court (135 N. C. 743, 47 S. E. 757), the gravamen of the action is trespass. Plaintiff does not sue to recover the land, but for an injury to his possession. It has not shown it was in actual possession of the locus in quo claiming the same as its own, nor is there any pretense that it ever had any such possession to be invaded, so far as the case shows. It relied upon constructive possession arising out of its alleged title, and counsel so stated at the last hearing, as they had previously done. The jury have found that while plaintiff has title to the land described in the complaint, because the grant (referred to therein) and mesne conveyances introduced by it at the trial corresponded with the description set out in the complaint, yet the jury have gone further and said that these papers do not describe the land upon which the timber was cut and upon which the trespass is alleged to have been committed. There has been no assessment of damages, nor attempt to assess them, and no issue submitted for their assessment. The jury have merely found that there has been no trespass, and there must be a trespass before there can be any assessment of damages. The plaintiff therefore, has lost upon the main issue in the case. Again, it is apparent that the plaintiff sued to recover damages for cutting timber and removing the same from the land it claims to own, that being the sole trespass complained of, and that the acts of trespass upon which the suit was originally predicated were of the same nature as those now alleged to have been committed since the suit was commenced. In other words, the timber from the beginning has been cut upon the same land. The plaintiff so alleges in the fourth, fifth, and sixth sections of the complaint. The specific allegation in those sections is that defendant had cut (before the suit was commenced) and is now cutting timber on the land, and, moreover, will continue to cut timber thereon unless restrained by the court. The defendant admits the cutting of timber, but denies the plaintiff's ownership of the land on which the cutting has been and is being done, and avers ownership in itself. So that the issue was squarely joined between the parties as to the location of the lands described in the plaintiff's grant and deeds. The jury, answering the third issue, under instructions, not only not assailed, but proper in themselves, and which strictly confined their consideration of that issue to the question of location, have found that the plaintiff's grant and deeds did not cover the locus in quo. We do not see why this finding and the judgment of the court in accordance therewith is not a complete bar to the prosecution of

any further suit or proceeding for the recovery of damages. Plaintiff having relied upon its title as giving it the necessary constructive possession to maintain this action of trespass for cutting the timber, it has, so far as the recovery of actual or substantial damages is concerned, been defeated before the jury upon the vital question involved in the case, namely, the location of the lands described in its title deeds and their identification with those upon which the trespass is alleged to have been committed, and, but for the technical advantage gained by the agreement, it would have lost everything.

The test as to the bar of a previous action is, not whether the damages sought to be recovered are different, but whether the cause of action, or the decisive question involved, is the same. *Gibbs v. Cruikshanks*, L. R. 8 C. P. 460. A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having substantially the same object in view, although the form of the latter and the precise relief sought is different from the former. *Edwards v. Baker*, 99 N. C. 258, 6 S. E. 255; *Tuttle v. Harrill*, 85 N. C. 456. It is true that the act of entering upon land and cutting timber constitutes a continuing trespass for which successive actions may be brought; the plaintiff recovering damages in each to the date of his writ. *Jones v. Kramer*, 133 N. C. 448, 45 S. E. 827; *Moore v. Love*, 48 N. C. 215. But this principle does not apply, so as to prevent a bar, where the plaintiff has failed to prove the unlawful entry, or to show his possession, either actual or constructive, of the land upon which he alleges the defendant trespassed; and the jury have found and the court adjudged in this case that the plaintiff has no title to the land upon which to base a constructive possession, which was his sole reliance. *Brown v. Lake*, 29 Ohio St. 64. Having joined issue upon this question, so essential to be established in its favor in order to warrant a recovery of damages, and having lost, it will not now be heard to assert what is practically and in legal contemplation the same title and right, but must abide the legal consequences of the verdict and judgment against it. The rule is that a point once determined between the parties or their privies cannot again be brought in question, and the former decision may be relied upon as an estoppel in any cause of action that may thereafter be tried involving the same point. *Gay v. Stancell*, 76 N. C. 369; *Bigelow on Estoppel* (5th Ed.) p. 10; *Yates v. Yates*, 81 N. C. 397; *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248. In matters not whether we treat the former adjudication as a bar or as a strict estoppel (*Isler v. Harrison*, 71 N. C. 64), the legal effect is the same, as either is of conclusive force upon the question decided. As said in *McElwee v. Blackwell*, 101 N. C., at page 195, 7 S. E., at page 895, "the title is determined and this effect-

ally defeats the action." At the former trial the fundamental and essential fact of the plaintiff's case, upon which it based its claim for damages, was, as we have shown, found against it, and the law forbids further litigation.

We do not construe the defendant's or the inspector's reports of timber cut as do the plaintiff's counsel; but, even if the defendant had reported the timber as having been cut on the land described in the complaint, the law will not permit that fact, nor the terms of the orders made in the cause, to outweigh the deliberate verdict of a jury upon that question, followed, as it was, by a judgment of the court thereon. *Fanshaw v. Fanshaw*, 44 N. C. 169; *Yarborough v. Harris*, 14 N. C. 40. The motion of the plaintiff is for the assessment of damages accrued since the action was commenced; that is, of course, for damages which have accrued in like manner as those which were alleged to have been sustained prior to the date of the summons. To allow this would be to give the plaintiff two chances to establish its case and to recover, not as much, it is true, as it would have done if it had succeeded, instead of failed, in showing the justice of its claim, but still something of the same kind and depending upon the same asserted right or title which the jury had found did not in fact exist. We hold that the effect of the former decision is to bar the plaintiff's recovery of damages.

No error.

(140 N. C. 391)

SHEPARD v. SUFFOLK & C. R. CO.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. RAILROAD — CONSTRUCTION — CATTLE GUARDS.

Revisal 1905, § 2601, requiring railroads, passing through inclosed lands, to construct and maintain cattle guards at the point of entrance upon and exit from said lands, applies to lots in a town and to land in stock law territory, as well as to tracts of land in the country and in territory in which the stock law is not in force.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 315-318.]

2. SAME—RIGHTS IN LAND—DEEDS.

A deed conveying land to a railroad for a right of way gives the railroad no more rights than it would have acquired to such land by condemnation.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 163.]

Appeal from Superior Court, Chowan County; Ward, Judge.

Action by W. B. Shepard against the Suffolk & Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Pruden & Pruden, for appellant. C. S. Vann, for appellee.

CLARK, C. J. The plaintiff owned a lot of two acres in the town of Edenton, which

was inclosed and used by him to pasture cows and horses. He conveyed a right of way through it to defendant railroad company, who tore down the fence beyond the right of way and failed to erect a cattle guard at the entrance and exit to the lot. The plaintiff sued for damages to the fence and for failure to erect cattle guards. There was evidence that the rental value of the lot was reduced from \$4 to \$3 per month by the failure to erect such guards. It was in evidence that the ordinances of the town forbade live stock from running at large therein. The defendant asked the court to charge that in view of such ordinance the defendant was not required to erect cattle guards at the entrance to and exit from the plaintiff's lot. The court refused to so charge, and the exception to such refusal is the sole point presented, for the defendant does not resist that part of the verdict which assessed \$15 for damages to the fence, but appeals from the assessment of \$26 damage from failure to put in the cattle guards.

Revisal 1905, § 2601, reads as follows: "Every incorporated company owning, operating or constructing, or which shall hereafter own, operate, or construct, or any company which shall be hereafter incorporated and shall own, operate, or construct any railroad passing through and over the land of any person now inclosed or which may hereafter become inclosed, shall at its own expense construct and constantly maintain in good and safe condition good and sufficient cattle guards at the point of entrance upon and exit from said inclosed lands, and they shall also make and keep in constant repair crossings to any plantation road thereupon. Every such corporation which shall fail to erect and constantly maintain such cattle guards and crossings shall be guilty of a misdemeanor and fined in the discretion of the court, and further liable in action for damages to the party aggrieved." The defendant contends that this statute does not apply to a lot in town nor to stock law territory, but there is nothing in the statute that discriminates between town and country, nor between stock law and non-stock law territory, and the courts are not empowered to write any discrimination into the statute. The adoption of the stock law does not abrogate in such locality a general statute or rule of law. *Roberts v. Railroad*, 88 N. C. 562. The fact that stock are not allowed to run at large in Edenton made it all the more imperative that the defendant should put up cattle guards where its track passed through the fences of plaintiff's pasture, else stock could not be confined therein and the pasture would become worthless for such purpose.

The defendant contends that it will be a burden if railroad companies are compelled to put up cattle guards wherever they cross the line of every small lot in town. Few lot owners will demand that this be done, and if it should prove an unjust burden there

is a ready remedy by application to the Legislature to amend the statute. Here, if the plaintiff's two-acre pasture were in the country, it would not be contended the defendant should not put in cattle guards. We fail to perceive any reason why the plaintiff's pasture shall be destroyed with impunity, by failure to put in a cattle guard to keep in his cows and horses, merely because the pasture lies inside the town limits. The deed to the right of way gives the defendant no more rights than he would have acquired by condemnation. *Hodges v. Telegraph Co.*, 133 N. C. 233, 45 S. E. 572.

No error.

(140 N. C. 423)

CHERRY v. LAKE DRUMMOND CANAL & WATER CO.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. TRESPASS—PERMANENT DAMAGE TO REAL ESTATE—ACTION BY REVERSIONER.

A reversioner, having neither possession nor right of possession, may maintain trespass on the case for a trespass causing permanent damage to the estate committed by a stranger.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reversions, § 9; vol. 46, Cent. Dig. Trespass, §§ 32-37.]

2. PARTIES—WAIVER OF DEFECT.

Where, in an action by the owner of two-thirds of the reversionary interest in real estate for trespass causing permanent damage to the estate, defendant entered a general denial, the right to require that all persons so interested be joined as parties was waived.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 167-170.]

3. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where an action for trespass to real estate was barred, the error of the court in charging that the evidence did not show any damage was harmless.

4. LIMITATION OF ACTIONS—INJURY TO REAL PROPERTY.

An action against a canal company for injuries to the reversionary interest in real estate, occasioned by it throwing dirt on the land in widening its canal, is barred in three years, by the express provisions of Revisal 1905, § 385, subsec. 3; and section 394, establishing the period of limitations at 5 years for damages to land occasioned by a railroad in the construction of its road, applies only to actions against railroads.

Appeal from Superior Court, Camden County; Shaw, Judge.

Action by W. A. Cherry against the Lake Drummond Canal & Water Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Plaintiff, owning two-thirds of the reversionary interest in fee, after the life of Mrs. Kate Cherry, in a house and lot abutting on the canal of defendant, brought this action, alleging that defendant, in widening and deepening its canal in the years 1898 and 1899, had wrongfully and negligently thrown sand and dirt upon and around the said house and lot, causing great and permanent damage to the same. Neither the life tenant,

Mrs. Kate Cherry, nor the owner of the other third of the reversion were parties, and the action was brought to recover for permanent damage to plaintiff's interest in the property. Defendant denied that it had wronged or injured plaintiff or his interest, and pleaded the statute of limitations in bar of plaintiff's demand. There was evidence of plaintiff tending to show that in the years 1898 and 1899 the defendant company, a corporation for constructing and operating a canal in North Carolina and Virginia, had widened and deepened its canal, and in so doing had thrown sand and mud on the plaintiff's premises and so embanked it upon and around the house, situated thereon, that when it rained the said house was virtually in a mud hole, and by reason of said wrong and injury the premises had become almost valueless, the house being unrentable and uninhabitable, and the damage thereto was from \$1,200 to \$1,500; that the alleged wrong was done by the defendant in 1898 and 1899. There was evidence of the defendant tending to show that the damage was not so great in amount as the plaintiff claimed, and also to the effect that the embankment of sand and mud which caused the injury could be removed. On the pleadings there were four issues framed for submission to the jury, as follows: (1) Is the plaintiff the owner of the land described as alleged? (2) Did the defendant wrongfully and unlawfully injure the plaintiff's land as alleged? (3) If so, what permanent damage to the land has the plaintiff sustained? (4) Is the plaintiff's cause of action barred by the statute of limitations? At the close of the testimony the court intimated that it would charge the jury that, upon all the evidence, if believed, they should answer the first issue, "Yes; two undivided thirds subject to the life estate"; the second issue, "Yes"; and the third issue "Nothing." The plaintiff excepted, and upon this intimation submitted to a nonsuit, and appealed.

Aydlett & Ehringhaus, for appellant. Pruden & Pruden and Shepherd & Shepherd, for appellee.

HOKE, J. (after stating the case). It has been settled by several decisions of this court that the facts disclosed in the foregoing testimony amount to an actionable wrong on the part of the defendant company towards the owner of the injured property. *Mullen v. Canal Co.*, 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833; *Pinnix v. Canal Co.*, 132 N. C. 124, 43 S. E. 578. And the same authorities declare that, when the damage is of a permanent character, recovery may be had in one action for the entire wrong. *Mullen v. Canal Co.*, 130 N. C. at page 505, 41 S. E. at page 1030 (61 L. R. A. 833). It is also an established principle that, where there has been a trespass committed on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder of the reversion can maintain an

action for the wrong done to his estate and interest. He could not maintain the technical action of trespass, because, as said in *Latham v. Lumber Co.*, 189 N. C. 9, 51 S. E. 780, he has neither the possession nor the right thereto; but he could maintain an action of trespass on the case if the wrong was done by a stranger, and of waste or action in the nature of waste if done by the owner of a particular estate. 28 Am. & Eng. Enc. (2d Ed.) 575, 622; *Burnett v. Thompson*, 51 N. C. 210. Ordinarily, when the remainder or reversion is held by co-owners, the alleged wrongdoer might by demurrer require that all persons so interested should be joined. But in this case, the defendant having entered a general denial, any defect of parties which may have existed is waived; and, if permanent damage is shown impairing the value of the inheritance, the plaintiff, as owner of two-thirds of the reversion after the life estate of Mrs. Kate Cherry, has a right of action for the full amount of damage done to his two-thirds interest in the property. *Burnett v. Thompson*, supra; *Putney v. Lapham*, 10 Cush. (Mass.) 232; *Thompson v. Hoskins*, 11 Mass. 419. The action, then, is well brought, so far as the parties in interest are concerned.

The court is also inclined to the opinion that the judge below committed an error in the charge proposed by him on the third issue—that addressed to the question of permanent damage. There seems to have been evidence to be considered by the jury tending to show permanent damage. This intimation of his honor was very likely an inadvertence, and intended by him for the fourth issue—that as to the statute of limitations. Very certain it is, however, that the judgment of nonsuit should not be disturbed; for, though it should be established and declared by a verdict that permanent damage has been done to the plaintiff's estate and interest, it is perfectly clear, both from the allegations of the plaintiff and the uncontroverted facts, that the plaintiff's cause of action is barred by the three-year statute of limitations. The statute being properly pleaded, the error as to permanent damage, if any was committed to the plaintiff's prejudice, was harmless, and no good would result by awarding a new trial. In 2 Am. & Eng. Enc. Pl. & Pr. 499, we find it stated that "appellate courts deal with judicial acts, and it would not avail to reverse a ruling or judgment correct on the record, though it may be founded on an erroneous reason." And again, in the same volume, at page 500: "This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal, or other objections which the record shows

could not have prejudiced the appellant's rights." The decided cases in this and other jurisdictions support this position. In *Butts v. Screws*, 95 N. C. 215, Ashe, J., for the court says: "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." See, also, *Ratliff v. Huntly*, 27 N. C. 545; *Fry v. Bank*, 75 Ala. 473. The opinion also finds support in the case of *Shackleford v. Staton*, 117 N. C. 73, 23 S. E. 101, where, on motion, a cause was dismissed when, the statute having been properly pleaded, the facts stated in the complaint showed that the cause of action was barred by the statute of limitations. According to the allegations of the complaint and the uncontroverted facts, the entire wrong was done in the years 1898 and 1899. The action was instituted on August 24, 1903. The statute of limitations which applies (Revisal 1905, § 395, subsec. 3) declares that an action of this character is barred in three years. The plaintiff therefore can in no event recover, and any error on the third issue was harmless.

It is urged that chapter 224, p. 297, Pub. Laws 1895, established a period of five years as the limitation, and that in *Mullen v. Canal Co.*, 130 N. C. 505, 41 S. E. 1027, 61 L. R. A. 833, the court applied this statute to actions like the present; but this is a misconception of the opinion referred to. This statute (chapter 224, p. 297, Laws 1895), brought forward in the Revisal of 1905 as section 394, which established the period of limitation at five years, in express terms applies only to actions against railroad companies, and the courts have no authority to extend its provisions to actions of a different character. The language of the learned judge who wrote the opinion in *Mullen's Case*, supra, is as follows: "While chapter 224, p. 297, Laws 1895, applies only to railroads, yet, as the court has extended the rule of permanent damages to both companies and telegraphs, under the principle laid down in *Ridley v. Railroad*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, we see no reason why it should not apply equally to canals." It will thus be observed that the court here only declared that it would extend the rule of permanent damages to actions against the defendant company according to the principles announced and exploited in *Ridley's Case* and as contemplated by the statute in reference to railroads, but did not, and did not intend to, extend the application of the statute or the period of limitation therein established to cases not contained in its provisions.

There is no reversible error presented, and the judgment of nonsuit is affirmed.

(140 N. C. 452)

CRESENT HOSIERY CO. v. MOBILE COTTON MILLS.

(Supreme Court of North Carolina. March 6, 1906.)

1. SALES—BREACH OF CONTRACT—ACTIONS—MEASURE OF DAMAGES.

Defendant contracted to sell to plaintiff 75,000 pounds of yarn, to be delivered in weekly shipments. Defendant, in August, 1902, commenced delivering yarn at the rate of 1,000 pounds a week, but owing to difficulties in procuring hands it delivered only about 40,000 pounds up to April, 1904, when it refused to make further deliveries. During the period of delivery defendant requested forbearance in failing to deliver the specified quantity per week, and renewed his promise to deliver. Plaintiff acquiesced, and the time for delivery was postponed. *Held* that, in an action by plaintiff for failure to make further deliveries, the measure of damages was the difference between the market and contract price of the yarn at the date of defendant's refusal to make further deliveries.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1174-1201.]

2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

A judgment will not be reversed for error in a portion of an instruction on the measure of damages, where there is nothing in the record to show that the party complaining was prejudiced thereby.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4047.]

Appeal from Superior Court, Halifax County; Peebles, Judge.

Action by the Crescent Hosiery Company against the Mobile Cotton Mills. From a judgment for plaintiff, defendant appeals. Affirmed.

There was evidence tending to show that on or about August 1, 1902, defendants contracted to sell and deliver to plaintiff 75,000 pounds of cotton yarn; 25,000 at 14½ cents per pound, and 50,000 at 14¼ cents per pound. That defendant, from time to time thereafter, delivered under the contract 39,992 pounds, leaving a balance undelivered of 35,078 pounds, for non-delivery of which the present action was instituted. That the contract evidently contemplated that the yarn was to be delivered in weekly shipments, no definite amount being specified for each week, and defendant had commenced shipping at the rate of 1,000 pounds per week, but, owing to difficulties in procuring hands and cotton, had been irregular about it, and between the time the contract was entered into and April 16, 1904, had delivered to plaintiff the said amount of 39,992 pounds, which had been received as delivered under the contract; and on that date defendant wrote to plaintiff and refused to make any further delivery. The correspondence between the parties during the period covered by the deliveries which were made shows that at various times, when there were delays and failures in the shipments, defendants would write to plaintiff explaining that these failures, etc., were owing to scarcity of hands, etc., but stating that the drawback would be overcome, and expressing the intention to resume shipments

and keep right up with plaintiff's orders. Plaintiff, while requesting shipments of yarn, accepted the various explanations, in one letter expressing sympathy with defendants' difficulties about the hands and continuing the contract relation between the parties. There was evidence to the effect that the market price of these yarns had continuously and steadily increased from the date of the contract till the time when same was broken on April 16, 1904, and on that date the market price at the place of delivery was 22¼ cents, and continued at that price during the month of April. There was also evidence to the effect that some time after receiving the letter of April 16th, plaintiff had bought, to replace the cotton yarns not delivered, 25,000 pounds of yarn at 22½ cents, and later, the remaining 10,078 pounds at 20 cents per pound. This, from the testimony, seems to have been some months after the termination of the contract. The court charged the jury that if the evidence was believed there was a breach of contract, and the damage was the difference between the market and the contract price of the yarn at the date of the termination of the contract by letter, April 16, 1904. Defendant excepted. There was a verdict in favor of the plaintiff assessing its damage at \$2,830.85. The plaintiff having only claimed in its pleading and demanded judgment for \$2,000, and the court having declined to permit an amendment to the pleadings enlarging the plaintiff's demand, there was judgment on the verdict for \$2,000 and interest, and the defendant excepted and appealed.

Day, Bell & Dunn and Murray Allen, for appellant. Kitchin, Smith & Kitchin, W. E. Daniel, and E. L. Travis, for appellee.

HOKE, J. (after stating the case). The exceptions in this appeal which require consideration are addressed to the charge of the court on the issue as to damages. The defendant contends that this is a contract for delivery of goods in installments, and that the court below committed an error in fixing April 16, 1904, when the breach of contract was recognized as entire, as the time when the amount of damage should be estimated; whereas he should have fixed upon the successive periods when there was a failure to deliver the weekly installments as a correct rule, and that on a market which was constantly advancing the rule adopted worked to his prejudice to the extent of several hundred dollars. The various exceptions of the defendant are addressed to that single question.

It is undoubtedly the general rule that, on a failure by the bargainor to deliver goods having a market value, the measure of damage is the difference between the contract price and the market value "at the time when and place where it should have been delivered." 2 Sedg. Dam. § 734; 2 Sutherland on Damages, § 651; Clements v. State, 77 N. C. 142; Coal Co. v. Ice Co., 134 N. C. 574

47 S. E. 116; *Saxe v. Lumber Co.*, 159 N. Y. 378, 54 N. E. 14. And where, by the terms of the contract, the goods are to be delivered by installments or at stated periods, the time of delivery will be the date for the delivery of each installment successively; the damage being the aggregate of these differences estimated as of these respective dates, and interest where allowed. *Sutherland*, supra, § 651; *Wood's Mayne of Damages*, § 206; *Brown v. Buller*, Law Rep. 7 Exch. 319; *Furnace Co. v. Cochran* (C. C.) 8 Fed. 463. And this rule generally obtains, though the last period for delivery had not elapsed when the action was brought or the cause tried. *Roper v. Johnston*, Law Rep. C. P. No. 8, p. 167. Where, however, the date of delivery has been postponed by agreement of the parties or at the request of the bargainor and for his convenience, acquiesced in and assented to by the bargainee, in such case the time of delivery will be at the subsequent date, and the damages estimated as of that date. *Sedg.* supra, § 737; *Paige on Cont.* § 1589; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; *Iron & Metal Co. v. Hirsch*, 94 Ill. App. 579; *Hill v. Smith*, 34 Vt. 525; *Trask v. Hamburger*, 70 N. H. 453, 48 Atl. 1087; *Ogle v. Earl Vane*, Law Rep. Q. B. No. 3, p. 271; *Hickman v. Haines*, Law Rep. C. P. No. 10, p. 595. In *Paige on Contracts*, supra, it is said: "And if the time of delivery is postponed by mutual consent, the time fixed by the last postponement is the time at which the damages should be estimated." In *Iron & Metal Co. v. Hirsch*, supra, it is said: "The performance by appellant was postponed from time to time by promises to deliver. These promises extended over the period from the time when delivery was due by the terms of the contract until the time of the settlement by the appellee of the claim for damages against him and the bringing of the suit." And the damages were assessed at a subsequent period. In *Ogle v. Vane*, supra, it was held that: "There was evidence from which the jury might infer that the plaintiff's delay was at the defendant's request; that, as the evidence went to show, not a new contract, but simply a forbearance by the plaintiff at the defendant's request, the statute of frauds did not apply, and the plaintiff was entitled to a verdict for the full amount of damages." As will be noted, this was a case involving a question on the statute of frauds, but it is, we think, also an apt authority, on the point here presented, that, where delivery is postponed by defendant's request and for his convenience, the date of estimating the damages will be fixed at the subsequent date. *Hickman v. Haines*, supra, is to like effect.

We are of opinion that the correct interpretation of the correspondence and conduct of the parties show that there was a request for forbearance on the part of the defendant accompanied by renewed promises to deliver,

acquiesced in and assented to by the plaintiff, which resulted in postponing the time for delivery originally agreed upon. Thus, in the letter of June 8, 1903, the defendant writes: "We are due you on your order, after this shipment of May 30, of 53,866 pounds. We have been very short-handed in our mill, and we are away behind on all our orders on that account; but we are making every effort to get more hands, and as soon as we can do that and get out our full production, we will then be able to make you more frequent shipments, and we will be glad to do so as soon as it is possible for us to do it. [Signed] Mobile Cotton Mills, M. W. Dunlap, Pres." And on July 10, 1903: "We have had a great deal of machinery standing because we did not have the hands to run it, and as you understand if we cannot get the yarn made, we cannot ship it. However, we will keep right behind your order and make a special effort to get you off a shipment with as little delay as possible." Signed as above. And on June 13, 1903: "We will request the railroad company to trace the shipment we made you on June 30 and hope it will reach you promptly. We will also make you another shipment on your order as soon as we possibly can. We are still very short-handed in our mill on account of sickness among our hands, and are away behind on all of our orders on that account, and we do not think it is going to be possible for us to ship you 2,000 pounds weekly, as you have requested, and if our hands are sick and we cannot get the yarn, it is a matter beyond our control. We will keep right behind your order and do the very best we possibly can for you, but the situation does not seem to be improving any, with us regarding our hands, and it seems to be impossible to get any more at this season of the year, though we have made every effort to get them and we doubt if we will be able to get any more for several months yet, as the place from which we can get our new hands is from the country, and they all have little crops now which they will not leave until they have gathered them. We expect to ship you every pound due you on your order, and will make the shipments as soon as we possibly can, and with as little delay as possible." Signed as above. This evidence brings the case clearly within the principle stated, and, as to all deliveries due at the time the contract was recognized as broken, there is no error in the charge of the judge below. This, we think, disposes of the appeal for, according to our estimate, all of the deliveries were past due at the time the contract relation was severed, on April 16 1904.

The defendant, however, contends that by the terms of the original contract five or six of the weekly installments were still due on April 16, 1904, and that as to these the general rule should be applied.

If this fact be conceded, it could not avail the defendant. It would indeed show that there was error in the charge as to the por-

tion of yarn remaining undelivered, for, as held in *Roper v. Johnston*, supra, the rule which fixes the date of each installment, as the determinative period, applies to failures after, as well as before, an entire breach of contract; and, as to yarn remaining undelivered, there has been neither forbearance nor renewed promise. But the verdict and judgment will not be disturbed on this account, because neither the case nor the record affords any means of showing that the defendant's rights were in any way prejudiced. So far as appears, there was no decline in the price of yarns from April 16th till the time when the contract would have expired; but the evidence tends to show the contrary. As to yarns remaining undelivered, therefore, and without evidence of any decline in price, it cannot be seen that the error, if committed, has worked any harm to the defendant's cause. As held in *Cherry v. Canal Co.* (at this term) 53 S. E. 138, in order to constitute reversible error, it must appear that the appellant's rights have in some way been prejudiced by the action of the court below.

This does not appear in the present case, and the judgment below is affirmed.

(141 N. C. 726)

STATE v. MORGAN.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. BASTARDY—FAILURE TO GIVE BOND—IMPRISONMENT—RIGHT TO DISCHARGE.

Revisal 1905, § 1915, authorizing the discharge upon certain procedure of every putative father of a bastard committed for failure to give bond or pay money for the maintenance of the child, and every person committed for the fines and costs of any criminal prosecution, is modified by the later enactments contained in sections 1352, 1355, providing that, when any county has made provision for the working of convicts upon the public roads, all insolvents imprisoned for nonpayment of costs in criminal cases may be retained in imprisonment and worked on public roads until they have repaid the county to the extent of half the fees charged against each county for each person taking the insolvent oath, and as so modified section 1915 does not apply to counties in which provision is made for working convicts on the roads.

2. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—BASTARDY PROCEEDINGS.

Revisal 1905, § 262, providing that, when in bastardy proceedings the putative father shall be charged with costs or the payment of money for the support of bastard, the court may sentence such putative father to the house of correction, etc., is not objectionable as authorizing imprisonment for debt.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, § 211; vol. 10, Cent. Dig. Constitutional Law, § 151½.]

3. BASTARDY—FAILURE TO PAY COSTS—SENTENCE—LABOR ON PUBLIC ROADS.

Under Revisal 1905, §§ 1352, 1355, authorizing the county commissioners to work upon the public highways any person imprisoned for failure to enter into bond for keeping the peace or for good behavior, or who fail to pay the costs adjudged against them, and making it the duty of the judge, where any county

has made provisions for the working of convicts upon the public roads, to sentence to imprisonment at hard labor on the public road persons imprisoned for nonpayment of costs in criminal cases, etc., defendant in bastardy proceedings cannot be sentenced to labor on the public roads; there being no express authority for such a sentence, and such proceedings not being criminal proceedings.

Appeal from Superior Court, Wake County; Moore, Judge.

Charles Morgan was imprisoned for failure to give bond pursuant to a judgment against him in bastardy proceedings, and filed a petition to be discharged from custody. From a judgment granting the petition, the state and the relatrix appeal. Affirmed.

The Attorney General and J. C. L. Harris, for the State.

CLARK, C. J. The defendant, tried before a justice of the peace on a charge of bastardy upon the complaint of the mother of the child, did not deny the paternity, and was therefore adjudged to pay her \$50, allowance (Revisal 1905, § 254) for the maintenance of the child, a penny fine, and \$3.80, costs of the action, and to give bond in the sum of \$100, with surety, to indemnify the county against any and all charges for the maintenance of the bastard child. This judgment was in accordance with sections 254 and 259 of the Revisal of 1905. The judgment further provides: "And in default of such payments and of the execution of said bond that he be committed to the house of correction of Wake county for the term of ten months, with authority to the commissioners of said county to work him on the public roads of the county," etc. Section 262 of the Revisal provides: "In all cases arising under this chapter when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall by law, be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father to the house of correction for such time, not exceeding twelve months, as the court may deem proper: Provided that such person or putative father, at his discretion, instead of being committed to prison or to the house of correction, may bind himself, as an apprentice to any person whom he may select," etc., "the price obtained shall be paid to the county treasurer." The defendant did not comply with the order of the court, nor accept the option given him to bind himself as an apprentice to some person selected by himself. Thereupon the sentence to "ten months in the house of correction" became operative, if there was such "house of correction."

The Revisal 1905, § 1352, authorizes the county commissioners to work upon the public works, highways, and streets any persons

imprisoned in jail "upon conviction of any crime or misdemeanor or who may be committed to jail for failure to enter into bond for keeping the peace, or for good behavior, and who fail to pay the costs," provided "such prisoner or convict shall not be detained beyond the time fixed by the judgment of the court," and also provided the court should so authorize in its judgment. Revisal 1905, § 1355, makes it the duty of the judge, where "any county has made provision for the working of convicts upon the public roads," to sentence for the term of their imprisonment "all persons convicted of offenses" and sentenced to imprisonment in jail, or to the penitentiary for less than 10 years and all sentenced to imprisonment for "nonpayment of costs in criminal cases." This statute has often been held constitutional. See cases cited in *State v. Young*, 138 N. C. 573, 50 S. E. 213. The defendant, having remained in jail 20 days, filed a petition before the clerk of the superior court of Wake, under authority of Revisal 1905, §§ 1915, 1918a, and upon taking the oath prescribed by section 1918a was discharged from custody. The state and the woman appealed, assigning as grounds: (1) The imprisonment of the defendant was for a definite and fixed term, under Code, § 38 (now Revisal 1905, § 262), and the clerk had no power to discharge him. (2) Because the defendant did not aver that he had paid or worked out half his costs, as required by chapter 419, p. 408, Laws 1889 (now Revisal 1905, § 1355).

The defendant relies for his discharge upon the Revisal 1905, § 1915, which authorizes such discharge upon the procedure provided in that chapter of: "(1) Every putative father of a bastard committed for a failure to give bond, or to pay any sum of money ordered to be paid for its maintenance. (2) Every person committed for the fine and costs of any criminal prosecution." But that section, originally enacted in 1773, must be construed in connection with the other sections of the Revisal, and does not repeal the later statutes, which authorize and direct the working upon the public roads of those sentenced for nonpayment of costs in criminal cases, as Revisal 1905, §§ 1352, 1355, and others, which are a modification of the general terms of the earlier statute (now Revisal 1905, § 1915). That earlier statute applied to a condition of things when the working out of costs was unknown, and the defendant, without this provision for relief, would be imprisoned without hope of discharge. It does not apply to counties where provision for working out the costs is now made. The earlier statute (section 1915) does not repeal those enacted much later (sections 1352, 1353), but the latter modify it. This has been so held in *State v. Manuel*, 20 N. C. 146. All three sections being re-enacted into the Re-

visal at the same time, they must be construed together.

That section 1915 of the Revisal, authorizing the discharge of insolvents in the mode therein prescribed, is modified by the later statute (passed in 1887), now Revisal 1905, § 1355, may be seen by reference to the following language of section 1355: "When any county has made provision for the working of convicts upon the public road, * * * it shall be lawful for, and the duty of the judge holding court in said counties to sentence to imprisonment at hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jail or in the state's prison, the following classes of convicts [naming them]. In such counties * * * also all insolvents, who shall be imprisoned by any court in said counties for nonpayment of costs in criminal causes, may be retained in imprisonment and worked on the public roads until they have repaid the county to the extent of the half fees charged up against each county for each person taking the insolvent oath." There are further provisions that the "rate of compensation allowed each insolvent for work on the public roads shall be fixed by the county commissioners at a just and fair compensation"; and section 1352 further provides that such insolvent "shall not be detained beyond the time fixed by the judgment of the court." Some one must labor to pay the half costs incurred by an insolvent convicted of crime, and the Legislature thought it better that the lawbreaker should do this, and to that extent improve the public roads, than that the punishment should fall upon hard working citizens of earning money to pay what convicted criminals should earn by their own labor, and the criminals are safeguarded both by fair valuation for their services and the judgment limiting the time they may serve. There is no constitutional provision denying this power to the Legislature.

The defendant then relies upon the ground that the sentence to the house of correction is unconstitutional because it is for nonpayment of debt. There is a failure to discharge a public duty, to wit, to provide for the maintenance of the bastard child and prevent its being a charge upon the county, and to give bond to protect the public from such liability. This public duty can be enforced by appropriate remedy, like failure to work the public roads, to serve on the jury, to serve in the army, to pay alimony ordered (*Pain v. Pain*, 80 N. C. 325), or the like, and it was competent for the General Assembly to provide that upon failure to save the public harmless from being taxed to support the defendant's bastard, or to select some one to whom he might apprentice himself to earn money for that purpose, the court could sentence the defendant "not exceeding

twelve months." *State v. Palin*, 63 N. C. 471; *State v. Bensley*, 75 N. C. 212; *State v. Edwards*, 110 N. C. 512, 14 S. E. 741. This is not punishment for crime, but enforcement of the order of the court, as in case of a refusal to obey an order for alimony or contempt in disobeying any other order; the statute in this case making the limit 12 months. The sentence to the house of correction is valid enough, if there was a house of correction. The defendant, however, did not complain of that sentence, which he was not undergoing, but of being ordered to work on the public roads.

The defendant further contends that any order of imprisonment for nonpayment of a fine and costs, or that the defendant be set to work them out on the public works and roads, is unconstitutional because it is "imprisonment for debt." It is true that a fine, and costs also, are debts, but they are more. A fine and costs in criminal actions are a part of the punishment imposed as a result of the conviction and judgment, and, if not paid, imprisonment at hard labor can be imposed upon such failure. This has always and everywhere been held. "It is competent for the Legislature to impose hard labor upon a defendant for nonpayment of the costs of the prosecution; this being part of the punishment." 11 Cyc., citing *Joice*, ex parte, 88 Ala. 128, 7 South. 3; *State*, ex parte, 87 Ala. 46, 6 South. 328; *Berry v. Brislan*, 86 Ky. 5, 4 S. W. 794; *State v. Brannon*, 34 La. Ann. 942; *Meyer*, ex parte, 57 Miss. 85; *Eaton v. State*, 15 Lea. (Tenn.) 200; 8 A. & E. Enc. 992, 993. "Neither fines, forfeitures, nor costs in criminal cases are debts within the meaning of the prohibition against imprisonment for debt." In re *Sanborn* (D. C.) 52 Fed. 583, and other cases cited. 10 Century Dig. § 151½, cols. 1472, 1479. "Imprisonment for nonpayment of the costs of the prosecution is not repugnant to the constitutional prohibition of imprisonment for debt." 8 Enc. Pl. & Pr. 994; citing numerous cases from Alabama, Connecticut, Illinois, Indiana, Kansas, Maryland, Mississippi, North Carolina, Tennessee, and Texas. The decisions, as well as the statutes in this state, are fully in accord with these authorities. Among them are *State v. Manuel*, 20 N. C. 146, where the subject is interestingly and exhaustively discussed by Judge Gaston (page 159); *State v. Cannady*, 78 N. C. 542; *State v. Wallin*, 89 N. C. 580.

Working out fines and costs in criminal cases has always been held a matter within legislative power. Ex parte *Meyer*, 57 Miss. 85; Ex parte *State*, 87 Ala. 46, 6 South. 328; Ex parte *Joice*, 88 Ala. 128, 7 South. 3; *Eaton v. State*, 15 Lea. (Tenn.) 200. "No practice is better settled," says Judge Calron,

Hill v. State, 2 Yerg. (Tenn.) 247; *State v. Williams*, 97 N. C. 414, 2 S. E. 370; 1 Bishop, Cr. Pr. § 1321. An offender against the ordinances of a city may be imprisoned for nonpayment of costs of conviction. *Berry v. Brislan*, 86 Ky. 5, 4 S. W. 794. A prosecutor taxed with the costs of a malicious or frivolous prosecution may be imprisoned for nonpayment of the same. *Green v. State*, 112 Ga. 52, 37 S. E. 93. Imprisonment of the putative father for failure to obey an order of maintenance, or to give the bond, is sustained wherever the statute so authorizes. It is a matter of legislative discretion, and is not imprisonment for debt. *State v. Palin*, 63 N. C. 471; *State v. Edwards*, 110 N. C. 512, 14 S. E. 741; *Woodcock v. Walker*, 14 Mass. 386, and other cases cited. 6 Cent. Dig. § 209, col. 1988 et seq. Also numerous cases cited 5 Cyc. 670, 671; *State v. Yandle*, 119 N. C. 874, 25 S. E. 796, 34 L. R. A. 392; *State v. Nelson*, 119 N. C. 797, 25 S. E. 863. The last two cases have been overruled only in so far as they hold that bastardy is a criminal action. *State v. Liles*, 134 N. C. 735, 47 S. E. 750.

The defect, however, in the contention for the state is that Revisal 1905, §§ 1352, 1355, do not include among those authorized to be worked upon the roads those "sentenced to the house of correction," nor does it include those who fall "to give bond for maintenance of a bastard," nor for failure to pay costs, except "those imprisoned for nonpayment of costs in criminal causes." In the recent case of *State v. Liles*, 134 N. C. 735, 47 S. E. 750, the court reviewed all the cases upon the nature of bastardy proceedings, and held in accordance with our long line of decisions (overruling two or three later cases to the contrary), and in accordance with the almost uniform holding in other states (134 N. C. page 741, 47 S. E. 752), that bastardy is not a criminal action at all, but it is a quasi civil regulation to enforce a police regulation for the purpose of securing the maintenance of the child and to prevent the costs thereof falling upon the taxpayers, and that the object of such proceeding is not the punishment of the father. The criminal offense is fornication and adultery, and in that the mother, instead of being complainant, would properly be a codefendant.

For these reasons, the defendant was entitled to be discharged from custody. Whether he ought not rather to have been set at large upon a writ of habeas corpus than by this proceeding is a matter we are not called upon to discuss, since we cannot remand him to illegal custody.

WALKER and CONNOR, JJ., concur in result.

(105 Va. 216)

CARLIN & CO. v. FRASER.

(Supreme Court of Appeals of Virginia. March 22, 1906.)

1. EVIDENCE—WRITING—PRIOR PAROL AGREEMENTS—ADMISSIBILITY.

Evidence of a prior parol agreement is not admissible to vary the terms of a valid written contract, in the absence of fraud or mistake.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2030-2047.]

2. TRIAL—FRAUD—PLEADING—INSTRUCTION.

Where fraud is not pleaded, it is error to give an instruction thereon.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 587, 589.]

3. SAME—INSTRUCTION.

It is misleading to give an instruction based on inadmissible evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596, 598.]

4. SAME—MEASURE OF RECOVERY—SET-OFF.

In an action wherein defendants pleaded a set-off to plaintiff's claim, instructions as to the amount plaintiff would be entitled to recover on his claim should conclude with directions to set off the amount found due on the set-off against the amount found for plaintiff and to render verdict for the party found entitled to the balance.

Error to Circuit Court, York County.

Assumpsit by Charles Fraser against Carlin & Co. Judgment for plaintiff, and defendants bring error. Reversed.

Brooke & Elliott, for plaintiffs in error.
S. Gordon Cumming, B. A. Lewis, and Wm. C. L. Tallafiero, for defendant in error.

HARRISON, J. On the 21st day of February, 1899, a contract in writing was entered into between Charles Fraser, of the first part, and Carlin & Co., of the second part, for the sale of certain piles. So far as necessary to be here referred to, this contract provided as follows:

"The party of the first part hereby agrees to furnish and deliver to the parties of the second part, at such point or points along the water front of the U. S. Naval Academy, at Annapolis, Md., all the piles required as set forth on the drawings and described in the specifications of Ernest Flagg, architect, for the building of a sea wall and buildings at said Naval Academy, subject to the inspection and approval of the said architect or his representative, and of the engineer in charge of the work appointed by the U. S. Navy Department. * * * And the parties of the second part hereby agree to pay to the party of the first part for said piles, delivered at said Naval Academy, after approval by said architect or his representative and said engineer in charge, at the prices set forth in the attached schedule, which forms a part of this agreement. * * * And it is further agreed that in the event of the party of the first part failing, neglecting, or refusing to furnish and deliver said piles at such time and in such quantities and lengths as the said parties of the second part shall order and direct or to furnish and deliver such

piles as will comply with the conditions of inspection and approval as herein described, then the parties of the second part shall be at liberty to enter into agreement with other parties for the furnishing and delivering of said piles, and the party of the first part agrees to reimburse the parties of the second part for any additional cost or expense incurred by them by reason of such default or neglect by the party of the first part."

The specifications with which the piles to be furnished were to comply provided as follows: "The piles shall be of white oak, Georgia yellow pine, spruce, hemlock, or Norway pine, straight, true, sound, and fine straight grained, each to be the number of feet in length that the conditions may require."

In pursuance of this contract the first shipment by Fraser was three rafts of piles, at the aggregate price of \$3,049.36. The fact is established by the record that these piles were rejected by the constituted authorities of the government as not complying with the specifications. After these piles were rejected, no further effort was made to comply with the contract in question, and the defendants made other arrangements for securing the necessary piles. Subsequently Carlin & Co. used some of the rejected piles in doing certain preliminary work necessary for executing their contract with the government, and paid Fraser for those so used the sum of \$670, which was duly credited.

This action of assumpsit was brought by Charles Fraser to recover of Carlin & Co. the sum of \$6,923.95 due by open account consisting of several items, the first and largest item being \$2,379.96 the balance claimed to be due on the three rafts of piles mentioned, which were rejected by the government, after crediting the \$670 paid to Fraser by Carlin & Co. for those piles used by them in their preliminary work. The account sued on is alleged in the declaration to be for damages sustained by the plaintiff in consequence of the failure of the defendants to keep and perform the contract already averted to.

To this action the defendants, Carlin & Co., plead non assumpsit, and filed in addition a special plea of set-off, in which they set forth the contract which forms the basis of the plaintiff's action, and aver that the plaintiff had neglected, failed and refused to deliver, as agreed upon, the necessary piles for the government work, and that in pursuance of the terms of the contract they had bought the piles at the most reasonable prices obtainable in order to carry out their contract with the government; that by reason of the failure of the plaintiff to keep his contract and the necessity thus imposed upon them of buying the piles elsewhere, they had sustained a loss of \$29,702.42, which they asked to be allowed to set off against the plaintiff's demand.

Upon the issue thus joined, the jury ren-

dered a verdict in favor of the plaintiff for \$6,911.20, which the lower court refused to set aside, giving judgment in accordance therewith; and thereupon this writ of error was awarded.

The first five bills of exception were taken to the action of the court in admitting certain evidence on behalf of the plaintiff over the protest of the defendants. All of the evidence objected to and covered by these exceptions tended to vary and contradict the written contract between the parties, and was plainly inadmissible. The contract clearly and expressly provided that all piles furnished were to be according to specifications and subject to the inspection and approval of the government representative. These provisions were manifestly the most important in the contract to the defendants, because the piles purchased were for the purpose of building a sea wall for the United States government, as stated in the contract, and unless those furnished were accepted by the government, they were valueless to the defendants. Notwithstanding these plain and important provisions of the contract, the plaintiff was permitted to introduce evidence tending to destroy these terms by setting up alleged conversations and negotiations prior to the execution of the contract, the object and effect being to establish the plaintiff's right to deliver piles not in accordance with the government specifications, although the government should refuse to accept them.

It is not pretended that there was any mistake in the preparation and execution of the written contract; on the contrary the plaintiff testifies that he understood that the piles to be furnished were subject to the approval of the representative of the government, further stating that it was clear to his mind that if he failed, refused or neglected to furnish such piles as would comply with the conditions of inspection and approval, as described in the contract, the defendants would be at liberty to enter into an agreement with other parties for such piles, and that he would be responsible to the defendants for any additional cost or expense incurred by them in consequence of his default.

No fraud in connection with the contract is either alleged or proven. The written contract filed by the plaintiff in this case is a clear and complete memorial, needing no explanation, and lacking in nothing that would add to its binding force. The general principle that evidence of a contemporaneous parol agreement is not admissible to vary or contradict the terms of a valid written instrument, except in cases of fraud or mistake, is so familiar and well established that citation of authority in its support would seem to be superfluous. It is a principle founded in wisdom, and cannot be too carefully guarded. Upon its enforcement the certainty and sanctity of written contracts depend, and its violation would be

destructive of the most solemn transactions of life. This court has often discussed this subject, and adhered without variation to the rule of evidence adverted to as an established axiom of our jurisprudence. *Towner v. Lucas*, 13 Grat. 705; *Allen v. Crank*, 2 Va. Dec. 279, 23 S. E. 772; *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544.

In the case last cited it is said: "It cannot be assumed that the written contract was designed as an imperfect expression of the parties' agreement, from the mere fact that the written instrument contains nothing on the subject to which the parol evidence is directed. On that assumption the rule which excludes parol proof as a means of adding to the contract would be entirely abrogated. And to permit parties to lay a foundation for adding to the contract by oral testimony that they agreed that part only of their contract should be reduced to writing would open the door to the very evil the rule was designed to avoid. The only evidence of the completeness of a written contract, as a full expression of the terms of the agreement is the contract itself. Where parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance, and consequently all parol testimony of conversations held between them, or declarations made by either of them, whether before, after, or at the time of the completion of the contract, will be rejected. If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied, parol evidence to vary or add to its terms is not admissible.

Applying these well-settled principles to the case at bar, we hold that it was error to admit the evidence under consideration.

We are further of opinion that there was no agreement shown to change, or to waive any of the terms of the written contract after it was executed. The defendants could hardly have intended to waive the provisions out of which this controversy grows, because to have done so would have been to permit the plaintiff to load them up with piles that the government would not accept, and which would therefore be valueless to the defendants.

A further assignment of error is to the action of the court in giving the following instruction:

"The jury are instructed that if they believe from the evidence that the said Carlin & Co., or their representatives, who negotiated a contract with the said Fraser to supply piles, fraudulently concealed from, or failed to divulge to said Fraser before and at the time of the execution of the written contract between the parties that the government specifications required the furnishing of Georgia yellow pine piles and requested his

quotations on Maryland or Virginia piles; then they are instructed that the failure of the said Fraser to supply Georgia yellow pine piles was not a breach of contract on his part; and that he was not responsible for the rejection of the piling furnished by him to Carlin & Co., but that the said Carlin & Co. are indebted to him for the piling furnished."

We are of opinion that it was error to give this instruction. It is misleading because it deals with the question of fraud or fraudulent concealment by the defendants of certain facts, whereas no fraud was alleged. Nothing, least of all fraud, can be the subject of trial until it is put in issue. *Alsop v. Catlett*, 97 Va. 364, 370, 34 S. E. 48. It is further misleading because based upon evidence that was inadmissible. The error in giving this instruction was not harmless, as contended, but fundamental.

Bills of exception 8 and 9 cover the two following instructions given on behalf of the plaintiff:

"The jury are instructed that if they believe from the evidence that the subsequent agreement between said Fraser and Carlin & Co., or the latter's authorized representative, made at Annapolis, after the rejection of the first piling delivered there by Fraser, was that said Fraser was to receive 10 per cent. commissions on the cost of piling purchased in South Carolina, delivered at Annapolis, then they shall find for the plaintiff on this item an amount equal to 10 per cent. of what amount they believe from the evidence to have been the cost of purchasing and delivering such piling at Annapolis.

"The jury are instructed that if they believe from the evidence that any or all the items specified in the bill of particulars filed with the declaration in this case, were supplied by Fraser to Carlin & Co., pursuant to an agreement made between them, or between Fraser and Carlin & Co's authorized representative, then they are instructed that they must find for the plaintiff in an amount equal to the aggregate of such items or such part of them as they believe from the evidence to have been so furnished."

These instructions are objected to because they ignore the special plea of set-off, and direct the jury to find for the plaintiff regardless of his indebtedness to the defendants, whereas such instructions should have told the jury that in the event of finding for the plaintiff as therein set forth, the amount should be offset by whatever sum they might believe from the evidence the defendants were entitled to recover under their special plea, and should render a verdict for the party to whom the balance was found to be due.

After the plaintiff had failed to comply with the written contract of February 21, 1890, by furnishing piles acceptable to the government, he and the defendants entered into a parol agreement, by the terms of which

the plaintiff was to go to South Carolina and buy piles for the defendants, receiving as compensation for this service 10 per cent. commissions upon the cost of the piles so purchased and delivered at Annapolis. This is the item referred to in the instruction covered by bill of exception No. 8.

All of the items of the plaintiff's bill of particulars are referred to in the instruction covered by bill of exception No. 9. The evidence tended to show that the defendants sustained a loss approximating \$30,000 as a result of the plaintiff's alleged breach of the written contract, which under the express terms of that contract the plaintiff was bound to make good.

We are of opinion that the objection to the instructions under consideration was well taken. Under such circumstances it is the better practice that the instructions should not ignore the defendant's case; but should conclude by telling the jury that the amount found by them to be due the plaintiff was to be offset by whatever sum if any they might believe from the evidence was due from the plaintiff to the defendant, and that the verdict should be for the party to whom the balance was found due.

As the judgment of the circuit court must be reversed, it is not necessary or expedient to consider other questions discussed which may not arise on another trial, or as to which the evidence may be different.

For these reasons the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views expressed in this opinion.

(59 W. Va. 266)

DYE v. CORBIN.

(Supreme Court of Appeals of West Virginia.
March 13, 1906.)

1. TRIAL—STRIKING OUT EVIDENCE.

A motion to exclude all of the plaintiff's evidence introduced upon the trial of an action should be sustained, when such evidence is insufficient to sustain a verdict in favor of the plaintiff, notwithstanding there is a scintilla of evidence supporting the plaintiff's case.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 358.]

2. PHYSICIANS AND SURGEONS — MALPRACTICE — BURDEN OF PROOF.

In an action for damages against a physician, for negligence and want of skill in the treatment of an injury or disease, the burden is on the plaintiff to prove such negligence or want of skill, resulting in injury to the plaintiff.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Physicians and Surgeons, § 39.]

3. SAME—DEGREE OF SKILL REQUIRED.

A physician is not required to exercise the highest degree of skill and diligence possible, in the treatment of an injury or disease, unless he has by special contract agreed to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily exercised by the members of the profession in good standing, in similar localities and in the

same general line of practice, regard being had to the state of medical science at the time.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Physicians and Surgeons, §§ 21–30.]

4. SAME.

A physician does not warrant or insure that his treatment will be successful, in the absence of special contract to that effect.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Physicians and Surgeons, § 23.]

5. SAME—FAILURE TO CURE.

Failure on the part of a physician to effect a cure does not alone establish or raise a presumption of want of skill or negligence on his part.

6. SAME—MISTAKE IN JUDGMENT.

Where a physician exercises ordinary skill and diligence, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment.

7. SAME.

A physician is liable for the result of an error of judgment, where such error is so gross as to be inconsistent with that degree of skill which it is the duty of a physician to possess.

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.

Action by T. E. Dye against M. L. Corbin. Judgment for defendant, and plaintiff brings error. Affirmed.

Duty & Fidler, for plaintiff in error.
Freer & Robinson, for defendant in error.

COX, J. On the 14th of January, 1906, in the circuit court of Ritchie county, T. E. Dye instituted an action of trespass on the case for \$10,000 damages against M. L. Corbin, a practicing physician of that county, for malpractice in the diagnosis and treatment of an injured ankle. Upon trial before a jury, after the plaintiff had introduced all of his evidence, the defendant, without introducing any evidence, moved the court to exclude plaintiff's evidence, which motion being sustained, a verdict for defendant followed. Plaintiff moved to set aside the verdict, which motion was overruled, and judgment entered for defendant. The proper exceptions to the rulings of the court being taken, plaintiff was allowed a writ of error by a judge of this court.

The assignments of error relate to, and are based upon, the action of the court in sustaining the motion to exclude plaintiff's evidence. The court should have sustained the motion to exclude plaintiff's evidence, if that evidence was insufficient to sustain a verdict in his favor. If it ever was the law that the court should not sustain a motion to exclude plaintiff's evidence, or to exclude plaintiff's evidence and direct a verdict for defendant, where there is only a scintilla of evidence to support plaintiff's case, it is no longer the law in this state. The test is not whether there is a scintilla of evidence to support the plaintiff's case, but whether the evidence will sustain a verdict in his favor. The plaintiff must show a prima facie case. This is the only reasonable rule. The utter futility of requiring a court to overrule a motion to exclude plaintiff's evi-

dence where that evidence is insufficient to support a verdict, notwithstanding there is a scintilla of evidence supporting the plaintiff's case, is apparent. Why compel the trial to proceed when in no event can the plaintiff finally recover? It is useless to continue a trial when there is nothing to try, and to compel a defense when there is nothing against which to defend. For these reasons, our later cases hold that a motion to exclude plaintiff's evidence should be sustained when that evidence is insufficient to support a verdict in his favor. *Ketterman v. Dry Fork R. R. Co.*, 48 W. Va. 606, 37 S. E. 683; *Cobb v. Glenn Boom Lumber Co.*, 57 W. Va. 49, 49 S. E. 1005; *Williamson & Co. v. Nigh et al.* (decided at this term and not yet officially reported) 53 S. E. 124. This being the rule, was the evidence offered by plaintiff sufficient to sustain a verdict in his favor?

Plaintiff offered evidence tending to prove, among other things, the following: Plaintiff received an injury to his left ankle on the 31st of August, 1902, by being thrown from a horse about two miles from Ellenboro in Ritchie county. After receiving the injury, he was carried to the house of Mullenax, where a large number of persons gathered. The defendant, a practicing physician and the family physician of plaintiff, was sent for, and after some time came and examined the plaintiff's injury. At the time of the examination, the ankle was considerably swollen. The plaintiff said that he thought it was broken. The defendant after examination said it was dislocated, but not broken. Plaintiff requested the defendant to procure another physician, and to administer an anæsthetic. The defendant advised against the employment of another physician, and did not administer an anæsthetic. He procured cotton and splints made from pasteboard, and bandaged the injured ankle. By his direction, persons present assisted him by holding the patient while the ankle was bandaged. After the plaintiff had been thus treated, he was carried to his home, a short distance. On the next day, the defendant visited the plaintiff and treated the injury. On the second day, the defendant treated the injury; the pasteboard splints being replaced by a tin splint or tin boot leg. The defendant continued the treatment until the sixth or seventh day after the injury, when he removed the tin splint and placed the injured limb in a cast made of plaster of paris, after which he told the plaintiff that he might get out of bed and go wherever he pleased. Some time after the cast was placed on the injured limb, plaintiff complained of pain. The defendant, being called, opened the cast by cutting a groove in it, again adjusted it to the limb, and put another cast over the old one. Between 10 days and three weeks (the time is not shown with certainty) after the injury, plaintiff began to go about by the use of crutches. After he began to go about, he accidentally fell twice, but he claims with-

out hurt to the injured ankle. About the 26th of September, 1902, he went to Parkersburg, some distance from his home, and about that time and afterward went to various other places, and did other acts which are claimed by defendant to constitute contributory negligence on the part of the plaintiff. In our view of the case, it is unnecessary to detail those acts claimed to show contributory negligence. About 10 weeks after the cast was placed on the injured limb, plaintiff went to Parkersburg to consult a physician, and while waiting for the physician to return to his office plaintiff cut off the cast. When the cast was removed, the heel of the foot seemed to be turned inward, and the fore part of the foot had dropped downward. On the 6th of January, 1903, plaintiff went to Cincinnati, Ohio, for treatment by Drs. J. R. and S. H. Spencer, practicing physicians in that city. They made a number of radiographs of the injured limb, and found the following condition, as testified to by Dr. S. H. Spencer: "He had a fracture of the fibula of the left ankle joint. There was a dislocation, and in connection with this fracture and dislocation it threw the joint inward, and the foot turned inward. The dislocation was inward, and the foot turned inward, and the fibula was broken above the external malleolus, and the lower end of the bone was turned backwards; or, in other words, the head of the fibula was broken off and was turned backwards. There was an osseous deposit thrown out in and around the head of this bone, which had cemented, as it were, the foot and ankle joint. Because of this ankylosis there was a stiffening of the ankle joint." After returning from Cincinnati, the plaintiff consulted Dr. Cunningham of Marietta, Ohio, and was treated by him, which treatment resulted in the amputation of the foot about six or seven inches above the ankle. The amputation occurred on the 17th of October, 1904. For the present, we may eliminate from consideration the question of contributory negligence; and first determine whether or not the plaintiff has made a prima facie case, excluding that question.

Plaintiff claims that the evidence in this case shows a liability on the defendant for failure to correctly diagnose the injury, and for failure to properly treat the injury. The declaration charges that the defendant, having accepted the employment of physician for the treatment of the plaintiff, "so unskillfully and negligently conducted himself in that behalf that, by his want of skill and care, the injury of plaintiff became greatly increased and aggravated," etc. This essential averment must be sustained by proof. Before we can determine the sufficiency of the evidence to sustain this averment, we must ascertain the degree of skill and diligence which the law required of the defendant under the circumstances of this case. There was no special contract on the part of the defendant as to the result of his treat-

ment. The employment was general. The defendant was simply called to treat the plaintiff's injury, and accepted the employment. Our previous cases, *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700, and *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17, are in point. In the latter case, it was held that a physician is bound to bestow such reasonable and ordinary care, skill, and diligence as physicians and surgeons in the same general line of practice ordinarily have and exercise in like cases, time, and locality being taken into consideration; and that a physician is bound to exercise the average degree of skill possessed by the profession in such locality. This holding is in accord with the great weight of authority. We think it may be said to be the generally accepted doctrine that a physician is not required to exercise the highest degree of skill and diligence possible, in the treatment of an injury or disease, unless he has by special contract agreed to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily possessed and exercised by the average of the members of the profession in good standing, in similar localities and in the same general line of practice, regard being had to the state of medical science at the time. 22 Am. & Eng. Law 799; Current Law, vol. 4, p. 638; 3 Wharton & Stille's Md. Juris. (5th Ed.) §§ 473-475; *Gramm v. Boener*, 56 Ind. 497; *Whitesell v. Hill* (Iowa) 66 N. W. 894; *Small v. Howard*, 128 Mass. 181, 35 Am. Rep. 363; *Hathorne v. Richmond*, 48 Vt. 557; *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561; note to *Gillette v. Tucker*, 93 Am. St. Rep. 657.

The general rule stated does not make the physician in any sense the warrantor or insurer of the success of his treatment, in the absence of special contract to that effect. *Lawson v. Conaway*, supra; *Kuhn v. Brownfield*, supra; 22 Am. & Eng. Law, 800. The evidence of the Cincinnati physicians, S. H. and J. R. Spencer, who made radiographs of the injured limb, was offered to show want of skill and diligence on the part of the defendant. Dr. S. H. Spencer testified as follows: "Q. Was this injury of the character that it could have been possible, by proper medical skill, to have reduced it so as to have left the limb in a better condition than it was left in? A. Yes, sir; that was my judgment. Q. Suppose a patient had sustained an injury of the ankle joint, so as to have the fibula broken and turned backward, together with a dislocation of the ankle joint, in the manner and character as the one you have described; and suppose that the attending surgeon should undertake to reduce that fracture and dislocation without administering an anesthetic to the patient, by having him held by physical force while he undertook to reduce the limb,

and with no more effect than the one you have examined on the plaintiff; what is your judgment, as a physician and surgeon, would you consider this treatment good or bad? A. I would consider it bad treatment." Dr. J. R. Spencer testified as follows: "Q. Suppose an injury sustained by any one of the kind and character that you find by examination of Mr. Dye's ankle, and it was treated by the attending surgeon without the administration of an anæsthetic to the patient, and by causing him to be held during the manipulation by physical force, whether or not it would have been good treatment? A. I think it was not the proper way to proceed."

The foregoing is not all the evidence of the two physicians named, but the part quoted will serve to show the character of all of it. It must be borne in mind that these physicians did not see the plaintiff until more than four months after the injury. Neither the physician who was consulted by the plaintiff in Parkersburg, nor the physician who had amputated the foot, was called to testify for plaintiff. Taking the evidence of the Cincinnati physicians as true, and giving full force and effect to it and to every legitimate inference that may be drawn from it, we are unable to reach the conclusion that it shows such negligence or want of skill on the part of the defendant, considering the locality where and the circumstances under which the treatment was given, as would make the defendant liable. Of what standard of proper medical skill or bad treatment do these physicians speak? As we have seen, the law does not in any case, without special contract, require the highest degree of skill and diligence possible. We are left to conjecture by what standard these physicians estimated proper medical skill or bad treatment. If these physicians meant the standard existing in Cincinnati, a large city, where they no doubt were familiar with the practice, then such standard fixes no liability on the defendant; because he was not bound by the standard prevailing in Cincinnati, but by the standard prevailing in the locality where the treatment was given, or in like localities. The evidence of these physicians seems to be directed particularly to the failure of the defendant to give an anæsthetic. It will be observed that these physicians do not say that the failure to give an anæsthetic produced a bad result on the injured ankle, or that the treatment of the ankle was improper. The treatment may have been attended with more pain to the patient because an anæsthetic was not administered, but the treatment of the ankle may have been the same, whether with or without an anæsthetic. It does not follow that the injury to the ankle was increased or aggravated by failure to give an anæsthetic. There is no evidence that the injury to the ankle was increased or aggravated by such failure. Such increased or aggravated injury

to the ankle cannot be presumed without evidence.

Again, it is not shown that, under the standard of skill and diligence by which the defendant was bound, it was his duty to administer an anæsthetic, considering time, locality and the condition of the patient. The questions propounded to these physicians included none of these conditions which existed when the treatment was given by defendant. The answers, being responsive to the questions, cannot be taken to include more than the questions. This being true, we are left without any opinion from these physicians as to whether the treatment given by the defendant, under the conditions existing when it was given, was proper or improper. There is absolutely no evidence showing what the proper treatment for the injured ankle was, at the time and under the conditions existing when the defendant gave the treatment. To hold the defendant liable under the evidence of these physicians would be to do so upon mere conjecture, without any satisfactory proof. Proof showing mere conjectural possibility that unfavorable results were due to want of care or skill, is not sufficient to make a physician liable. 3 Wharton & Stille's Med. Juris. § 517.

It may be claimed that the evidence of the plaintiff discloses failure of defendant's treatment to cure the injured ankle, and also discloses error or mistake in diagnosis. Failure on the part of a physician to effect a cure does not, alone, establish or raise a presumption of want of skill, or negligence, on his part. *Lawson v. Conaway*, supra; 3 Wharton & Stille's Med. Juris. § 517; *Wohlert v. Seibert*, 23 Pa. Super. Ct. 213; *Haile v. Reese*, 7 Phila. (Pa.) 138; *Pettigrew v. Lewis*, 46 Kan. 78, 26 Pac. 458; *Barney v. Pinkham*, 29 Neb. 350, 45 N. W. 694, 28 Am. St. Rep. 389; *Craig v. Chambers*, 17 Ohio St. 253; *Sims v. Parker*, 41 Ill. App. 284. It has also been held that the fact that a physician fails to discover a fracture or dislocation does not, alone, establish or raise a presumption of want of care on his part. 3 Wharton & Stille's Med. Juris. § 517; *Richards v. Willard*, 176 Pa. 181, 35 Atl. 114; *James v. Crockett*, 34 N. B. 540. Where a physician exercises ordinary care and skill, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment. A physician is liable for the result of error of judgment, where the error is so gross as to be inconsistent with that degree of skill which it is the duty of a physician to possess. 3 Wharton & Stille's Med. Juris. § 501; *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107; *Johnson v. Wintson* (Neb.) 94 N. W. 607; 22 Am. & Eng. Enc. Law, 805, and cases cited in note 1.

We find no evidence of gross error of judgment; no evidence as to what the proper treatment was under the conditions existing when the defendant treated the plaintiff;

no evidence that the treatment given was improper, considering time, locality, and conditions. We therefore hold that the plaintiff's evidence was insufficient to sustain a verdict in his favor.

The judgment of the circuit court must be affirmed.

(59 W. Va. 292)

SNODGRASS v. JOLLIFF et al.

(Supreme Court of Appeals of West Virginia.
March 13, 1906.)

1. TAXATION—PROPERTY TAXED TO DIFFERENT PARTIES—PAYMENTS.

Price conveys a tract of land to Higgins "except one-half the oil and gas royalty, which is one-sixteenth of all oil and gas underlying said tract of land." Price conveys half of the sixteenth which he so excepted to Jolliff, McNeeley and Ice. Higgins is charged on the land tax book for 1901 with the tract without reduction of valuation for the interest in oil and gas reserved by Price. Price is charged on the land tax book for 1901 with one-sixteenth of the oil and gas. Jolliff, McNeeley, and Ice are charged on the land tax book for 1901 with one-sixteenth of the oil and gas. Higgins pays his taxes and Price pays his, but Jolliff, McNeeley, and Ice fail to pay their taxes. A sale of the interest of Jolliff, McNeeley, and Ice in the oil and gas for taxes will not pass good title, because of the payment of taxes by their co-tenant, Price or Higgins.

2. SAME—PAYMENT BY TENANT IN COMMON.

Payment by a tenant in common of taxes for the common property under an assessment in his name will render a sale of his co-tenant's interest for taxes in his name for the same year void.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County.

Bill by R. E. L. Snodgrass against A. B. Jolliff and others. Decree for plaintiff, and defendants appeal. Reversed.

Thos. P. Jacobs, for appellants. W. G. & E. B. Snodgrass, for appellee.

BRANNON, J. S. J. Price by deed granted a tract of 53 acres of land in Wetzel county to Bramen Higgins "except one-half the oil and gas royalty, which is one-sixteenth of all the oil and gas underlying said tract of land." Later Price conveyed to A. B. Jolliff, G. B. McNeeley, and C. H. Ice the one-half of the oil and gas which had been excepted by Price in his said conveyance to Higgins, the oil and gas thus conveyed to Jolliff, McNeeley, and Ice by Price being $\frac{1}{32}$ of the oil and gas in the tract. Thus Higgins owned $\frac{1}{16}$, Price $\frac{1}{32}$, and Jolliff, McNeeley, and Ice $\frac{1}{32}$ of the oil and gas in the tract. Higgins caused the said tract of land to be entered on the landbook immediately after he received his conveyance, and it was charged to him for the years 1900 and 1901 at the same valuation at which it was assessed in 1897, 1898, and 1899, without any reduction of value on account of the exception of the fraction of oil and gas excepted by Price, and Higgins paid the taxes on the tract for the years 1900 and 1901. Price had the sixteenth of the oil and

gas in said tract excepted by him in his conveyance to Higgins entered on the landbook for the years 1900 and 1901, and paid the taxes in his name for those years. Jolliff, McNeeley, and Ice were charged for the year 1901 with one-sixteenth of the oil and gas in said tract, though they owned only $\frac{1}{32}$. Jolliff, McNeeley, and Ice did not pay their taxes for 1901, and their interest was sold as one-sixteenth for delinquency and purchased by E. L. Snodgrass, who obtained a tax deed under such sale, the deed reciting their interest as $\frac{1}{32}$, the interest so sold being the same conveyed to them by Price as the $\frac{1}{32}$ royalty. Price was charged, before he conveyed to Higgins, at the same valuation per acre at which the land was assessed to Higgins after he became owner. Higgins leased the tract for oil and gas production to the South Penn Oil Company, reserving one-eighth of the oil produced as a rent or royalty, the parties owning such royalty, or call it oil, in the fractions above stated. The oil company bored wells on the land and produced oil. After the bill of Snodgrass, now to be mentioned, had been filed, Jolliff, McNeeley, and Ice paid Price their proportionate share of the tax which Price had paid on said royalty interest under the charge in his name. After Snodgrass obtained his tax deed he filed a bill in chancery to obtain a decree declaring his title good to the $\frac{1}{32}$ interest of Jolliff, McNeeley, and Ice under his tax deed, and to cancel their claim to it as a cloud over his title, and to declare that they no longer had any title to said $\frac{1}{32}$ interest in the oil and gas, and to have an account of the oil produced after his tax deed, and to compel the said oil company thereafter to account to him for the $\frac{1}{32}$ of the oil produced. Jolliff, McNeeley, and Ice filed an answer stating such payment of taxes under said assessment to Higgins and that to Price, and claiming that payment of taxes by Higgins and by Price was payment for the interest of Jolliff, McNeeley, and Ice, and claiming that as the assessor did not divide the value by charging the surface less the value of said mineral interest to Higgins and the oil and gas to Price and them, pursuant to section 25, c. 29, Code 1889, the assessment to Jolliff, McNeeley, and Ice was void, and the tax sale void. The case resulted in a decree holding the tax title of Snodgrass good to pass to him the title of Jolliff, McNeeley, and Ice, and granting him the relief prayed for. Jolliff, McNeeley, and Ice appeal from that decree.

It is claimed that the conveyance by Price to Jolliff, McNeeley, and Ice vested in them a separate and several ownership in the oil and gas, and that the share of the oil and gas, so acquired by Jolliff, McNeeley, and Ice, was properly charged on the landbook to them separately from the surface, under section 25, c. 29, Code 1899, and that

a sale of their interest for taxes passed good title to Snodgrass. On the other hand, for Jolliff, McNeeley, and Ice it is claimed that the Code section cited does not authorize the charge of a fractional interest in the oil and gas, but only requires such separate entry where one owner owns all the oil and gas, or other mineral, separate from the surface, and that the assessment to Jolliff, McNeeley, and Ice of their fractional interest was illegal and a sale under it passed no title, as held in *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615. The argument is that the statute demands a division, by separate values, of surface from minerals, and that there was no division, by subtraction from the former total value of the tract, as it was before Price conveyed to Higgins, of the mineral value, and that the statute was not followed, and that the assessment to Jolliff, McNeeley, and Ice was void. We do not pass on these contentions. If it be true that a fractional interest in minerals cannot be taxed to its owner separately from the surface, then the charge of the whole tract to Higgins at the unchanged surface value, without diminution by reason of the subtraction of the value of the one-sixteenth of the oil and gas retained by Price, would pay taxes on the whole, that is, the surface and all the oil and gas under it. *State v. Low*, 46 W. Va. 451, 33 S. E. 271, on the other hand, if such fractional interest is, under the Code, separately chargeable; then the charge of the whole one-sixteenth of the oil and gas to Price, covering his half of the one-sixteenth and a half conveyed by him to Jolliff, McNeeley, and Ice, would answer for the ownership of Price, Jolliff, McNeeley, and Ice, and payment by Price under the assessment in his name would pay also the taxes for Jolliff, McNeeley, and Ice, because they and Price were co-tenants, and payment by one co-tenant of taxes on the common land pays for all the co-tenants. 17 Am. & Eng. Ency. L. (2d Ed.) 686; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269. So would payment by Higgins, also a co-tenant. If two persons own a tract of land jointly and it is charged in the name of each one separately, would not payment for the whole tract by one of the owners under the charge of the tract in his name defeat a tax sale of the land in the name of the other owner? The case of *Bailey v. McLaugherty*, 48 W. Va. 546, 37 S. E. 701, is urged upon us to sustain the tax deed. It holds that where one person conveys a tract of land to another, and it remains on the taxbook in the name of the former owner, who pays the tax, and is also charged to the grantee, who fails to pay his tax, a sale in the grantee's name for taxes passes good title, notwithstanding payment by such former owner. That is not just this case. It is materially different. In that case the grantor and grantee were not co-tenants; whereas, in this

case, Price, Jolliff, McNeeley, and Ice were co-tenants. In the *Bailey Case* the sale was in the name of the only true owner. Were not taxes paid by both Higgins and Price—double taxes on the contested share?

Our conclusion is to reverse the decree of the circuit court, cancel the tax deed, and dismiss the plaintiff's bill without relief to him.

(59 W. Va. 204)

SMITH v. SOUTH PENN OIL CO.

(Supreme Court of Appeals of West Virginia.
March 6, 1906.)

1. MINES AND MINERALS—OIL LEASE—CONSTRUCTION.

The following clause in a lease for oil and gas purposes imposes no obligation to pay rent: "Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within three (3) months from the date hereof, or unless the lessee shall pay at the rate of sixty-five and $\frac{25}{100}$ (65 $\frac{25}{100}$) dollars, quarterly, in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed."

2. SAME—LIABILITIES OF LESSEE.

If, after having drilled one unproductive well under such a lease, and paid commutation money until the completion thereof, the lessee is permitted to drill another without making further payments, and without notice that any compensation will be demanded or required of him for such further use and occupation of his premises, none can be recovered.

3. SAME—CONDUCT OF PARTIES.

Such a contract being ambiguous as to what shall constitute a completed well, the conduct of the parties in treating the completion of an unproductive well as an act sufficient to vest in the lessee a right to make further exploration, without additional payments, is conclusive upon them, under the principal of practical construction.

(Syllabus by the Court.)

Error to Circuit Court, Tyler County.

Action by Albert H. Smith against the South Penn Oil Company. Judgment for plaintiff, and defendant brings error. Judgment reversed, and judgment for defendant rendered.

A. B. Fleming, R. F. Fleming, C. Powell, and Thos. P. Jacobs, for plaintiff in error. J. V. Blair, J. H. Strickling, and M. K. Duty, for defendant in error.

POFFENBARGER, J. A judgment for \$217.50, with interest and costs, was rendered by the circuit court of Tyler county on a demurrer to evidence against the South Penn Oil Company, in favor of Albert H. Smith, in an action of assumpsit, for compensation for the use and occupation of real estate, and said South Penn Oil Company seeks a reversal of said judgment.

Possession of the land was taken and held under a lease executed to the defendant for oil and gas purposes, containing no express covenant binding the lessee either to drill a well or pay rent. The only covenants are to

deliver in the pipe lines, to the credit of the lessors, their heirs, and assigns, one-eighth of the oil produced and saved from the premises; to pay \$200 per year for the gas from each gas well on the premises, the product of which is marketed and used off of the premises; to locate all wells, so as to interfere as little as possible with the cultivated portions of the farm; and to pay all damages to growing crops by reason of operations. Then follows this clause: "Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within three (3) months from the date hereof, or unless the lessee shall pay at the rate of sixty-five and $\frac{25}{100}$ ($65\frac{25}{100}$) dollars quarterly, in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed. Such payments may be made direct to the lessors or deposited to their credit in McKin Post Office, Tyler County, West Bay." The lease bears date January 18, 1896. Seven payments of \$65.25 each, for delay in drilling, were made, and a well was completed in December, 1897. The lessee then abandoned the premises until the spring of 1899, when it re-entered thereon and completed another well in May of that year. Both wells were unproductive, and the tools, machinery, and appliances were finally removed from the premises in January or February, 1900. This action was brought for rent for the whole period from January 18, 1896, until January 18, 1900, at the rate of \$65.25 per quarter.

Barring the fact of actual occupancy and use of the leased premises, this case is governed by the principles announced in *Snodgrass v. South Penn Oil Co.*, 47 W. Va. 509, 35 S. E. 820, following the case of *Glasgow v. Gas Co.*, 152 Pa. 48, 25 Atl. 282. The lease contains, not a covenant to pay rent, but only a clause giving to the lessee the option or privilege of paying a specific sum every three months in advance, as a means of keeping the lease alive and operative. It was not bound to do so, and could, without the violation of any terms in the lease, allow its rights to be forfeited and to cease and determine by failure to drill a well or pay said sum. It merely gave the privilege of extending the lease by periodical payments of the amount specified.

The declaration, however, is not predicated upon any covenant in the lease. The demand is for the use and occupation of the land "by the said defendant at its special instance and request, and by the sufferance and permission of the said plaintiff for a long space of time before, then elapsed, had, held, used, occupied, possessed, and enjoyed." But there is no evidence of any occupancy otherwise than under the lease and for the purposes therein expressed, and that instrument imposes no obligation. It simply permitted occupation and use for the purpose

of exploring for oil and gas. The lessors may have had it in their power to prevent the second entry upon the property, but, if so, they waived that right and took the benefit of the large expenditures incident to the drilling of the second well. It was not an occupation and use for the sole benefit of the lessee, but for the mutual benefit of both parties. As one unsuccessful exploration had been made, and the lessee was permitted, without objection, to drill another well, under a contract indefinite and uncertain as to the rights of the parties after the drilling of such a well, what should be deemed a completed well being undefined by the lease, this conduct on the part of both lessors and lessee amounted to a practical construction thereof. The lessee claimed the right to go on and put down another well without making additional payments for continuance of the lease until completion thereof, and the lessors, by their silence and acquiescence, assented and agreed to this interpretation of the contract, and, having done so, cannot now set up a claim for rent. The testimony of the plaintiff makes this theory plain. He said, "I had a chance to lease my land, but, when the people wanting it would learn the situation, they said they didn't want it while the South Penn Company have a lease on it, but said, if I could get it released, they would take my land. Then I spoke to M. K. Duty and asked him to speak to them and see if they would not give it up, and he wrote to them and they answered back." But what they said is not stated. The witness did not produce the letter, nor prove its contents, and he further testified that he did not enter into a written lease or further agreement with the lessee concerning the drilling of the second well. The applications of this rule are many and varied. See Page, Con. § 1126. It cannot avail against the plain terms of a deed or other contract, and the conduct of a party, relied upon as expressive of his understanding of the contract, must be positive and unequivocal, and it must appear that he was cognizant of the actual intention of the other party. *Id.*

But all these circumstances are combined here. Smith, suspecting a claim by the lessee of right to make further exploration without paying additional amounts, addressed an inquiry to it to verify his suspicion. In response thereto the second well was soon afterwards put down, without any objection or demand for payment of rent. It is plain, therefore, that in the opinion of both parties the lessee by drilling the first well, though unproductive, acquired the right to make further exploration without payment of additional commutation money. The decisions of this court afford a number of illustrations of the application of this principle. *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 754; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185. *Crislip v. Cain*, 19 W. Va. 438, 441; *Hurst v. Hurst*, 7 W. Va. 299; *Caperton's Adm'r's v. Caperton's Heirs*, 36 W. Va. 479, 15 S. E. 257.

Chapman v. Coal Co., 54 W. Va. 193, 46 S. E. 262. That the deed is ambiguous as to what is sufficient to vest a right of exploration, without payment of money, admits of no doubt. It declares that it shall remain in force for the term of 10 years, and then provides that it shall cease and determine "unless a well shall be completed" on the premises within three months, or unless the lessee shall pay a certain amount of money every three months "until a well is completed." What kind of a well? Some are productive and some unproductive, and it costs a considerable amount of money to put down either kind. The question is not what in point of fact or law constitutes a well, but what is a well within the meaning of the deed. No court or jury is as able to answer it as well as the parties themselves, and they have responded by their conduct. It is not intended here to intimate that the drilling of an unproductive well vested any right in the lessee other than that of exploration as aforesaid, or absolved it from any further duty in the premises in case it desired to hold the property for the full term specified. Principles relating to this subject are discussed fully in *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566; *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Urpman v. Lowther Oil Co.*, 58 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027.

In view of the foregoing principles and conclusions, the error of the court in overruling the defendant's demurrer to the evidence is manifest. The judgment will therefore be reversed, the demurrer to the evidence sustained, and judgment rendered for the plaintiff in error, with its costs in the court below, as well as in this court.

(60 W. Va. 374)

DENT v. PICKENS et al.

(Supreme Court of Appeals of West Virginia.
March 13, 1906.)

1. APPEAL—DECISION—LAW OF THE CASE.

In determining whether a matter is res judicata by a decision of an appellate court, when the order entered reverses a decree of the trial court, and remands the cause for further proceedings, according to directions given in the written opinion, filed at the time of the rendition of the decision, the opinion and record, as well as the order, are to be considered; and if it appears from the record that the parties between whom it is claimed there was an adjudication were before the court, and the subject-matter of the alleged adjudication brought in the suit, by pleadings relating thereto, and, from the opinion and order, that the matter was expressly decided, the parties are concluded by the decision in all further proceedings in the cause in the court below, as well as in all collateral proceedings, although the pleadings in the cause, viewed from the standpoint of a demurrant thereto, were insufficient.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661-4665.]

2. SAME—EXTENT OF DECISION.

Not only all matters that were actually litigated, but also all others that the parties

were bound, by the state of the pleadings, to assert, by way of defense to, or in support of, the demand or demands set up in a cause, are res judicata by the decision rendered therein.

3. JUDGMENT—RES JUDICATA—PARTIES—LIS PENDENS.

Except in pure proceedings in rem, nothing is res judicata by a decision as to persons who were not parties to the cause in which it was rendered; but the status of the property involved therein may have been so affected, by the pendency of the suit, as to have rendered it insusceptible of valid purchase or acquisition by strangers thereto, while the cause was pending or after decision, as against one who was a party to it.

[Ed. Note.—For cases in point, see vol. 80, Cent. Dig. Judgment, §§ 1230-1233.]

4. LIS PENDENS—EXTENT OF RULE.

The rule lis pendens extends to nonnegotiable choses in action and funds, for the subjection of which to the payment of a debt, a suit in equity has been instituted to set aside assignments thereof, as having been made in fraud of the plaintiff's rights.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lis Pendens, §§ 9-11.]

5. FRAUDULENT CONVEYANCE—ASSIGNMENT OF FUND—ANSWER.

The answer of an assignee to a bill, attacking an assignment of a fund as having been fraudulently made, must deny notice of fraudulent intent of the assignor, as well as fraudulent intent on the part of the assignee. Failure to deny it is equivalent, in legal effect, to an admission of the truth of the allegation of notice.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 784.]

6. SAME—GENERAL DENIAL—EFFECT.

The answer of an assignee, responding to a bill charging fraud in the assignment, specifically denies the fraudulent intent imputed to him by the allegations of the bill, says nothing as to the fraudulent intent imputed to his assignor, is silent as to the allegation of notice of the fraud of the latter, and denies generally each and every charge or intimation of fraud charged against respondent in plaintiff's original and amended bills; and there is no exception to said answer. *Held*, the general denial is insufficient to negative fraudulent intent of the assignor and notice thereof to the assignee.

7. SAME—BONA FIDE PURCHASER.

One who claims title to property or a fund as a bona fide purchaser without notice must allege, not only that he is a purchaser for value, but also that he had no notice of the fraudulent intent of his vendor or his assignor. It requires both payment of adequate consideration and want of notice of fraud to make out a title in such case.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 602.]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Suit by Susan C. Dent against Dever Pickens and others. Decree for plaintiff, and defendants A. G. Dayton and others appeal. Affirmed in part, and reversed in part.

Fred. O. Blue and Davis & Davis, for appellants. J. Hop Woods, for appellee.

POFFENBARGER, J. On the 12th day of May, 1905, in the chancery cause of Susan C. Dent v. Dever Pickens and others,

pending in the circuit court of Barbour county, an order allowing an appeal in the following terms was entered by this court: "An appeal and supersedeas upon the foregoing petition is allowed as to so much of the decree pronounced on the 23d day of February, 1905, as requires that A. G. Dayton and Mollie Pickens pay to the plaintiff the sum of \$1,000, with interest thereon from the 12th day of May, 1892, and the sum of \$69.24, with interest thereon from the 6th day of June, 1892, and that said A. G. Dayton and John J. Davis pay to the plaintiff the sum of \$125, with interest thereon from the 21st day of May, 1892, and that said A. G. Dayton and John Bassel pay to the plaintiff the sum of \$150, with interest thereon from the 26th day of May, 1892."

The decree contains a number of other adjudications in favor of the plaintiff, some of which, not covered by the order allowing the appeal, are made the subject of assignments of error in the briefs of counsel. They say that, as the case is before this court on an appeal, they may, under the rules, assign any error in the decree. We do not understand this to be in accord with the practice of this court or its rules, as properly construed. When the appeal is from the whole decree, errors in it, not assigned in the petition for the appeal, may be assigned in the briefs, and may even be noticed by the court and acted upon without any assignment thereof. But when the appeal allowed does not extend to the whole decree, the court has before it, and within its jurisdiction, only those matters as to which the appeal was allowed. All adjudications as to which no appeal was allowed remain in the court below, within its jurisdiction, and constitute proper subjects for its further action. A proposition so obviously deducible from the terms of the order requires no citation of authority for its support, but, as the contrary thereof seems to be relied upon with confidence, reference is here made to 3 Cyc. 220, where a number of decisions in which the rule has been enforced are cited. The only exception is a case in which the matter as to which the appeal was allowed is so connected with all others as to render it impossible to act upon it without affecting them. At this time, therefore, none of the matters adjudicated in the decree of February 23, 1905, except the two items of \$1,000 and \$69.24, decreed against A. G. Dayton and Mollie Pickens, the \$125 item, decreed against A. G. Dayton and John J. Davis, and the \$150 item, decreed against A. G. Dayton and John Bassel, are within the jurisdiction of this court, nor can they be considered on this appeal. As to these items, the appellee relies upon the principle of *res judicata*, claiming that this court, by its decision and directions to the court below, on the first appeal in this cause, the disposition of which is reported in 46 W. Va. at page 378, 83 S. E. at page 303, adjudicated and settled

the controversy in reference thereto in her favor. If this be true, there is no error in the action of the court below in allowing them to her; for that decision, whether it be right or wrong, is unalterable. *Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174; *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644; *Camden v. Werniger*, 7 W. Va. 528; *Henry v. Davis*, 13 W. Va. 230; *Campbell v. Campbell*, 22 Grat. 649; *Bank v. Craig*, 6 Leigh, 399; *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Mackall v. Richards*, 116 U. S. 45, 6 Sup. Ct. 234, 29 L. Ed. 558; *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Himely v. Rose*, 5 Cranch, 313, 3 L. Ed. 111. The first important inquiry, therefore, is whether this Court decided anything respecting said items, and if so, what.

Before entering upon this inquiry, it is proper and necessary to a clear analysis of the decision rendered by this court, to mark a distinction as to parties. A. G. Dayton, John Bassel, and John J. Davis were not parties to this cause at the time of said decision. Bassel was not a party at all, in any capacity. Dayton and Davis were parties as trustees, and Dayton as special commissioner. Mollie Pickens and Dever Pickens were parties, and the litigation, as to one of the matters now under consideration, the Coburn debt, less the part assigned to Mollie Pickens, was between Susan C. Dent on the one side and Dever Pickens and Minnie B. Coburn on the other side, and, as to said assigned part, between Susan C. Dent and Mollie Pickens; Dayton and Davis being rather nominal parties in their representative capacities. Hence whatever decision was rendered affected personally Dever Pickens, Minnie B. Coburn, and Mollie Pickens, and the status of the funds about which they were litigating. No personal decree could have been rendered against Dayton, Davis, and Bassel, but the status of the fund may have been rendered against Dayton, Davis, and Bassel, but the status of the fund may have been so affected as to have rendered the subsequent decree against them proper on the third amended bill afterwards filed against them along with the original parties.

Susan C. Dent, in the year 1889, instituted an action at law against Dever Pickens, laying her damages in the declaration at \$25,000. Pending the same, and before judgment, the defendant executed a deed of trust, conveying to A. G. Dayton and John J. Davis, trustees, certain real estate to secure the payment of alleged indebtedness, amounting, in the aggregate, to \$11,000. Her original bill in this cause, filed in February, 1889, set up the pendency of said action and attacked the said deed of trust as fraudulent, and prayed that it be set aside as to her demand. In September, 1889, she filed an amended bill, showing the recovery of a judgment by her in said action for the sum of \$10,000, and the issuance of execution thereon and docketing of the same in the

clerk's office of the county court of said county, whereby she claimed to have acquired a lien upon all the personal property and estate of said defendant. In this amended bill, she further charged that, on the 10th day of May, 1889, the defendant, for the purpose of hindering, delaying, and defrauding her out of the collection of her said debt, had entered into a marriage contract with Minnie B. Coburn and fraudulently settled upon her, by assignment, a large amount of personal property in the form of debts due him from sundry persons, and conveyed to her his interest in a certain tract of land, containing 396 $\frac{3}{4}$ acres. Among the debts so assigned, there was one which is described in said contract as follows: "The rest and residue of the debt due said Dever Pickens from M. W. and Ledrue Coburn, and secured by deed of trust to Alston G. Dayton and James Pickens, trustees, dated December 21st, 1885, after deducting therefrom \$1,000, assigned Jan'y 14th, 1880, to Mollie Pickens." The marriage contract, containing this assignment and recital, was exhibited with said amended bill. The following allegations of the amended bill relate, in part, to said Coburn debt and the assignment of a portion thereof to Mollie Pickens: "Plaintiff further says that on the 31st day of August, 1889, she caused an execution to be issued upon said judgment, and, on the 31st day of August, 1889, had the same placed in the hands of the sheriff of said county to be executed, and, on the 31st day of August, 1889, had the same docketed in the clerk's office of the county court of said county, and thereby acquired and continued the lien of said execution upon the debts transferred by said defendant Pickens to said Minnie B. Coburn, whereof the said M. W. Coburn, Ledrue Coburn, A. G. Dayton, surviving trustees of himself and said James Pickens, deceased, in the deed of trust dated December 21, 1885, mentioned in said contract, Mollie Pickens, A. S. Pickens, M. S. Clevenger, A. H. Young, Emma Walker, and John D. Pickens, in his own right, have due notice and had also knowledge of the fraudulent purpose of said defendant Pickens in making said contract. Plaintiff further avers that since she filed her said original bill the said Dever Pickens has abandoned this state and is living in one of the far western states, as does also the said Minnie B. Coburn, who is the daughter of said M. W. Coburn and the niece of said Ledrue Coburn, both of whom are insolvent; that the said Dayton and Davis are and were the counsel of said Dever Pickens from the day of the institution of plaintiff's action at law against him in which said judgment was recovered up to this day; that said Mollie Pickens, Emma Pickens, and John D. Pickens are the sisters and brothers of said Dever Pickens; that said A. S. Pickens is his nephew; that said A. H. Young is the husband of his sister, and that said M. S. Clevenger is either some relative

or intimate friend of said Dever Pickens; and that all of them well knew the financial standing and habits of said Pickens and of his purpose to cheat the plaintiff in all of said transfers." Said first amended bill further alleged that Dever Pickens, "for the purpose of hindering, delaying, and defrauding the plaintiff out of the collection of her said debt, entered into a marriage contract or ante-nuptial settlement with the defendant, Minnie B. Coburn, a person without financial means or worldly position, justifying the generosity of said Pickens, whereby, in consideration of the promise of said Coburn to marry said Pickens, he transferred and set over to her certain debts due to him," amounting in the aggregate to more than \$3,500; and that the said contract was void in law and fraudulent in fact; and that the said Minnie B. Coburn was privy to, and had perfect knowledge of the fraudulent purpose of said Pickens in executing the same.

A second amended bill was filed in 1893, which contains the following allegations respecting said sum of \$1,000 and the Coburn debt: "Plaintiff further says that the said Dever Pickens is insolvent; that the deed of trust executed by him to the defendants Davis and Dayton, trustees, on the 14th day of January, 1889, and the said contract, are fraudulent for the reason set up in her former original and amended bills; that the defendants Mollie Pickens, A. S. Pickens, M. S. Clevenger, A. H. Young, Emma Walker, and John D. Pickens, both as executor and in his own right, had due notice thereof; that the debts due from them and from the defendants M. W. Coburn and Ledrue Coburn, to said Dever Pickens mentioned in said trust and contract remain unpaid and are bound by the lien of said execution; that the \$1,000 mentioned in said contract as part of the debt due to said Dever Pickens, secured by the trust of said M. W. and Ledrue Coburn to said A. G. Dayton and one James Pickens (who is now deceased), trustees, dated December 21, 1885, was fictitious and fraudulent, of which said Mollie Pickens had due notice, as did also the said Dever Pickens and said surviving trustee, A. G. Dayton, and if not paid is bound by the lien of plaintiff's said execution, and if paid was paid in fraud of plaintiff's right in the premises, and said Mollie Pickens will be made to respond to the plaintiff for the amount thereof." The prayer of said second amended bill reads, in part, as follows: "To the end that the plaintiff may be relieved, she prays that the said Mollie Pickens may be made to respond to the plaintiff as aforesaid, in case she has received the said sum of money; that the said contract may be declared void and fraudulent as to the plaintiff; that the said trust of January 14, 1889, as to the debts secured therein to the estate of said James Pickens, Ann M. Pickens, and R. M. Boring, may be declared fraudulent and void; that

the lien of said execution may be enforced against the debts due to said Dever Pickens from the defendants Mollie Pickens, A. S. Pickens, John D. Pickens, in his own right, M. S. Clevenger, A. H. Young, Emma Walker, M. W. Coburn, and Ledrue Coburn, and that they may be restrained and enjoined from paying the same to anybody but the plaintiff; that the interest of Dever Pickens under said trust of January 14, 1889, and said contract may be declared; that his interest in the real estate therein mentioned may be ascertained and subjected to the plaintiff's said judgment and execution; that a lien may be declared in favor of the plaintiff therefor in case the same may be held fraudulent as of the date of the institution of this suit, to wit, January 24, 1889."

The decree brought up by the first appeal was made and entered on the 17th day of February, 1896, more than three years after the filing of said second amended bill. It was predicated, not only upon the pleadings, but upon evidence taken, and was, therefore, a final adjudication upon the merits of the controversy. It dismissed all of said bills. This Court, on the appeal, reversed that decree and remanded the cause with specific directions; the mandate requiring the circuit court to further proceed in the cause, "according to the principles stated and directions given in the written opinion aforesaid, and further according to the rules and principles governing courts of equity."

By reference to the opinion of this court, at page 392, of 46 W. Va., page 308 of 33 S. E., it will be seen that the attention of the court went directly to the said Coburn debt of \$2,050.89. Then followed this language: "And it is claimed by the appellant that the debt of \$2,050.89 mentioned in said agreement is, by virtue of the lien of the plaintiff's bill, and the docketed execution therein mentioned, liable to her judgment, and the same should be charged against the person paying the same, or receiving payment thereof, with notice of plaintiff's rights, and against the funds in the hands of said general receiver, to wit, the sum of \$836.84, with interest, as stated in said agreement. This proposition is correct, as applying to the debtors mentioned in said assignment from the date of the filing of said first amended bill. Defendant Mollie Pickens failed to answer, and the amended bills were taken for confessed as to her." On page 393 of 46 W. Va., page 308 of 33 S. E., the opinion directs the circuit court "to refer the cause to a commissioner to ascertain and report what moneys due on the claims assigned by Dever Pickens from the parties mentioned in the amended bills as debtors to him, if any, have been paid since the filing of the first amended bill, by whom and to whom paid, and whether the \$1,000 of the debt secured by the trust deed made by M. W. Coburn and Ledrue Coburn of October 21, 1885, secured to Dever Pickens, and mentioned in the said marriage contract

as having been assigned to Mollie Pickens, has been paid to her since the filing of the first amended bill, and whether any or all of such moneys have been paid or not; that the court take proceedings to collect all such money as may not be shown, upon proper and sufficient evidence, to have been paid prior to the filing of the said first amended bill, to be collected from the persons who have since received it, or from the debtors who may not have paid what they owe; and that the same, as fast as collected, be applied to the judgment of appellant, until the same is satisfied."

The argument against the claim that this matter is *res judicata* is that this court, at that time, having dealt only with the first amended bill, which asserted an execution lien upon said debt, cannot be regarded as having based its action on the allegations of the second amended bill, and, as the judgment on which the execution had issued was reversed, the execution lien failed, in consequence whereof the reason or basis of the decision has failed. Further argument in this connection is based on insufficiency of the allegations of the second amended bill and indefiniteness of some expressions in the opinion of the court. It is to be observed, however, that, in the opinion, it is said the defendant Mollie Pickens failed to answer, and the amended bills were taken for confessed as to her. In another place the opinion says the court below shall, through its commissioner, ascertain and report what moneys due on the claims assigned by Dever Pickens from the parties mentioned, not in the first amended bill, but in the amended bills as debtors to him, if any, have been paid since the filing of the first amended bill; and the final direction is that the court take proceedings to collect all such money as may not be shown, upon proper and sufficient evidence, to have been paid prior to the filing of the said first amended bill, to be collected from the persons who have since received it, or from the debtors who may not have paid what they owe; and that the same, as fast as collected, be applied to the judgment of the appellant, until the same is satisfied; and in immediate connection with this direction the \$1,000 claim of Mollie Pickens is mentioned. The first amended bill was filed in September, 1889. The money in question was paid by Melville Peck, special commissioner, to Alston G. Dayton, attorney, on the 27th day of April, 1892, a long time after the filing of said first amended bill. All this was before the court and specially mentioned in the opinion, and the positive, emphatic direction is to cause to be collected and paid to the appellant in that appeal, the appellee in this one, all money which had not been paid prior to the filing of said first amended bill. The adjudication by this court, notwithstanding any reasons assigned in the opinion, must be regarded as founded upon the record of the cause, as it was when

brought to this court. The reference to the first amended bill seems to have been for the purpose of ascertaining the date on which the appellee first acquired a lien upon, or right to charge, the personal property of the defendant. As the court deemed this to have occurred upon the filing of said first amended bill, that was the date most frequently referred to in the opinion, but it does not follow that the adjudication stands only upon the first amended bill. On the contrary, there are references to the second amended bill, for the opinion mentions the "amended bills" more than once.

The allegation of fraud and notice thereof in the second amended bill might have been held insufficient on a demurrer thereto, had one been interposed, but it does not appear that anybody demurred to it, nor did Mollie Pickens answer it. Its insufficiency was not in any way questioned nor its allegations denied. Dever Pickens responded to it, denying the fraud alleged and notice thereof to said Mollie Pickens. Possibly his answer might have availed his sister, had it been brought to the attention of the court. But she was treated as being in default. The opinion says the amended bills were taken for confessed as to her. It is said in the brief that this court, in the opinion rendered on the petition for rehearing, said: "Her debt is not denied to have existed. Dever Pickens owed her the money." This is a misapprehension. The language attributed to the court is quoted from the brief of counsel merely as argument. On the contrary, the opinion rendered on the petition for rehearing says the defendant Mollie Pickens was permitted, notwithstanding her helpless condition, to be allowed to remain in default by the other members of the family, as well as their counsel, and was thereby placed in such condition as to be in great danger of losing a large portion of her estate; and it seems that they, in their eagerness to save themselves, overlooked the interests of their unfortunate sister. What can be the meaning of all this language in the opinion, if the court did not predicate its decision, in part, upon the second amended bill, alleging fraud?

As to all of the M. W. and Ledrue Coburn debt, except the \$1,000 thereof claimed by Mollie Pickens, the litigation was between Susan C. Dent and Minnie B. Coburn. The first amended bill charged unequivocally that the assignment of said debt, less said sum of \$1,000, was void in law and fraudulent in fact, and that Minnie B. Coburn had notice of the fraud on the part of Dever Pickens, and participated therein. The object of the bill was to charge that fund and subject the same to the payment of Susan C. Dent's judgment. Under well-settled principles, such a bill, if sustained, gives a lien on the fund from the time of suing out process thereon. This bill set up the execution lien, but the object of that allegation was to charge the

same fund by the assertion of a lien thereon, on an additional ground, namely, the execution. Plaintiff attempted by her first amended bill to subject that part of the Coburn debt which was claimed by Minnie B. Coburn, not on one ground, but on two grounds—fraud and the execution lien. Assuming that the execution lien did fail by reversal of the judgment, its failure in no wise affected the other ground. Minnie B. Coburn answered the bill, and contested its allegations of fraud; there was a full hearing upon the issue thus made, and this court most unequivocally decided that, as against Minnie B. Coburn, said debt was liable to the plaintiff's claim. As to the \$1,000, part of the Coburn debt, claimed by Mollie Pickens, the litigation was between her and Susan C. Dent, and proceeded upon the second amended bill, the allegations of which she did not deny, and the sufficiency of which she did not question, and this court expressly decided that said sum was liable to the plaintiff's claim.

Whether the reversal of the judgment on which the execution had issued should have produced a different conclusion is another question the adjudication has foreclosed. The second amended bill brought it to the attention of the court, as well as the recovery, in the second trial, of another judgment for \$9,000, and the issuance of a new execution thereon. The inquiry now is, not whether a correct decision was rendered, but simply, what was decided. The record shows there was jurisdiction of the persons of the parties and also of the subject-matter of the decision, and the grounds of all the contentions now set up to show that the invalidity of the assignments of the Coburn debt was not decided were disclosed to this court by the record at the time the decision was rendered. Being then regarded as insufficient to prevent a decree in favor of the appellee, they can confer no authority upon this, or any other court, to disregard the plain emphatic terms of the mandate in determining what was decided.

It is said the action of this court on the second appeal, reported in 50 W. Va. 382, 40 S. E. 572, in reversing the decree of February 23, 1900, and in refusing to treat the decision rendered on the first appeal as an adjudication against a bequest of \$2,000 to the executors of James Pickens, deceased, expressly charged by the will upon certain real estate, although omitted from the directions given in the opinion as to the liens on the property, would justify us now in disregarding so much of that opinion as purports to adjudicate the rights of the parties respecting the Coburn debt. A very plain distinction between the two subjects is perceived. The opinion made no reference to said \$2,000 bequest or charge. It was not a subject of controversy in the cause. It was not attacked by any allegation of any bill filed. Here, the matter which is said not to

have been adjudicated was brought to the attention of the court by the pleadings, was one of the subjects of controversy, and was expressly considered and dealt with in the opinion as well as in the positive directions to the court below, embodied in the opinion, which the order of this court commanded the court below to treat and enforce as a part of the mandate. The reasons for the conclusion that said \$2,000 lien was not affected by the former decision were stated in the opinion, in part, as follows: "The plaintiff filed a bill, first amended bill and second amended bill, and in none of these bills is there any allegation or charge that said \$2,000 has been released or paid in any way. The contention, therefore, that the matter of this \$2,000 claim is res adjudicata is not tenable. No issue was ever made upon it, and it is not enough that it might have been set up in the same suit. Nothing charged in the bill made it necessary for the executors to assert said claim by way of defense to the bill. It, therefore, does not belong to that class of things which are deemed to be res adjudicata because they might have been adjudicated. * * * Matters are not adjudicated which have never been pleaded, or which the party asserting them was not bound to plead in the former suit by way of defense or in support of his claim as plaintiff." The state of the record as to the matter now under consideration renders it impossible to apply this doctrine.

That the course pursued in arriving at the conclusion above expressed is authorized by our decisions, and harmonizes with principles declared by courts generally, admits no doubt. *Blern v. Ray*, 49 W. Va. 129, 38 S. E. 530, propounds the doctrine that a man is concluded by an adjudication, when the state of the pleadings as to the matter in question was such as to call upon him to respond thereto, and as to those things which were actually litigated and decided. In that case the plaintiffs escaped the rule, because their bill in the former case had made no reference to the property they charged by their bill in the second suit. It was not in the former case, nor were they bound by any principle of law or rule of procedure to put in; but, if they had been, the adjudication would have bound them, whether it was, in fact, in or not. *St. Lawrence Co. v. Holt and Mathews*, 51 W. Va. 352, 41 S. E. 351, illustrates the application of the rule to a different kind of a case. There, the bill alleged matter against Holt and Mathews, upon which relief against them was prayed. They failed to answer it, presumably because they deemed its allegations insufficient to afford a basis for a decree. Both the order made by this court and the opinion pursuant to which the order was made were more or less ambiguous. Nevertheless the decree dismissing the bill and thereby permitting a sale of the property claimed by Holt and Mathews to satisfy a

deed of trust thereon was deemed by this court to have amounted to an adjudication of the question of title against Holt and Mathews. Insufficiency of the bill, as viewed from the standpoint of a demurrant thereto, and indefiniteness and ambiguity in the opinion and decree, availed nothing against the only deduction that could logically be made as to the court's action, and this, too, notwithstanding deprivation of the right of trial by jury of the issue of title, which would have been raised by full defense. As sustaining the conclusion, arrived at under general principles discussed in the opinion, an authority of no less dignity than a decision of the Supreme Court of the United States is cited and relied upon, near the close of the opinion, namely, *Hefner v. Insurance Co.*, 128 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309. It is useless to repeat the reasons upon which these decisions are predicated, or discuss generally the principles of the doctrine under which this case falls. They are in no sense questioned; the only contention being that the case is not within them. Mere defective pleading is no objection. *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105; *Hefner v. Ins. Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309; *St. Lawrence Co. v. Holt and Mathews*, 51 W. Va. 352, 41 S. E. 351. When the decree is ambiguous, or makes the opinion a part thereof, the court looks to both, as well as the pleadings in the cause, to determine what has been decided. *St. Lawrence Co. v. Holt and Mathews*, cited; *Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174; *Herman, Estop. & Res Ad.* 470, § 402.

Though there was an adjudication as above stated there was no personal decree or adjudication against Dayton, Davis, or Bassel. There could have been none, since they were not parties. But it was decided that Susan C. Dent had, by reason of her first amended bill, a lien upon that part of the M. W. and Ledrue Coburn debt claimed by Minnie B. Coburn from the date of the filing of said bill. It was out of that fund that there had been paid to Davis said sum of \$125, to Bassel said sum of \$150, and to Mollie Pickens said sum of \$69.24. He received this money after the filing of said bill and the assertion of a lien thereon, pending the suit. It was a proceeding against that particular fund. That fund constituted the subject-matter of the litigation, and was subject to a lien in favor of Susan C. Dent at the time this money was taken out of it as aforesaid. Dayton, Davis, and Bassel were made parties in their individual capacities to said third amended bill, on which the present decree against them is predicated. They were bound to take notice of the pendency of this suit against that fund, and of the lien thereon acquired by the filing of said first amended bill. Choses in action, as well as tangible personal property and real estate, are subject to the rule *lis pendens*, when the

Institution of the suit gives a lien on the fund, as a bill to set aside a fraudulent transfer does under the law of this state. This was asserted as the general law of the country by the case of *Haddon v. Spader*, 20 Johns. (N. Y.) 554, decided in 1822, in which all the English cases on the subject were carefully reviewed and analyzed.

Bennett on *Lis Pendens*, on pages 140 and 141, after reviewing all the authorities, gives the following clear expression of his conclusion: "The conclusion seems warranted that, after the bill is filed and *lis pendens* commences, the specific property involved in the litigation becomes subject to the claim or demand of the complainant; and that, if the claim or demand should turn out to be of such a nature that the property ought to be subjected to it under the rules prevailing in a court of equity, the power of unrestricted disposition in the defendant would be suspended or lost, and a purchaser from him *pendente lite* would take the property subject to the lien which attached upon it by the institution of the suit; that in the case of personal property it would be immaterial whether the judgment were a lien or not when the suit was commenced, for in such case it is the execution and not the judgment which would become a lien; and that if its collection had been obstructed so that the levy could not be made by reason of fraudulent conveyances of the defendant, to remove which the bill was filed, and the execution remained in full force and capable of enforcement against the property but for the obstacles created by the fraudulent conveyances, the court would have jurisdiction over the property, and hence it would be bound by *lis pendens*. The authorities go even farther than that; and it is well settled in this country that if a creditor files a bill to set aside fraudulent conveyances, and to have the property applied, by the aid of a court of equity, to the payment of his judgment, although no lien has been or can be acquired at law, he acquires a specified lien or power over the property by filing the bill, and is entitled to priority over other creditors; and that any party purchasing the property sought to be subjected to the claim is a purchaser *pendente lite*."

Whether the lien extends to personal property at all has been a matter of controversy among the several courts of the country, some affirming, and others denying, the proposition, and those of the former class have differed as to the subjects of the rule and the extent of its application; but there seems to be among them practical unanimity in the view that, in creditors' bills, insolvency proceedings, and suits to set aside fraudulent conveyances and transfers and charge the property with debts, it has full operation, because, in such cases, a lien, or the equivalent thereof, is acquired by the commencement of the suit. See 21 A. & Eng. Ency. Law, 628, 629. This court, in

Bruff v. Thompson, 31 W. Va. 16, 6 S. E. 352, has countenanced the view that it applies in any case in which a lien has been acquired in any of the modes recognized by law, and Judge Green thought it should have still broader application. There is no occasion here to carry it further, and, not to apply it under such circumstances would render it practically impossible to subject intangible property to the satisfaction of the debts of a fraudulent debtor. Nor, so doing, is there any encroachment upon the principles which seem to inhibit the application of the rule to specific money and negotiable paper. Commencement of a suit to set aside a fraudulent conveyance, transfer, or assignment, under our practice, creates a lien on the property so proceeded against. *Wallace v. Treagle*, 27 Grat. (Va.) 479; *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382, 55 L. R. A. 916; *Clark v. Figgins*, 31 W. Va. 156, 5 S. E. 643, 13 Am. St. Rep. 860; *Geiser, etc., Co. v. Chewning*, 52 W. Va. 523, 44 S. E. 193. The notice required by section 12 of chapter 139 of the Code of 1899 was not filed, but that section applies to suits brought to charge real estate. *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702.

Escape from the operation of this principle was attempted by the assertion of a claim of assignment by *Dever Pickens* and *Minnie B. Pickens* (née *Coburn*) of \$1,000 of said *Coburn* debt to *A. G. Dayton*, to be held by him as security for the payment of counsel fees to himself, *John J. Davis*, and *John Bassel*, for services rendered and to be rendered by them in said action at law. The assignment is averred to have been made prior to the filing of said first amended bill, and a written instrument evidencing the same, filed with a deposition, bears date August 20, 1889. The third amended bill charged retention and payment of this money by *Dayton* with fraudulent intent and full knowledge of the plaintiff's rights and of the fraudulent intent of the assignors. In his answer, he specifically denies any fraudulent intent, sets up the alleged assignment, and then denies, generally, "each and every charge or intimation of fraud charged against him in plaintiff's original and amended bills either charged against him individually, or as trustee." He nowhere denies fraudulent intent on the part of *Dever Pickens* and *Minnie B. Pickens*, nor does he deny knowledge of their fraudulent intent in making said assignment. If, having specifically responded to certain allegations thereof, he had denied generally all other allegations of the bill, his answer might have been sufficient, in the absence of an exception thereto, under the doctrine laid down in *Sandusky v. Faris*, 49 W. Va. 150, 38 S. E. 563, and *Burlew v. Quarrier*, 16 W. Va. 108; but the general denial stops short of notice and other material allegations, and is, therefore, purely argumentative and equivocal as to the matter of notice. Where fraud is

alleged against a party who claims to be a bona fide purchaser without notice, or where he asserts a title as such, he must deny that he had any notice of the fraud of his grantor or assignor. "In all cases in which a party sets up his title to relief in equity as a bona fide purchaser, he must deny notice, though it be not charged. It is a general rule in pleading that whatever is essential to the right of the party and is necessarily within his knowledge must be positively and precisely alleged, and the plaintiffs, coming in the character of bona fide purchasers, were bound to state affirmatively the equity of their case. If they will not aver the fact that they were purchasers without notice, we are not bound to presume it. *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 302; *Murray v. Ballou*, Id. 575. See, also, *Gallatien v. Cunningham*, 8 Cow. (N. Y.) 861." *Cochrane v. Hyre*, 49 W. Va. 315, 88 S. E. 554. Messrs. Dayton, Davis, and Bassel, no doubt rendered a large amount of efficient professional service to their clients, relying upon the understanding had with Pickens, as to security for their fees, and may have acted in the utmost good faith and without any knowledge of fraudulent intent on the part of their clients; but this is no excuse for failure to file a sufficient answer to the bill charging notice of the fraudulent intent of their clients. The plaintiff and the court, under such circumstances, were warranted in proceeding as if the undenied allegations were true. *Siers v. Wiseman* (W. Va.) 53 S. E. 460, 462; *Grant v. Cumberland, etc. Co.* (W. Va.) 52 S. E. 36. That the assignment occurred before the bill attacking it was filed is wholly immaterial. Fraudulent conveyances and assignments usually take place before institution of the suit. Equity will undo fraud as readily as it will prevent it.

If the averment of the assignment be regarded as new matter, set up as ground for affirmative relief, instead of treating the answer, as a whole, as having been intended to be a mere response to the bill by way of denial of its allegations, the same rule would apply. In order to make out a good title on the face of the answer, and especially an equitable title, it would be necessary to affirm that the respondent was a purchaser for value without notice; the bill having alleged fraudulent intent on the part of the assignors; for proof of that fact against the assignors would necessitate want of notice thereof on the part of the assignees to make their title good. In alleging title, all the essential elements thereof must be set forth. The omission of any one of them is fatal. Averment of an assignment antedating the filing of the bill might logically tend to the conclusion that it was not fraudulent, and that there was no knowledge of fraudulent intent, but it would not amount to an averment of want of notice. It is a mere evidential fact, not precluding either fraud or notice thereof.

From the principles and conclusions above stated, it results that A. G. Dayton was liable to the plaintiff for said sums of \$69.24, \$125, and \$150, paid by him to Mollie Pickens, John J. Davis, and John Bassel, respectively; and that, as said parties received it from him with knowledge of the source from which it was derived and all the circumstances above referred to, so much of the decree as relates to said sums will be affirmed.

As said Dayton received said sum of \$1,000 and paid it to Mollie Pickens before the filing of said second amended bill, he stands in a different situation as to it. It cannot be said that there was any pending suit with reference thereto at the time he received the money, and he, therefore, violated no duty. For this reason, the decree should have required Mollie Pickens alone to pay said sum; and, in so far as it requires A. G. Dayton and Mollie Pickens to pay to Susan C. Dent \$1,000 with interest thereon from the 12th day of May, 1892, until paid, the same must be reversed and a decree entered here requiring said Mollie Pickens to pay said sum, with interest thereon as aforesaid, to said Susan C. Dent.

A cross-assignment of error is predicated on the refusal of the court to require the defendant A. G. Dayton to pay over to the plaintiff a balance of the Coburn debt, amounting to \$376.97, part of which he retained on account of his fees as attorney for Dever Pickens, and the residue of which he applied on costs due from his client. That matter is not now before this court, for the reasons assigned in disposing of other assignments of error as to matters not brought up by the appeal.

(59 W. Va. 253)

THACKER COAL & COKE CO. v. BURKE et al.

(Supreme Court of Appeals of West Virginia.
March 6, 1906.)

1. MASTER AND SERVANT—ENTICING SERVANT.

One who maliciously entices a servant in actual service of a master to desert and quit his service is liable to action therefor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1283.]

2. SAME—LIABILITIES.

If one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person, to the injury of that third person, it is actionable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1283.]

3. SAME.

Persons who conspire to induce others to break a valid contract between other persons are liable to action therefor.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, § 9; vol. 34, Cent. Dig. Master and Servant, § 1283.]

4. SAME.

The act found in Code 1899, § 14, appendix, p. 1053, does not authorize any individual, or number of individuals, to malicious-

ly entice servants to desert service in which they are engaged, or to prevent them from engaging in such service under a contract for such service.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1283.]

(Syllabus by the Court.)

Error to Circuit Court, Mingo County.

Action by the Thacker Coal & Coke Company against Charles Burke and others. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Reversed.

Rucker, Anderson & Hughes and Sheppard & Goodykootz, for plaintiff in error. J. H. Gaines, J. L. Stafford, and Douglass W. Brown, for defendants in error.

BRANNON, J. The Thacker Coal & Coke Company filed a declaration in trespass on the case in the circuit court of Mingo county against Charles Burke and five others for damage for enticing servants from the plaintiff's service, which declaration upon demurrer was dismissed, and the company sued out a writ of error.

Certain legal principles control the case. In *Transportation Co. v. Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895, we find it stated, on authority there given, that "if one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person, it is actionable." We find that holding confirmed in *Angle v. Chicago Railway*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, in the language following: "If one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can sustain an action against the wrongdoer. When a man does an act which in law and fact is a wrongful act, and injury to another results from it as a natural and probable consequence, an action on the case will lie." If additional authority were needed for such a proposition of common sense and justice, see the case decided by the highest English tribunal in 1901, *Quinn v. Leathem*, App. Cases 1901, 495. What I have already said refers to contracts in general. As to the particular contract between master and servant, the law is, if possible, yet more decided. The common law says that one who causes a breach of that contract is liable to damages. It has been said by some that action in such case lies only by reason of the act of Parliament in the reign of Edward III, A. D. 1350, making the act of enticement of a servant from his employer wrongful. If so, we might hesitate in saying that it is actionable in West Virginia; but I assert, believing that I am supported by ample authority, that action is given in such case by the common law. So the text writers and courts treat it. In *Comyns' Digest*, title "Action on the Case," A, p. 278, the common-law rule is

thus stated: "In all cases where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The Supreme Court of the United States in *Angle v. Chicago Railway*, cited, stated the rule thus: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce an injury, an action on the case will lie." It is generally treated as a common-law cause of action. The general principle applicable to contracts in general would give action against a third party for wrongfully causing the breach of contract between master and servant; but as to this particular contract the law has been long settled.

I cite the following authorities: "It is well settled that any person who knowingly entices away the servant of another, and thereby induces him to violate his contract with his master, or who thereby deprives the master of the services of one then actually in his service, whether under a contract to serve or not, is liable to the master for his actual loss therefrom. But in this action it is necessary to prove not only that the person employed was in the service of the plaintiff, but also that the defendant, knowing the fact, wrongfully induced him to leave it. The intent of the defendant, and the natural or actual effect of its execution, is the gist of the action, and unless the declaration discloses that the act was done intentionally or willfully, and that it actually did, or was calculated to, cause damage to the plaintiff, and that it was done without right or justifiable cause, no recovery can be had. Malice is inferred from the wrongful character of the act, and the declaration or complaint must disclose such facts as support the inference. If a contract to serve is established, actual service under the contract need not be shown. It is enough to show that the defendant, with notice of the servant's contract obligation to the plaintiff, has persuaded him not to enter into the plaintiff's service under it." *Wood, Master and Servant*, §§ 230, 231. "The idea of interference with contract relations as a specific tort is of recent origin. The materials from which the generalization was worked out are found in several lines of precedents. From an early day it has been established that a master may maintain an action against one who entices away his servant or harbors and detains him with knowledge of his former contract." 16 Am. & Eng. Ency. L. (2d Ed.) 1109. "Certainly since the statute of laborers the common law has recognized the right of a master to recover for the actual damage he may have suffered by the wrongful interference by a third person with his relationship to his servant, by personal injury to the servant, or otherwise depriving the master, in whole or in part, of

his service. * * * Actions for enticing servants from their employer, and for knowingly harboring servants who had previously left their employer, arose after the first statute of laborers. They survive its repeal, and occur in modern practice. Knowingly enticing from the service of another one who is employed under a contract not fully executed is an actionable wrong. Indeed, from this basis there has grown up a branch of law in which malice is an essential ingredient." Jaggard on Torts, § 155. "To the relation between master and servant, and the rights accruing therefrom, there are two species of injuries incident. The one is retaining a man's hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work. As to the first, the retaining another person's servant during the time he has agreed to serve his present master. This, as it is an ungentlemanlike, so it is also an illegal, act; for every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time. The inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master, and for that injury the law has given him a remedy by a special action on the case, and he may also have an action against the servant for the nonperformance of his agreement. But, if the new master was not apprised of the former contract, no action lies against him unless he refuses to restore the servant upon demand." Blackstone, bk. 2, 142.

I deem it useless to occupy space by quotation from other text-books and decisions to prove the doctrine above stated. They all lay down the law to the same effect. 2 Kinkhead on Torts, § 457; 3 Page on Contracts, §§ 1326, 1327; 11 Am. St. Rep. 378, 474, notes; Schouler on Domestic Relations, § 487; Moran v. Dunphy (Mass.) 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; Bowen v. Hall, 6 L. R. Q. B. D. 338; Walker v. Cronin, 107 Mass. 555; Quinn v. Leatham, App. Cases 1901, 495; Taff Vale Co. v. Amalgamated Society, App. Cases 1901, 426. Hammen on Contracts, § 350, says: "The duty to respect the contractual tie so far as not to interfere with it rests upon all the world. Thus it is everywhere agreed that it is an actionable wrong to entice away a man's servant from his employment. Independently of any right to sue the servant for breach of the contract of employment, the master may hold the guilty person liable in damages for thus wrongfully inducing the servant to sever the relation. Many courts, indeed, go further, and lay down the broad principle that the man who unjustifiably induces one of two parties to a contract to break it, intending thereby to injure the other or to obtain a benefit for himself, does that other a wrong, for which he must respond in damages."

The first count of the declaration alleges

that the company is owner and operator of a coal mine, and was engaged on the 8th day of August, 1901, in the business of mining coal from the mine; that, in order to carry on the business, it was necessary for the plaintiff to employ, and it did employ, a large number of men to work in the mine, who were engaged in the company's service in working the mine and loading coal on railroad cars for shipment to parties with whom the plaintiff had contracts to furnish coal; that the defendants, well knowing these facts, but contriving and wickedly and maliciously intending to injure the plaintiff in its business, unlawfully, wrongfully, maliciously, without justifiable cause, without the consent and against the will of the plaintiff, molested, obstructed, and hindered the plaintiff in its said business "by willfully, wrongfully, and maliciously persuading, inducing, enticing, and procuring said servants of the plaintiff, employed as aforesaid, to absent themselves and depart from the plaintiff's service"; that on pretext, and by reason of such persuasion, enticement, and procuration, the said servants on the date aforesaid, without license and against the will and consent of the plaintiff, wrongfully absented themselves and departed from said service, and continued to do so; that the plaintiff was unable to employ other servants to work in its mine in the place of the servants so enticed away, and was thereby prevented from prosecuting and carrying on its business as extensively and profitably as it could and would have done, had not its servants been induced and enticed by the defendants to quit its service. The first count does not, in words, state an express contract for service between employer and employé. By the language used in the books a contract must exist. This count says the miners were "employed" by the plaintiff and in actual service. Now, if the law gives action for enticement of a servant, it is not conceivable that a third person can maliciously entice away a lot of employés simply because there was no contract fixing term of service. The relation of master and servant exists. In such case there is a contract recognized by law, an implied contract by which the employé can recover for his service. By entering such service the employé agrees, contracts, to work. It is no difference that he can quit when he pleases. In Walker v. Cronin, 107 Mass. 555, was such a count, and the court held it good. Frank v. Herold, 63 N. J. Eq. 443, 52 Atl. 152, meets this objection. It says: "To make out the relation of master and servant, it is not necessary that there be any written, or even verbal, contract between the parties to work for any particular length of time, but the relation exists where one person is willing to work for another from day to day, and that other desires the labor and makes his business arrangements accordingly. Employers, where third parties interfere with their employés, against the latter's consent, and

endeavor by unlawful means to induce them to quit work, have a right to sue for relief." In *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367, it was held that an action for procuring discharge of a servant could be maintained, though no time of service was fixed. The court said that so long as the servant chose to continue another person could not interfere, and "neither the fact that the term of service interrupted is not for a fixed period nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service, or who refuses to perform his agreement, is of itself a bar of action against a third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement." In *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, it is held unlawful to conspire to prevent employes from continuing in service, though there is no fixed period of service. This count is interpreted as alleging a subsisting contract between the company and its servants in process of execution. Even where there is a full right of competition, where one party does an act hurtful to another, even though it be maliciously done, we held it to be justified and not actionable, except where it produced the breach of a contract. But we said that, if there was a contract between a competitor and his customers in trade, any action by a third person causing a breach of that contract between its parties was wrongful action, and subject to an action for damages, even though it was done for the benefit of the interfering party in the lawful competition of trade. We held that the advancement of the interest of the third party for self-preservation in trade would not justify his causing one of the parties to that contract to break it. *Transportation Co. v. Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895. A party cannot have a justifiable cause to instigate, to move, the breach of a contract between master and servant. We repeat that the law says that, where there is such a contract and a third party causes its violation, he is liable to an action. We do not have to say whether, if the interference is without malice, it is actionable, since the declaration avers a knowledge by the defendant of the existence of the contract, and avers that they maliciously and wrongfully caused its breach. We do not deny the principle that a man may do an act damaging another, even maliciously, when he has legal excuse or justification therefor; but we say that when his action, with knowledge on his part of a contract, causes, by intention, a breach of that contract, he is liable to damages, even though he acts for the promotion of his own interest. But in the present case the declaration avers that the defendants had no justification. It does not intimate that their action was moved by a purpose to benefit their own business, their own trade, their own interest

in any shape. On the contrary, it avers that their action was characterized by a willful intent to injure the plaintiff without justifiable cause. If they had justifiable cause for their action, the declaration does not speak it, and we are governed, on demurrer, by the declaration. Therefore we hold that the first count of the declaration states a cause of action. We, however, say that it is defective in not specifying the servants who were enticed.

The second count alleges that the plaintiff, to secure miners from other states, made special written contracts with certain miners, to wit, "William Linder and eight others, residents of North Carolina, whereby these miners agreed to come to the plaintiff and enter into service and engage in digging and shipping coal from its mine at a certain fixed rate per ton," specifying the rate, and that the company paid their fares of \$11.50 each from North Carolina to the mine, under contract with the miners that the fares were to be repaid the plaintiff out of the wages earned by the miners in mining for the plaintiff; that on the arrival near the mine the defendants, knowing of such contract, wrongfully, maliciously, and with unlawful purpose to injure the business of the plaintiff, and against the consent of the plaintiff, induced and enticed said miners to break their several contracts of service and refuse to enter the service of the plaintiff according to the written contract, and persuaded and induced and enticed them to depart, and that by reason of said persuasion and enticement said miners, engaged under said written contract, wholly failed and refused to perform their contracts and enter the service of the plaintiff, and immediately departed from the place where they were employed to work without having entered the service of the plaintiff, and without having paid the plaintiff the money advanced for said railroad fare; and that none of the miners have returned to work in the said mine. Under the principles stated above this count shows a good cause of action.

A third count alleges that the plaintiff, being such operator of a coal mine, made a written contract with Samuel Bovean, whereby Bovean contracted to mine for the plaintiff 500 tons of coal, and Bovean had entered upon the performance of the contract, and that the defendants, knowing of such contract, unlawfully, wrongfully, maliciously, and with unlawful purpose to injure the business of the plaintiff, induced and enticed Bovean to break and disregard the contract, and that Bovean, by reason of such enticement, broke and refused to execute the contract. Under principles above stated this count shows a good cause of action.

A fourth count says that the plaintiff, being owner and operator of such coal mine, made special written contracts with Alvin Hunter and other persons named, whereby each one of them obligated himself to mine

for the plaintiff a certain fixed amount of coal at a specified rate per ton; that said Hunter and others had actually started upon the performance of their contracts; that the defendants, well knowing thereof, contriving and falsely and maliciously intending to injure, vex, harass, oppress, impoverish, and wholly ruin the plaintiff in its business, unlawfully, and maliciously did agree, confederate, combine, and form themselves into a conspiracy to persuade, entice, and procure Hunter and others named to violate, break, and wholly disregard their contracts with the plaintiff; that the defendants, having so conspired and confederated under the name of the "United Mine Workers of America," contriving and intending as aforesaid, in pursuance and execution of their conspiracy, on a day named, unlawfully, wantonly, wrongfully, and maliciously, without justifiable cause, and against the will of the plaintiff, molested, obstructed, and hindered the plaintiff in its business of mining and shipping coal by willfully, wantonly, wrongfully, and maliciously persuading, enticing, and procuring Hunter and the others named to break, violate, and disregard their contracts, and that on pretext, and because of such persuasion, Hunter and others, against the will and without the consent of the plaintiff, without cause, violated their contracts by refusing to continue their work of mining coal as required by their contracts, and have not performed their contracts. Under principles above stated this count shows a good cause of action. *Employing Club v. Dr. Blosser Co.* (Ga.) 50 S. E. 353, 69 L. R. A. 90.

The defendants rely on Code of 1899, p. 1053, § 14, reading as follows: "Nor shall any person or persons or combination of persons by force, threats, menace or intimidation of any kind, prevent or attempt to prevent from working in or about any mine, any person or persons who have the lawful right to work in or about the same, and who desire so to work; but this provision shall not be so construed as to prevent any two or more persons from associating themselves together under the name of Knights of Labor, or any other name they may desire, for any lawful purpose, or from using moral suasion or lawful argument, to induce any one not to work on and about any mine." This statute is a penal, criminal statute; for it makes the acts in it specified unlawful, and by section 17 imposes a punishment. This is a criminal act. It does not pretend to create rights between individuals. It prohibits certain acts, and the proviso simply curtails the scope of the enactment by saying that the enacting clause shall not be construed to impair any right already existing, if existing, to join the organizations therein specified or use moral suasion. It is only a curb upon the enactment. It does not affirmatively grant, create, or originate those rights. It does not make them lawful, if before unlawful. And

could the Legislature authorize any person to violate a contract?

We, therefore, reverse the judgment, overrule the demurrer, except as to the first count, and remand the case to the circuit court for further proceedings, with leave to amend the first count of the declaration.

(73 S. C. 215)

BUSSEY v. CHARLESTON & W. C. RY. CO.
(Supreme Court of South Carolina. Jan. 30, 1906.)

DEATH—ACTION BY PERSONAL REPRESENTATIVE.

Though Code Ga. 1895, § 3828, authorizing a widow to recover for the negligent killing of her husband, designates the beneficiaries, it does not affect the right to recover, so that suit in South Carolina for wrongful death in Georgia should be brought in the name of the personal representatives of the decedent.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 35-38.]

Appeal from Common Pleas Circuit Court of Edgefield County; Gage, Judge.

Action by Elizabeth J. Bussey against the Charleston & Western Carolina Railway Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

J. Wm. Thurmond and Jas. H. Tillman, for appellant. S. J. Simpson and Sheppard Bros., for respondent.

GARY, A. J. This is an appeal from an order sustaining a demurrer to the complaint upon a cause of action that arose in Georgia, on the ground that there was a defect of parties, in that the action should have been brought by the administrator of the deceased as plaintiff, and not by his widow in her individual capacity. The complaint alleges that the statute of Georgia, generally known as "Lord Campbell's Act" (Code 1895, § 3828), provides that: "A widow, or if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former, or one of the latter, dies pending the action, the same shall survive in the first place to the children. * * *" Section 2852 of the Civil Code of Laws of South Carolina of 1902 contains the provision that the suit "shall be brought by or in the name of the executor or administrator of such person."

The underlying question is whether the provision in the Georgia statute, relative to parties authorized to bring the action, pertains to the right or to the remedy. If it was intended to affect the right of recovery, then the action should conform to such requirement; while, on the other hand, if it should be regarded as remedial, the courts of this state will apply the mode of procedure prevailing in this state. Our construction of the Georgia statute is that its intention was to designate the beneficiaries, and

not to prescribe the mode of procedure. If the statute of Georgia had provided as a consideration precedent to a recovery of damages that the action should be brought in the name of the widow, such provision would have formed part of the right instead of the remedy, and, when an action was brought in another state, it would have to be instituted in her name. If the plaintiff is required to conform her pleadings to the laws of this state, it will not affect her substantial rights. No burden will thereby be placed upon her right of recovery, nor will the defendant be deprived of any defense which it had the right to interpose under the laws of Georgia. We are aware that there is much conflict among the authorities upon the question under consideration. The plaintiff, however, has no just ground of complaint when the courts of this state accorded to her the same mode of procedure prescribed for the citizens of this state, especially when she is not thereby deprived of any substantial right. There will, moreover, be no hardship in this case, for the reason that the plaintiff has already qualified as the administratrix of her deceased husband, and the defendant is willing for the substitution to be made upon the record without the bringing of another action.

It is the judgment of this court that the order of the circuit court be affirmed.

(78 S. C. 211)

BANKS v. SOUTHERN EXPRESS CO.

(Supreme Court of South Carolina. Jan. 30, 1908.)

1. MASTER AND SERVANT — NEGLIGENCE OF SERVANT—QUESTION FOR JURY.

In an action to recover for injuries received by being run over by an express wagon, evidence held sufficient to go to the jury on the question whether the driver was the agent of defendant express company.

2. TRIAL — INSTRUCTIONS — REQUESTS — REFUSAL.

Appellant cannot complain of the refusal of a modification of a request asked by him, where it is substantially covered in the general charge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-656.]

Appeal from Common Pleas Circuit Court of Kershaw County; Purdy, Judge.

Action by Thomas A. Banks against the Southern Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. T. Hay and M. L. Smith, for appellant. B. B. Clarke and Kirkland & Moore, for respondent.

GARY, A. J. This is an action for damages. The complaint alleges that, at the time hereinafter mentioned, the defendant had an office in the city of Camden, and for the purpose of transacting its business used and operated an express wagon to carry and transfer packages between the depot of the Seaboard Air Line Railway Company and

its said office, and also for the delivery of packages in the city of Camden; that while the plaintiff was driving an ox hitched to a wagon, by the negligence of the defendant, through its agent and servant John Rush, who was in charge of said express wagon, he was run over and permanently injured; that said express wagon was, at the time of the injury, engaged in the ordinary business of the defendant, and was on its way to said depot to meet an incoming train, and there receive such packages as might be in charge of the defendant. The defendant answered, denying generally the allegations of the complaint. At the close of the plaintiff's testimony, the defendant made a motion for nonsuit, which was refused. The jury rendered a verdict in favor of the plaintiff, and the defendant made a motion for a new trial, which was also refused.

1. The defendant appealed, and the first assignment of error is as follows: "1. In refusing the motion for nonsuit, in this: that the uncontradicted evidence in the case showed that the persons, and the instrumentalities, by whom and by which the alleged injuries were committed, were the servants and the property of Weeks, and not of Southern Express Company; that Weeks was an independent contractor, and controlled the servants and the horse and wagon, and that Southern Express Company did not employ or control such servants, horse and wagon; that the evidence offered by the defendant is positive and uncontradicted, and all evidence offered by plaintiff, as to whom the property belonged and whose servants inflicted the alleged injury, was entirely inferential and stated no fact upon which the verdict of the jury in favor of the plaintiff could be based." The following principles of law are applicable to the case: "A master is liable for the negligence of his servant engaged in his business, because he selects his servant and controls him. He should not be answerable for acts done by the servant of another, or by that other who is not subject to his control. Therefore the owner of property fixed or movable, for whose benefit a work about such property is accomplished, is not held answerable for the negligence of an independent contractor, to whom he has committed the work, to be done without his control in its progress." *Conlin v. Charleston*, 15 Rich. Law, 201; *Rogers v. R. R.*, 31 S. C. 378, 9 S. E. 1059. "The principal is liable for the negligence of the agent's assistant, whenever he has either expressly or impliedly authorized the employment of the assistant, and the assent of the principal to the employment of the assistant may be implied from slight circumstances." 1 Enc. of Law, 980. "Authority is sometimes implied from the very nature of the duties and powers committed to a general agent to employ sub-agents, and when this is the case, the principal is bound by the acts of the subagent." *Id.*, 981. "Where an agent's authority to em-

ploy subagents to transact the business of an agency is shown to exist, either expressly or by implication, the torts of such agent will be binding upon the principal under circumstances in which the torts of the agent would be binding." *Id.*, 1155. "The business of the company was such as necessarily compelled it to rely upon the work of other parties, and this necessity usually and naturally gives rise to the employment of agents. When, therefore, this work is done by others, there is a strong implication that they are the agents of the parties receiving the benefit of their services." *Blackwell v. Mortgage Co.*, 65 S. C. 105, 43 S. E. 395. "Agency may be implied when one party accepts the benefits resulting from transactions of another party who ostensibly acted as his agent." *Bates v. Am. M. Co.*, 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340. "There was also some evidence to the effect that all the engines operated on said line of railroad were marked 'Southern.' This was sufficient to carry the case to the jury, even if it was necessary under the statute to show that the defendant was the actual owner of the engine causing the injury, for a presumption of ownership would arise from such circumstances, in the absence of all evidence to the contrary." *Bush v. Ry. Co.*, 63 S. C. 96, 40 S. E. 1029.

The first question that will be considered is whether there was testimony tending to prove that W. J. P. Weeks, who employed John Rush, was the agent of the defendant. Weeks testified that he was the agent of the defendant, and had a contract with it to receive and deliver all its packages in the city of Camden. There was testimony to the effect that the words "Southern Express" were painted upon said wagon; also, that while the defendant had a license to do business in Camden, Weeks did not have a license to run a dray as required by the ordinance of the city. It cannot be said that this testimony did not tend to show that Weeks was the agent of the defendant. Having reached the conclusion that there was some testimony tending to establish the fact that Weeks was the agent of the defendant, the next question is whether there was any testimony tending to show that John Rush was likewise the agent of the defendant. There was testimony to the effect that the business intrusted to Weeks required the services of more than one person; that the defendant had knowledge of this fact, and that John Rush was employed by Weeks in conducting said business; that the injury was sustained while Rush was in charge of the wagon and on his way to the depot to receive the express packages. Under the foregoing authorities, the question whether Rush was the agent of the defendant was properly submitted to the jury.

The second exception presents substantially the same questions as those just disposed of.

2. The third exception cannot be sustained, as the qualifications of the request which the

appellant contends should have been made was substantially submitted to the jury in the general charge.

The fourth and fifth exceptions were taken under a misapprehension of the facts, as the record shows that the requests were charged by the presiding judge.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(78 S. C. 202)

DIXON v. FLOYD et al.

(Supreme Court of South Carolina. Jan. 30, 1906.)

1. JUDGMENT—SETTING ASIDE—CONSENT OF ATTORNEY.

Code Civ. Proc. 1902, § 195, provides that the court may at any time within a year relieve a party from a judgment taken through mistake, surprise, or excusable neglect. *Held* not to authorize a setting aside of a judgment where the attorney had full knowledge of the facts connected with its nature and consented thereto.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 705-710.]

2. ATTORNEY AND CLIENT—AUTHORITY TO COMPROMISE.

An attorney has power to compromise a case during its progress before the master.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 209.]

3. JUDGMENT—SURRENDER OF PROPERTY—ENFORCEMENT.

Where a judgment has been entered requiring a defendant to surrender possession of certain property, the court has a right to make such orders as are necessary to make the decree effective.

Appeal from Common Pleas Circuit Court of Greenwood County; Watts, Judge.

Action by Carrie V. Dixon against Theresa Floyd, John Floyd, Eula Floyd, J. Peter Phillips and Farmers' Bank of Abbeville. From orders refusing to set aside judgment, and requiring defendant Theresa Floyd to surrender possession of land, she and the plaintiff appeal. Affirmed.

The following are the exceptions: "(1) Because the presiding judge erred in not finding and holding that the evidence clearly shows the appellants had no notice of the holding of the reference on February 27, 1904, and had no opportunity to attend the same, and offer evidence to sustain the allegations of the complaint. (2) Because the presiding judge erred in not finding and holding that the undisputed evidence showed that the judgment was obtained against the appellants by or through their mistake, inadvertence, surprise and excusable neglect. (3) Because the evidence shows that the making of the agreement by the attorneys for the appellants was not only unauthorized, but expressly forbidden by the appellants, and was not binding on them, and his honor erred in not so holding. (4) Because his honor erred in not finding and holding that the said agreement made by the attorneys at the reference held February 27, 1904, was not

authorized by the appellants, was forbidden by them, and was contrary to their rights and interests in the premises, and that they were excusable for not attending the said reference, there being no evidence to the contrary, but the evidence clearly showing that they did not know of the reference until after the agreement had been made. (5) Because, as the evidence clearly shows that the said judgment was obtained against the appellants through their surprise, mistake, inadvertence and excusable neglect, his honor erred in not vacating the same and allowing them to make proof of the facts alleged in the complaint. The said Theresa Floyd also appeals from the said order on the additional ground that the said orders and decrees of the court allow her only \$50 for her dower interest in the said lands, while taking the expressed consideration of the said deeds as basis, she was entitled to more than \$150 for dower, and the court should have vacated the said orders and judgments for the purpose of establishing her dower rights in said lands. The said Theresa Floyd also appeals from the said order to eject her from the said lands on the ground that the said decree or judgment of the court does not direct the delivery of possession of said lands, and the presiding judge erred in not holding that said case was ended and that he had not jurisdiction to make the order to eject her from the said lands."

Magill & Magill and Ellis G. Graydon, for appellants. Sheppards, Grier & Park, for respondent.

GARY, A. J. This is an appeal from an order refusing a motion to set aside a judgment on the ground of mistake, surprise, inadvertence, and excusable neglect; also from an order requiring one of the appellants to surrender possession of the lands described in the complaint. In order to understand clearly the questions presented by the exceptions, it will be necessary to state somewhat at length the facts of the case.

In 1902, Carrie V. Dixon brought an action for partition of two tracts of land—one containing 60 and the other about 244 acres. The complaint alleges that James G. Floyd died in 1893, seised and possessed of said lands in fee conditional, leaving as his heirs at law, his widow, Theresa Floyd, his daughters, Carrie V. Dixon, Eula Floyd, and Mary James Floyd, and his son, John Floyd—all of said children being minors, except Carrie V. Dixon. J. P. Phillips was made a defendant on the ground that he claimed some interest in the lands, and he answered the complaint denying certain allegations thereof, and alleging that he and others to whom he conveyed an interest, were the owners in fee and in possession of said lands. Theresa Floyd answered the complaint through her attorney, J. Y. Culbreath, Esq., claiming that she was entitled to dower in said lands. J. F. J. Caldwell, Esq., an attorney at law, was

appointed guardian ad litem of the infant defendants, and he filed an answer submitting their rights to the court. On motion of plaintiff's attorney, with consent of the attorneys representing the several defendants, all issues of law and fact were referred to the master, who fixed the 23d of February, 1904, for holding the reference; but, as the parties were not ready to proceed, it was postponed until the 27th of February, 1904. The master in his report says: "At a reference held on the 27th February, 1904, there were present Mr. Schumpert, one of the attorneys for the plaintiff, Mr. Grier, of the firm of Sheppards & Grier, representing that firm, and the defendant, Phillips, and Mr. Caldwell, guardian ad litem of the three infant defendants. Mr. Schumpert represented J. Y. Culbreath, attorney for Theresa Floyd. No testimony was offered in support of the claim of dower, made by the defendant, Theresa Floyd; nor was testimony offered to impugn or qualify the deed by James G. Floyd to Phillips, above mentioned. On the contrary, the counsel for adult parties to the action agreed upon the following adjustment and settlement of all the matters in controversy; that is to say, that the said J. P. Phillips shall convey the tract of 60 acres, more or less, described in the pleadings, to the defendant, Theresa Floyd, for and during her natural life, with remainder to the plaintiff, Carrie V. Floyd, and defendants, John, Eula, and Mary James, in equal shares, the child or children of any one of the remaindermen dying before the said Theresa Floyd to take the share of his, her, or their parent. The guardian ad litem of the infants expressed no dissent to this arrangement, but withheld his consent, and left the matter to the judgment of the court. Testimony was presented to the effect that the proposed settlement is proper and for the interest of the claimants, as will more fully appear by the notes of reference accompanying this report." The master recommended that said agreement be carried into effect, and his report was confirmed by an order of the court on the 2d of April, 1904. Attached to the order confirming the master's report is the following: "We consent. Schumpert & Holloway, Plaintiff's Attorneys. J. Y. Culbreath, Attorney for the Defendant Theresa Floyd. Sheppards & Grier." On the 2d of July, 1904, an order was made allowing J. P. Phillips to repurchase the tract containing 60 acres for \$400. Thereafter Carrie V. Dixon and Theresa Floyd filed a petition asking that said decrees be set aside on the ground of surprise, mistake, inadvertence and excusable neglect, in that they did not have any notice of said reference; nor of said agreement until said orders had been signed; nor that there would be applications for said orders; and in that their attorneys did not have authority to enter into said agreement, by which they allege their rights were sacrificed. They also asked that their attorneys be changed and that Messrs. Ellis G. Graydon and Magill &

Magill be substituted upon the record. On the 30th of March, 1905, an order was filed refusing the petition to set aside said orders. On the 3d of April, 1905, a rule was issued by the court, requiring the defendant, Theresa Floyd, to show cause why she should not surrender possession of said lands. Upon hearing her return, an order was filed requiring her to surrender possession of said premises. Carrie V. Dixon and Theresa Floyd appealed upon exceptions, which will be set out in the report of the case.

1. The first question that will be considered is whether his honor, the circuit judge, erred in refusing to set aside said orders on the ground of surprise, mistake, inadvertence, or excusable neglect. The appellants rely upon section 193 of the Code of Civil Procedure of 1902, which provides that the court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through mistake, inadvertence, surprise, or excusable neglect. A party cannot invoke the provisions of this section when his attorney had full knowledge of all the facts connected with the rendition of the judgment and actually consented thereto, in open court, in the absence of facts showing mistake, surprise, inadvertence, or excusable neglect on the part of the attorney, which facts are not made to appear in this case. *Steele v. R. R.*, 14 S. C. 324; *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66.

2. The next assignment of error is because the circuit judge should have ruled that the appellant's attorneys were not authorized to enter into said agreement. The agreement was made during the progress of the case upon the hearing before the master. It must, therefore, be regarded as having been made in open court. The distinction between the powers of an attorney during the progress of a case in open court, and at other times, is clearly pointed out by the authorities. *Ex parte Jones*, 47 S. C. 393, 25 S. E. 285, and cases therein cited. In the former, far greater latitude is allowed than in the latter. One of the principal reasons is because the trial frequently develops a state of facts quite different from that anticipated, and the attorney is compelled to act for the best interests of his client, without the opportunity for consultation which would be afforded him on other occasions. A failure to act promptly might materially prejudice the rights of his client. In the case under consideration, mutual concessions were made as to certain rights of the respective parties which the pleadings showed were strenuously contested; and in adjusting those rights under the circumstances, the attorneys did not act without authority.

3. The last question to be considered is whether there was error in requiring the defendant Theresa Floyd to surrender possession of said premises in the summary manner

hereinbefore mentioned. She was a party to the action and the court had the right to make such orders as were necessary to make the decree effective. *Ex parte Qualls*, 71 S. C. 87, 50 S. E. 646.

It is the judgment of this court that the orders of the circuit court be affirmed.

(73 S. C. 139)

STATE v. PERRY.

(Supreme Court of South Carolina. Jan. 26, 1906.)

GRAND JURY—DISQUALIFICATION—RELATIONSHIP OF JURY COMMISSIONER.

The consanguinity of a jury commissioner to a person alleged to have been killed by a party indicted, in order to invalidate the indictment by the grand jury, must be such as would reasonably lead to the presumption that the jury commissioner would thereby be affected in such a manner as to impair the proper discharge of his duties, and this fact must be determined by the presiding judge in the exercise of a sound discretion.

Appeal from General Sessions Circuit Court of Saluda County; Prince, Judge.

John C. Perry was indicted for murder. From an order quashing the indictment, the state appeals. Reversed.

C. A. Cooper, Sol., J. Wm. Thurmond, and C. J. Ramage, for the State. Eugene Able, for respondent.

GARY, A. J. This is an appeal from an order quashing an indictment against the defendant, charging him with the murder of Joe Denny Wills, on the ground that H. B. White, treasurer of Saluda County, and ex officio one of the jury commissioners, and who assisted in listing and drawing the grand jury that found said indictment, was related to the deceased by affinity, in that H. B. White married a first cousin by blood to said Joe Denny Wills. The reason assigned by his honor, the presiding judge, was that the relationship was in the sixth degree by affinity.

In *State v. McQuaige*, 5 S. C. 429, the prisoner challenged the array of jurors on the ground that the jury commissioner was a first cousin of the deceased, and that he assisted in drawing the jury. The challenge was overruled, and on appeal the ruling of the circuit judge was reversed. In that case the court failed to state what degree of relationship would disqualify a jury commissioner. There is no statute in this state, nor have we been able to find any rule of common law, determining this question. In the case of *State v. McNinch*, 12 S. C. 89, a motion was made to quash the indictment on the ground that the jury commissioner who took part in drawing the jury was the husband of a cousin of the deceased in the fourth or fifth degree. The motion was overruled, and on appeal the Supreme Court said (at page 94): "There is no consanguinity between the jury commissioner and the deceased, and the degree of affinity shown is

remote—too remote to be, of itself, evidence of bias or prejudice against the person charged. The case of *State v. McQuaige*, 5 S. C. 429, was decided upon the ground that the jury commissioner was a near blood relation—first cousin of the deceased. It is unnecessary, perhaps impossible, to draw an absolute line to mark what degree of relationship or affinity must control in such cases; but it is sufficient here to say there is no relationship by blood, and no evidence of such affinity as, of itself, would reasonably lead to the presumption that the jury commissioner would thereby be affected in such a manner as to impair the proper discharge of his duties." The correct rule is that the consanguinity or affinity must be such as "would reasonably lead to the presumption that the jury commissioner would thereby be affected in such manner as to impair the proper discharge of his duties," and this fact must be determined by the presiding judge in the exercise of a sound discretion. It would tend to retard the trial of cases very much to adopt any other rule.

In the case under consideration, it seems that the circuit judge quashed the indictment on the ground that the parties were related by affinity within the sixth degree, and that he was without power to exercise his discretion. In this there was error.

It is the judgment of this court that the order of the circuit court be reversed.

(73 S. C. 201)

STATE v. HENDERSON et al.

(Supreme Court of South Carolina. Jan. 26, 1906.)

CRIMINAL LAW—APPEAL—ABSTRACT QUESTION.

An appeal by the state from an order quashing a panel of petit jurors presents merely an abstract question, where defendants cannot now be tried by such array, and will be dismissed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2574.]

Appeal from General Sessions Circuit Court of Saluda County; Prince, Judge.

William L. Henderson and others were indicted for crime. From an order quashing panel of petit jurors, the state appeals. Dismissed.

C. A. Cooper, Sol., J. Wm. Thurmond, and Able & Blease, for the State. N. G. Evans and C. J. Ramage, for respondents.

GARY, A. J. This is an appeal from an order sustaining the challenge to the array of petit jurors, on the ground that the auditor, who is ex officio one of the jury commissioners, and who took part in drawing said jury, was related by consanguinity within the fifth degree to the person for the killing of whom the defendants were indicted.

1. In sustaining the motion, his honor, the presiding judge, said: "I am constrained to the opinion that the laws and the decisions

of our Supreme Court leave me no discretion where the jury commissioners, or any of them, is related to either the deceased or defendant within the sixth degree." The ruling was erroneous, as will be seen by the reference to the case of *State v. Perry*, 53 S. E. 169, in which the opinion has just been filed.

2. As the defendants, however, cannot now be tried by jurors drawn from said array, the appeal presents merely an abstract question, and the appeal is dismissed.

(73 S. C. 181)

BARFIELD v. J. L. COKER & CO.

(Supreme Court of South Carolina. Jan. 9, 1906.)

1. DOMICILE—VENUE—CHANGE—RESIDENCE.

The question of a person's place of residence depends upon his intention, as evidenced by his acts and declarations.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Domicile, §§ 9, 22.]

2. APPEAL—REVIEW—QUESTION OF FACT.

In a motion for a change of venue, the question of a residence of defendant is one of fact for the trial court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3836, 4020.]

3. VENUE—CHANGE—CONVENIENCE OF WITNESSES—DISCRETION OF COURT.

The determination of a motion for a change of venue for convenience of witnesses is within the discretion of the court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3836; vol. 48, Cent. Dig. Venue, § 64.]

4. NEW TRIAL—VERDICT—SETTING ASIDE—EFFECT.

Where a verdict was rendered against one defendant and in favor of the other, setting the verdict aside continued the case against both defendants.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 331.]

5. TRESPASS—COMPLAINT.

Where a complaint expressly alleges an unlawful and wanton seizure and taking away of plaintiff's property, it states a good cause of action.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, §§ 80-83.]

6. FALSE IMPRISONMENT—PLEADING—EVIDENCE.

Where one sues for false imprisonment, all that is necessary for him to allege and prove is that he has been unlawfully restrained of his liberty, and it is wholly immaterial to inquire whether the charge against him is well or ill-founded in fact.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Imprisonment, §§ 86-88.]

7. SAME.

An allegation that plaintiff was arrested, and was taken in charge and kept in custody, without reasonable cause, does not imply an arrest under lawful authority.

8. PARTNERSHIP—ACTION FOR TORT—PARTIES.

An action may be maintained against members of a firm, on a complaint naming them, for unlawful seizure of crops and for false imprisonment.

9. ELECTION OF REMEDIES.

Election of remedies does not apply where a complaint states two separate causes of action, one for unlawful seizure of plaintiff's property and the other for false imprisonment.

10. AGRICULTURE—LIENS—PAYMENT—APPLI-CATION.

On a sale of crops covered by a lien, the holder of the lien must apply the proceeds to the lien debt, though he did not know that the funds were the proceeds of such crops.

11. TRESPASS—DEFENSES.

Where the holder of a lien on crops knew, when a warrant for the seizure of the crops was issued by the magistrate, that the debt was actually paid, he is not relieved from liability by the issuance of such warrant.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespas, §§ 49-57.]

12. APPEAL—HARMLESS ERROR.

Where defendant's request to charge was erroneous, that the court modified the charge in favor of defendant is not reversible error as to defendant, though the modification did not relieve it from error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4052-4062.]

13. TRIAL—NONSUIT.

Where plaintiff sues on two causes of action, and there is evidence tending to establish one cause of action against both defendants, a nonsuit is properly denied, though there is no evidence connecting one defendant with the second cause of action.

14. FALSE IMPRISONMENT—WHEN LIES.

Where plaintiff was arrested under a warrant lawfully issued by a magistrate, he cannot maintain an action for false imprisonment.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Imprisonment, §§ 32-42.]

15. TRIAL—GENERAL VERDICT—SEVERAL COUNTS.

Where a complaint states two causes of action, and there is no evidence to support a verdict on one of the causes, and a general verdict is found for plaintiff, a new trial will be granted.

Appeal from Common Pleas Circuit Court of Lee County; Dantzler, Judge.

Action by D. J. Barfield against J. L. Coker & Co. Judgment for defendant. Plaintiff appeals. Reversed.

Cooper & Fraser, F. G. McLeod, and Woods & Macfarlan, for appellant. J. B. McLaughlin and R. W. McLendon, for respondents.

JONES, J. The above-entitled cause was heard with the case of J. L. Coker & Co., plaintiffs appellants, against D. J. Barfield, defendant respondent, upon a single "case" embracing appeals in both cases; but for convenience and clearness we will consider the appeals separately. This action was commenced in Lee county, on the 11th day of August, 1903, to recover damages for an alleged unlawful seizure of plaintiff's crops by defendants, and an alleged unlawful and malicious arrest of plaintiff at the instigation of defendants. The cause was first tried at Bishopville, before Judge Purdy and a jury, on March 9, 1904, and resulted in a verdict for plaintiff against defendants J. L. Coker & Co. for \$966.67; but said verdict was set aside, and a new trial granted by Judge Purdy. Thereafter, on September 16, 1904, the cause was again tried before Judge Jantzler and a jury, and resulted in a verdict against all the defendants for \$500.

1. The first question presented by this appeal which we notice, is raised by the ninth exception, which alleges error in the refusal of Judge Purdy to change the place of trial from Lee county to Darlington county. The motion was originally made on two grounds: (1) That Darlington county, and not Lee county, was the proper place of trial; (2) to promote the convenience of witnesses and the ends of justice. This action falls within the class provided for in section 146 of the Code of Civil Procedure of 1902, which declares: "If there be more than one defendant, then the action may be tried in any county in which one or more of the defendants to such action resides at the time of the commencement of the action." It is conceded that J. L. Coker & Co. are residents of Darlington county; but the plaintiff, who is a resident of Lee county, proceeded on the theory that defendant Woodham was a resident of Lee county, and the circuit court sustained this view. The question of a person's place of residence depends upon his intention, as evidenced by his acts and declarations. This is a question of fact, and the finding of the circuit court thereon is conclusive, if there is any evidence to support it. The defendant Woodham made affidavit as follows: "This defendant's family are now, and have been since the county was formed, in that portion of Lee county that was taken from Darlington county. That this defendant has been employed continuously and been engaged in business at Hartsville, in Darlington county. That he only visits his family where they live in Lee county, and otherwise spends all his time in said county of Darlington. That his business is at Hartsville, and he resides at Hartsville, in Darlington county." J. J. Lawton, one of the firm of J. L. Coker & Co., made affidavit "that the other defendant to the action, Milton Woodham, has been for quite a time employed at Hartsville, where he remains constantly to deponent's knowledge, except to visit his family in Lee county." One of the essential elements to constitute a particular place as one's domicile or principal place of residence is an intention to remain permanently, or for an indefinite time, in such place. The affidavits submitted certainly did not show conclusively that Lee county was not defendant Woodham's domicile. The two facts stated—the place at which defendant conducted his business, Darlington county, and the place where his family, with whom he was on amicable terms, resided, Lee county—were but evidentiary matters, in support of opposite conclusions on the question at issue. We cannot say the circuit court committed error of law in holding Lee county as a place in which defendant Woodham resided with his family, notwithstanding he did business in Darlington county, which occupied the greater part of his time. It was incumbent on the defendant, as the moving party, to satisfy the

court that he was not a resident of Lee county.

2. With respect to the second ground for a change of venue, namely, for the convenience of witnesses and to promote the ends of justice, we need only say that the determination of this question was within the discretion of the circuit judge, and it has not been shown that he committed any error of law in reaching his conclusion. *McFall v. Barnwell Co.*, 54 S. C. 370, 32 S. E. 417.

3. After the first trial, which resulted in a verdict for the plaintiff against J. L. Coker & Co., which was set aside by Judge Purdy, motion to change the place of trial was made before Judge Dantzer, on the ground that said verdict was in favor of defendant Woodham, and that the granting of the new trial only operated to continue the case against J. L. Coker & Co. alone, and therefore, since the sole defendants, J. L. Coker & Co., were residents of Darlington county, that county was the proper place for trial. The circuit court refused the motion, holding that the granting of the new trial by Judge Purdy operated to continue the case against both defendants. This ruling is also the basis of the seventh exception. The ruling of the circuit court was correct. Whatever may have been the effect of the verdict against J. L. Coker & Co. alone, if final judgment had been entered and retained thereon, in exonerating defendant Woodham from another or further suit thereon, it is clear that the setting aside of the verdict and granting a new trial operated to restore the status of the case as it existed before trial. If a verdict against J. L. Coker & Co. alone implied a finding in favor of defendant Woodham, the setting aside of that verdict necessarily removed the implication. It cannot be said that the foregoing conclusion deprives defendants J. L. Coker & Co. of the right to be tried in the county of their residence by joining them in the action with a mere nominal defendant or man of straw, because the complaint expressly charges that the acts of trespass alleged were committed by the defendants, including Woodham.

The first exception complains of error in overruling the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The specifications of demurrer are as follows: (1) As to the first cause of action, that there were no allegations of actionable damages therein; (2) as to the second cause of action, that while there was a specific allegation that there was legal process, yet there was no allegation that the process had terminated, or that it had terminated in favor of the defendant; (3) that the allegations of trespass are against the firm of J. L. Coker & Co., and that the firm could not commit the torts complained of.

The complaint in question is as follows: "The plaintiff, complaining of the defendants, alleges: (1) That defendants, J. L.

Coker, J. J. Lawton, D. R. Coker, and J. L. Coker, Jr., are copartners carrying on a general mercantile business at Hartsville, S. C., under the firm name of J. L. Coker & Co. (2) That on or about the ——— day of November, 1902, the defendants illegally, unlawfully, willfully, wantonly, and without cause entered the premises in peaceable possession of this plaintiff, in the county and state aforesaid, and did illegally, unlawfully, willfully and wantonly, in open violation of plaintiff's legal rights, seize and take from the possession of this plaintiff, and carry away, a certain lot of corn, about fifty (50) bushels, of the value of fifty (\$50) dollars; about ten bushels of peas, of the value of nine (\$9) dollars; about one thousand (1,000) pounds of fodder, of the value of twelve (\$12.50) dollars and fifty cents; and about twenty (20) bushels of cotton seed, of the value of six (\$6) dollars—all of which was the property of this plaintiff, in his peaceable possession, upon which no incumbrance existed in favor of the defendants, yet the defendants, regardless of the plaintiff's rights as a citizen, illegally, unlawfully, willfully, and wantonly trespassed upon the premises of this plaintiff, seized and carried away the above-described property, without the consent of the plaintiff and in his absence and to the terror of his family. (3) That at the time the above-described illegal, unlawful, willful, and wanton acts were committed by the defendants above named, this plaintiff was also illegally, unlawfully, willfully, wantonly, and without reasonable cause arrested at the instigation of the above-named defendants, and through their agency his liberty was taken from him, and he was taken in charge by one who claimed to be a constable, but who was simply an agent of the defendants, and was illegally, unlawfully, without any right or authority, and against his will, carried into another county, about fifteen miles from plaintiff's home, and there willfully and wantonly kept in custody, bereft of his liberty, and injured in his credit, until dark, when he was discharged from custody at the instigation of the above-named defendants, when alone, weary, and tired, he was forced to walk fifteen miles back to his home, from whence, without cause and legal rights, he had been seized and carried from his wife and children, who were very much excited and terrified by the illegal acts of the defendants. That all the above named indignities and acts, which were heaped upon plaintiff with an utter and reckless disregard of his legal rights, were committed by the above mentioned defendants in a high-handed, willful, wanton, and illegal manner, to the injury and damage of this plaintiff in the sum of one thousand (\$1,000) dollars"—concluding with a prayer for judgment.

4. The ground of exception to the first cause of action is not well taken, for the complaint expressly alleges the unlawful and

wanton seizure and taking away of the plaintiff's property, and so alleges actionable injury.

5. With reference to appellant's objection to the second cause of action, it rests upon the theory that this is an action for a malicious prosecution, and therefore should fall under the rule stated in *Stoddard v. Roland*, 31 S. C. 342, 9 S. E. 1027, and *Whaley v. Lawton*, 57 S. C. 256, 35 S. E. 558; whereas the respondent contends, and the circuit court correctly held, that the action is for false imprisonment. Where one brings an action for false imprisonment, all that is necessary for him to allege and prove is that he has been unlawfully restrained of his liberty, and it is wholly immaterial to inquire whether the charge against him, and for which he has been arrested, is well or ill founded in fact. *McHugh v. Pundt*, 1 Bailey, 441; *McConnell v. Kennedy*, 29 S. C. 187, 7 S. E. 76. There is a material distinction between an action for false imprisonment and an action for malicious prosecution. The former proceeds upon the theory that the plaintiff has been arrested without authority of law and unlawfully deprived of his liberty, while the latter proceeds upon the theory that the plaintiff has been lawfully arrested under a warrant charging a criminal offense, and that such prosecution is malicious and without probable cause. *Whaley v. Lawton*, *supra*. The appellants seek to bring this case within the rule stated in *Whaley v. Lawton*, 62 S. C. 91, 40 S. E. 128, 56 L. R. A. 649, wherein it was held that a party suing out a warrant by going before a magistrate and making the necessary affidavit, upon which the warrant is issued and a person arrested by an officer, cannot be held liable for false imprisonment. It is argued that the complaint charges that the plaintiff was "arrested," "was taken in charge," and "kept in custody without reasonable cause," and that these allegations imply that the arrest was made under lawful authority. These expressions, however, do not necessarily imply a seizure under lawful authority, and, taken in connection with other allegations of the complaint, were clearly meant to show that plaintiff had been arrested without authority of law and illegally deprived of his liberty.

6. The third specification requires little notice. The complaint is against the individuals who composed the partnership for trespass alleged to have been committed by them.

7. The eighth exception complains of error in refusing defendants' motion to require plaintiff to elect upon which of his causes of action he would proceed to trial. If the act of 1898 (22 St. at Large, p. 693), now appearing as section 186a of the Code of Civil Procedure of 1902, is applicable to this case, it denies the right to compel election, since the complaint sets forth two or more acts of wrong causing the injury for which suit is

brought. But the principle of election has no application to this case. Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts (7 Ency. Pl. & Pr. 361), or where the party has but one cause of action, one right infringed, one wrong redressed (*Bliss*, Code Pl. § 11). In this the complaint states two separate and distinct facts—one for unlawful seizure of property of plaintiff, the other for false imprisonment or an illegal restraint of his liberty. Hence there was no error in refusing to compel plaintiff to elect.

The question as to nonsuit logically comes next in order, but we postpone consideration of the question of nonsuit and proceed to consider exceptions to the charge.

8. The fourth exception complains of error in the charge as to the application of payments. The defendants requested the court to charge as follows: "The debtor has the right to direct the application of payments at the time of making the payments or at any time before application is made; but, if he does not direct the application, then the creditor has the right to make the application to any debt due him." The court charged the request with this modification: "When the lienor pays certain money to the donee from the proceeds of the sale of crop or crops covered by the lien, and the donee knows that the money paid is from such source—that is, from the sale of crops covered by the lien—that the law requires him to make the application of such money to the lien debt." It is objected that this latter charge was incorrect, and that the charge as requested should have been given. The instruction which appellant requested correctly states the general rule (*Baum v. Trantham*, 42 S. C. 104, 19 S. E. 973, 48 Am. St. Rep. 697); but such rule does not prevail when the question is as to what application should be made of payments from the proceeds of sale of property subject to an agricultural lien. In such case the law, at the instance of the debtor, compels application to the lien debt. It is the duty of the lienor to pay such proceeds to the extinguishment of the lien debt, and reciprocally it must be the duty of the donee to so apply such payments. *Hunter v. Wardlaw*, 6 S. C. 74; *Thatcher & Co. v. Massey*, 20 S. C. 542. The law compels this application, whether the creditor has knowledge or not that the payments were the proceeds of the sale of property under lien. The charge as given was erroneous, in so far as it contained the words "and the donee knows that the money paid is from such source"; but appellants can take nothing by exception to this error, since the charge as given was too favorable to them.

9. The fifth exception assigns error in modifying defendants' request to charge, which was in these words: "That if the jury believe the seizure complained of in the first cause of action was made under process

to foreclose an agricultural lien, then they must find for the defendant on the first cause of action." Responding to this request, the court said: "I charge you that with this amendment, unless participating in person or by agent within the scope of his agency and with malicious intent in the execution of such alleged warrant." The request to charge was misleading, as it ignored the contention of plaintiff that the lien debt had been paid, and that J. L. Coker & Co. knew that it had been paid, at the time of making the affidavit upon which the warrant of seizure was issued, and it further ignored the testimony on part of plaintiff tending to show that J. L. Coker & Co. participated in the seizure by actually receiving the property so seized and appropriated same without a sale, as required by law. If this contention of plaintiff be sustained by the evidence, we do not think that the mere fact that a magistrate has issued the warrant of seizure would exonerate J. L. Coker & Co. from damages resulting from such seizure. The request to charge being erroneous, no reversible error is shown, even though the modification should fail to free it from all error.

10. The sixth exception complains of error in charging as follows: "If he was arrested under the warrant in this case, if you so find, and if you find that he was not only arrested under the warrant in this case, but restrained of his liberty under this warrant, by virtue of the warrant, that then it could not be said, so far as the warrant is concerned, if he was restrained of his liberty by virtue of the warrant, then there could be no false imprisonment under the law." This charge, it seems to us, is in accordance with appellants' contention as to the law, and for this reason, we suppose, appellants submitted the exception without comment.

11. A motion for nonsuit was made for each and both causes of action, and was refused, to which exception has been taken. After carefully examining the testimony, we think it is clear that there was no error in refusing the nonsuit as to the first cause of action; there being some testimony tending to establish the same. With respect to the second cause of action, there was absolutely no testimony that defendant Woodham had any connection whatever with it, but no motion as to nonsuit as to him alone was made. With respect to defendant J. L. Coker & Co., at the time of the motion for nonsuit on second cause of action it did not clearly appear that plaintiff had been arrested by virtue of legal process, but at that stage of the case it only appeared that plaintiff had been arrested by one who said he had a warrant. There was no admission by plaintiff that he had been arrested under legal process, as contended for by appellants. Under these circumstances, we cannot say that there was error in submitting the case to a jury.

12. The vital contention by appellants arises on their exception to the refusal to

grant a new trial. At this stage of the case it was an undisputed fact that the plaintiff was arrested by Constable Culpepper under a warrant issued by Magistrate J. S. White for an offense against the laws of the state. The warrant of arrest and the affidavit upon which it was based, though introduced in evidence by the defendants, are not set out in the "case" for appeal; but the circuit court held that the warrant was legal process, and we must assume that it was such. The warrant was issued by Magistrate White, residing in Darlington county, on the 4th day of November, 1902, and the arrest was made on the following day. The circuit court correctly held that said magistrate had jurisdiction in that portion of Lee county where the arrest was made, which was formerly embraced in Darlington county, at the time of issuing said warrant, and the arrest of defendant thereunder. Act 1902, §§ 6, 14 (23 St. at Large, pp. 1197, 1200). It thus appeared that plaintiff was properly arrested by lawful authority. It must follow that an action for false imprisonment cannot be maintained against the party causing the arrest. *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76; *Whaley v. Lawton*, 62 S. C. 91, 40 S. E. 128, 56 L. R. A. 649.

13. Under this view there was error of law in not setting aside the verdict as to the second cause of action, and there must be a new trial as to that cause of action. But since the verdict is a general one, and it cannot be said to which cause of action it relates, and there is no means of apportioning the verdict as between said causes of action, a new trial must be granted on the whole case, under the authority of *Lamley v. Atlantic Coast Line Co.*, 63 S. C. 462, 41 S. E. 517, and *Jones v. Railroad*, 70 S. C. 217, 49 S. E. 568.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(73 S. C. 179)

J. L. COKER & CO. v. BARFIELD.

(Supreme Court of South Carolina. Jan. 9, 1906.)

ATTACHMENT—VACATION—MOTION.

Under rule 57 of the circuit court, providing that, when a motion to vacate an attachment is based on irregularity of a notice or order, the irregularity shall be specifically mentioned, a motion to set aside an attachment for improvidence, in that the affidavit on which it was based was untrue, was insufficient.

Appeal from Common Pleas Circuit Court of Sumter County; Purdy, Judge.

Action by J. L. Coker & Co. against D. J. Barfield. From an order vacating an attachment, plaintiffs appeal. Reversed.

Cooper & Fraser, T. G. McLeod, and Woods & Macfarlan, for appellant. J. B. McLaughlin and R. W. McLendon, for respondent.

JONES, J. This is an appeal from an order of Judge Purdy setting aside a warrant

of attachment issued at the instance of plaintiffs under which the crops of the defendant were seized. This case was heard along with the case of *D. J. Barfield v. J. L. Coker & Co.*, 53 S. E. 170, on a single "case"; but this court, for its own convenience, decides in a separate opinion.

The warrant of attachment was issued on November 4, 1902, by Magistrate J. S. White, a magistrate for the county of Darlington, but having jurisdiction at that time in that portion of Lee county formerly embraced in Darlington county. In August, 1904, a motion was made to set aside said attachment (1) for irregularity appearing upon the face of the proceeding; (2) for improvidence, in that the affidavit upon which it was based was untrue. The circuit court held that, under the ground of improvident issuance, the court could not consider the question presented in the affidavits of the moving party to the effect that the lien debt had been paid at the time of issuing the attachment, and this ruling is undoubtedly correct under the authority of the cases cited by the court. *Baum v. Bell*, 28 S. C. 210, 5 S. E. 485; *Tisdale v. Kingman*, 34 S. C. 330, 18 S. E. 547. The court, however, under the case of *Sharp v. Palmer*, 31 S. C. 444, 10 S. E. 98, set aside the attachment for insufficiency in the affidavit upon which it was based, inasmuch as the affidavit merely alleged, with reference to the attempt to defeat the lien, "that the said D. J. Barfield is about to sell and dispose of the crops subject to such lien and defeat the same."

But the appellant, at the time of the motion before Judge Purdy, resisted the motion, among other things on the ground that the moving party had not complied with the requirement of rule 57 of the circuit court, which provides that "when the motion is for irregularity, the notice or order shall specify the irregularity complained of." Judge Purdy, over these objections, proceeded to consider the question of irregularity based upon the insufficiency of the affidavit, under the view that the notice was sufficient under the case of *Addison v. Sujette*, 50 S. C. 192, 28 S. E. 948. The appellant questions the ruling, and we are bound to hold that the circuit court should have sustained the objection because of the failure to give the specification as required in rule 57. This question was sought to be presented in *Lipscomb v. Rice*, 47 S. C. 14, 24 S. E. 925, but was not considered by the court as arising, and so was not decided. In the case of *Addison v. Sujette*, supra, the court considered a motion for irregularity in which the grounds of irregularity were not specified; but in that case no objection had been raised to the consideration of the motion on that ground on circuit, and the question now presented was not before the court. The rule of court is clear and explicit upon the point. It does not have the effect, nor was it intended, to limit the jurisdiction of the court; but it was

intended to regulate the practice, is clear, explicit, and positive, and should be enforced when the party affected thereby in proper time and way invokes the protection of the rule. Being a matter of practice, it may be waived if not invoked in proper time; but there was no waiver of the rule in this case, but, on the contrary, its protection was invoked in due time. This conclusion will render it unnecessary to consider the remaining exceptions.

The order of the circuit court setting aside the attachment is reversed for the reason stated.

(73 S. C. 218)

DU BOSE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Nov. 29, 1905. On Rehearings, Jan. 31.)

TELEGRAPHS—DELAY IN DELIVERY—DAMAGES.

Plaintiff sued to recover for failure to deliver the message: "My wife dead. Burial five o'clock Sunday, Cypress Church. Phone Walter to prepare grave." There was evidence of delay for about 40 hours. Held, that plaintiff could not recover for expense in sending a messenger to hurry the preparations for the funeral because of the hot weather, when no money was paid therefor, nor because of the absence of friends and relatives from the funeral; there being nothing in the message bringing to the company's notice that they were to be informed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 65.]

Appeal from Common Pleas Circuit Court of Florence County.

Action by W. B. Du Bose against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. H. Fearons and Willcox & Willcox, for appellant. T. P. Kershaw, S. W. G. Shipp, and Gattely & Ragsdale, for respondent.

JONES, J. The plaintiff in this case sought to recover damages for negligent and wanton failure to promptly deliver the following telegram: "August 20, 1904. To P. B. McLendon, Lamar, S. C.: My wife dead. Burial five o'clock Sunday, Cypress Church. Phone Walter to prepare grave. W. B. Du Bose." The message was delivered to defendant's operator at Timmons ville, S. C., at 7:20 p. m., Saturday, August 20th, was transmitted to Sumter, S. C., relay office, at 7:35; but, notwithstanding repeated and frequent calls for Lamar by the Sumter office, it was not received at the Lamar office until Monday morning, the 22d of August, and was not delivered to the addressee until after the burial, which was had at Cypress Church, on Sunday, August 21st, at probably about 5 o'clock p. m. In the meantime, not knowing that the message had not been delivered, the plaintiff, on Sunday morning, on account of the condition of the corpse and the hot weather, decided to have the

burial at 2 o'clock p. m. instead of 5 p. m., and accordingly sent a messenger across country from Timmons ville to arrange for the funeral at said earlier hour. This messenger arrived at the home of Walter Du Bose, a brother of plaintiff, and referred to in the message as "Walter," at about 1 o'clock Sunday, and then for the first time Walter Du Bose was informed of the death of plaintiff's wife, and immediately set about to prepare the grave. The funeral party with the corpse arrived at Cypress Church at about 3 o'clock p. m., but the grave was not then prepared. Finally, after some funeral services in the church and the grave being ready, the burial took place. There was some conflict in the testimony as to when the burial actually took place, whether between 3 and 4 o'clock, or whether about 5 o'clock. Two witnesses for the plaintiff testified that the time was "about 5 o'clock," and one witness for the defendant testified that it was "nearly 5 o'clock"; some others thought it was earlier. Some 35 or 40 persons were present at the funeral.

The elements of damages alleged in the complaint as the result of defendant's alleged negligent and wanton conduct were: (1) The expense of sending the messenger by private conveyance a distance of 15 miles to Cypress Church; (2) mental anguish because of the inability, for want of time, to make suitable preparation for the reception and burial of his dead; (3) mental anguish because of the deprivation of the comfort and consolation of the presence of many of the friends and relatives of his deceased wife and himself at her said burial. At the close of plaintiff's testimony, defendant moved for a nonsuit on practically two grounds: (1) That there was no evidence tending to show either negligence or willfulness; (2) that there was no evidence tending to show that the injury or mental anguish alleged was the natural and proximate result of the negligence or misconduct alleged. This motion was refused, and the trial resulted in a verdict for \$500 in favor of plaintiff. Whereupon defendants moved for a new trial, on grounds not stated in the record; and this motion was also refused. The exceptions are to the refusal of the nonsuit and the new trial, and raise practically the questions submitted in the motion for nonsuit, inasmuch as it is not error of law to refuse a new trial on the facts, if there be testimony tending to support the verdict.

With reference to the question whether there was any testimony of negligence or willfulness: Proof of delay in delivering a telegram raises a presumption of negligence. *Poulnot v. Tel. Co.*, 69 S. C. 545, 48 S. E. 622; *Hellams v. Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *Arial v. Tel. Co.*, 70 S. C. 423, 50 S. E. 6. The delay in this case was about 40 hours, and certainly such delay unexplained indicates great negligence. The motion was for nonsuit on the whole case. If there be

any evidence tending to show negligence and none tending to show wantonness, the defendant is not entitled to nonsuit on the whole cause of action. *Poulnot v. Tel. Co.*, 69 S. C. 545, 48 S. E. 622; *Machen v. Tel. Co.*, 72 S. C. 280, 51 S. E. 697. But it is not sufficient for the plaintiff to show negligence on the part of the defendant; it is also necessary to offer evidence tending to show that the injury alleged was the natural and proximate result of the negligence alleged. *Arial v. Tel. Co.*, 70 S. C. 418, 50 S. E. 6; *Smith v. Telegraph Co.* (S. C.) 51 S. E. 537. In *Arial v. Tel. Co.*, supra, the court said, at page 422 of 70 S. C., page 7 of 50 S. E.: "The statute was not intended to make the company liable in all cases for mental anguish and suffering where there was negligence in receiving, transmitting, or delivering messages. In order to render the company liable in damages for mental anguish, the suffering must have been the direct, natural, and proximate result of its negligence in receiving, transmitting, or delivering the message. The message must show upon its face, or the company must have knowledge of, such facts as will enable it to foresee that the failure to perform its duty may reasonably be expected to result in mental suffering. The company is not liable in damages for mental anguish, when it was merely incidental to the failure to perform its duty, as in such cases the suffering could not be reasonably anticipated, and was not a result which it could be said the parties had in contemplation in entering into the contract."

It cannot be said that the element of expense in sending the messenger referred to was the result of defendant's negligence, as it was admitted by plaintiff that he incurred no expense in that regard, and it further was undisputed that the messenger was sent, not in consequence of the delay in delivering the message, but because of the determination to hurry the burial because of the condition of the corpse. It cannot be said that the delay in delivering the message caused delay in the preparation of the grave, inasmuch as the grave was ready by 5 o'clock, the time of the burial as indicated by the message. The defendant company had no notice, and no means of anticipating, that the parties would seek to have the burial at an earlier hour than 5 o'clock.

With reference to the absence from the funeral of some of plaintiff's relatives and friends, it cannot be said that the defendant company, either on the face of the message, or from any information brought to its notice at the time of the contract, had notice indicating that it was within the contemplation of the parties that the relatives and friends should have information of the time and place of burial so as to be present. It appears that some of plaintiff's relatives and friends were present, and we may well imagine that others would have been present,

if timely notice had been received by them; but there was no evidence that others could or would have been present, if notice had been received by them. It may be doubtful whether the court should, even under the broad terms of the mental anguish statute, undertake to award damages for mental anguish resulting from the absence of one or more relatives and friends from a funeral; but certainly there should be evidence that the telegraph company had reason to anticipate that mental anguish would result from such cause. We think that there was no such evidence in this case, and therefore that the nonsuit should have been granted.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

On Rehearing.

PER CURIAM. After careful consideration of the petition for a rehearing, the court is satisfied that no material question either of law or fact has been disregarded or overlooked. Hence there is no ground for a rehearing.

It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(73 S. C. 205)

BELL v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Jan. 30, 1906.)

APPEAL—APPEALABLE ORDER.

An appeal will not lie from an order at chambers extending time to answer after default, where no abuse of discretion is shown.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 559, 582, 700.]

Appeal from Common Pleas Circuit Court of York County; Gage, Judge.

Action by E. F. Bell against the Western Union Telegraph Company. From an order granting defendant leave to answer, plaintiff appeals. Affirmed.

On the 17th June, defendant's attorneys wired plaintiff's attorneys: "We have just been employed by defendants in Bell v. Telegraph Co., and will file answer as soon as the records are received, and will ask you to extend time for few days, as we have two courts on next week. Answer." The answer was: "Bell v. Telegraph Co. served so as to be tried in our July court, which opens 12th. Can't extend unless you will docket by consent for said term. If you docket by consent will extend time five days. Answer your consent to docket." Defendant's attorneys replied: "Will try and file answer in time in Bell Case." On 26th June defendant's attorneys served notice of motion to strike out certain allegations in the complaint and "(3) for time and for leave to answer the complaint." This motion was heard by Judge Gage on July 12, 1905, in open court, and the latter part of his order is:

"The plaintiff objected to the hearing of the motion on the ground that the same was too indefinite and uncertain, but I overruled the objection, and after hearing argument by counsel for both plaintiff and defendant, both as to the merits of the motion and as to leave to answer, it is ordered: Order, that the language in the complaint noted be stricken out. Ordered, further, that the defendants are in default and have not shown any reason why they should be allowed to answer. They had due notice that plaintiff would stand on their rights and ignored the notice. But they may have a good excuse, and I do not desire to cut them off from renewing the motion upon proper proof, if they so desire. Ordered, further, that the cause be continued."

A motion was then made before Judge Gage at chambers, on September 2, 1905, on affidavits for leave to serve and file an answer and to strike the cause from the calendar, as to which he made this order: "This is a motion by defendant for leave to answer. The complaint was served 8th June, 1905. On 26th June—18 days after service—defendant noticed a motion before me to strike out certain allegations of the complaint. Code Civ. Proc. 1902, § 181, rule 20. In the same notice was a declaration that defendant would, at the hearing of the motion, ask further time to answer. The motion was heard 12th July, the day noticed. On that day, the time in which defendant was required to answer—20 days—had expired. At the hearing, defendant showed no cause why the answer had been so long delayed. I granted the motion to strike out, but refused the motion to answer, unless upon further showing. The motion to answer is now renewed, on an affidavit of defendant's counsel. The plaintiff resists the motion, because it is not made pursuant to the requirements of rule 61 of the circuit court. I do not think that rule applies here, for the motion now, the second motion, is not made before any other judge. Besides, the affidavit makes plain why the defendant's attorney did not bring to a hearing the motion to answer within 20 days after service of the complaint. The attorneys had construed rule 20 to mean that in 20 days after service defendant must do one of two things—answer or notice a motion to strike out, etc. The language of the rule is 'notice a motion.' The words are 'Motion to strike out * * * must be noticed * * * within 20 days from the service [of the complaint].' The rule does not require that the motion must be heard, but that it must be given; and until the motion has been heard the defendant ought not to be prejudiced for having noticed it. I think that view is right, and the view I had heretofore maintained was wrong. The affidavit satisfies me that the defendant at least had reason to believe the time was yet full to move to answer when the hearing of the motion to strike out should have been disposed of. Ordered, therefore, that de-

fendant have leave to answer, and that the answer be served within 20 days after the filing of this order."

From this order plaintiff appeals.

Finlay & Jennings, for appellant. Geo. H. Fearons, Evans & Friday, and T. F. McDow, for respondent.

GARY, A. J. This is an appeal from an order granting the defendant further time within which to answer the complaint. The record fails to disclose any facts even tending to show an abuse of discretion on the part of his honor, the presiding judge. Therefore the order is not appealable. *McDaniel v. Addison*, 53 S. C. 222, 31 S. E. 223.

Appeal dismissed.

(140 N. C. 361)

MIDGETT v. BRANNING MFG. CO.

(Supreme Court of North Carolina. Feb. 27, 1906.)

TRIAL—NONSUIT—VOLUNTARY NONSUIT.

Plaintiff may not take a voluntary nonsuit and appeal, on the court's intimating pending the argument that, if the jury believe the evidence of defendant on a certain matter, plaintiff cannot recover; the matter of fact being still left open for the jury.

Appeal from Superior Court, Tyrrell County; Shaw, Judge.

Action by B. S. Midgett against the Branning Manufacturing Company. Plaintiff took a nonsuit, and appeals. Dismissed.

Certain issues as to negligence, contributory negligence, assumption of risk, and damage were agreed upon and approved by the court for submission to the jury. Pending the argument the judge intimated what he would charge the jury upon a certain phase of the evidence. Whereupon the plaintiff took a nonsuit and appealed.

Aydlett & Ehringhaus and J. B. Leigh, for appellant. W. M. Bond and Pruden & Pruden, for appellee.

BROWN, J. We are of opinion that the nonsuit was unnecessarily and prematurely taken, and without legal grounds to justify it. The right to suffer a nonsuit in an action like this at any time is undisputed. But the plaintiff cannot appeal unless it appears that he was justified in it, or driven to it, by an adverse opinion of the court which would practically bar a recovery. An intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law, which does not "take the case from the jury," and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature, and the appeals will be dismissed. We suggest, however, to the judges of the superior courts, that it is advisable to refrain from giving such intimations in advance, as to what they will charge the jury, unless their opinions

go to the "root of the case" and practically bar a recovery. Such intimations may tend to mislead the plaintiff and induce him to suffer a premature nonsuit. It is best to proceed to charge the jury and let all the alleged errors excepted to during the trial come up for review. If the plaintiff is permitted to take a nonsuit and appeal whenever an adverse ruling is made during the trial, not necessarily fatal to his case, it is possible the same case may be brought to this court for review repeatedly, and numerous and unnecessary trials had in the court below. It is best that the case be "tried out," and then, if an appeal is taken, all the alleged errors excepted to during the trial may be reviewed here.

In this case the judge, after the conclusion of the first speech by the plaintiff's counsel, intimated that he would instruct the jury that, if they believed the evidence introduced by the defendant upon the question of the contract between Campen and the defendant company, they should find that Campen was an independent contractor, and that, if they find this to be true, the plaintiff could not recover. Upon this the plaintiff took a nonsuit and appealed. In this, the plaintiff was in error; he should have "gone to the jury" upon that disputed fact as well as upon the other important and material issues in the case. Then, if the verdict should be against him, all his rights would be preserved by exception, and the entire trial reviewed by this court. There are facts and circumstances in evidence by the plaintiff, upon which he might well have contended before the jury that Campen was practically the agent of the defendant and employed by it for a guaranteed sum to manage its mill. If his honor had held that in any view of the entire evidence Campen was an independent contractor, and that therefore he would instruct the jury to answer the first issue "No," the plaintiff would have been justified in submitting to a nonsuit and appealing. But even then it would have been the better practice to have had the jury pass on the other issues, in order that the final determination of the case may be expedited, and thereby save costs and expense to the litigant as well as unnecessary labor to the courts. A verdict upon the other issues may have terminated the case without reference to Campen's status. In *Tiddy v. Harris*, 101 N. C. 591, 8 S. E. 228, Chief Justice Smith states the rule as follows: "The practice has long prevailed that, when the proofs are all in and the judge intimates an opinion that, under the old practice the plaintiff cannot recover or, under the new, fails to establish the issues necessary to his having judgment, he may suffer a nonsuit, and, by appeal, have the correctness of the ruling reviewed." To the same effect are *Gregory v. Forbes*, 94 N. C. 221, and *Crawley v. Woodfin*, 78 N. C. 4. In *Davis v. Ely*, 100 N. C. 286, 5 S. E. 240, Chief Justice Smith says: "It has been repeatedly held

that appeals, fragmentary in their character, could not be allowed when the subject-matter could be afterwards considered and any erroneous ruling corrected as well, without detriment to the appellant." In that case, however, under special circumstances, the court set aside the nonsuit and ordered a trial of the cause.

We have recently considered this question in *Hayes v. Railroad* (at the last term) 140 N. C. —, 52 S. E. 416. In the disposition of that case, for the reasons given by Mr. Justice Walker, and on account of the prejudicial action of the court below during the trial and before the case was submitted to the jury, we felt impelled to exercise our discretion and follow the precedent set in *Davis v. Ely*, supra, and set aside the nonsuit and direct that the trial upon the whole case be proceeded with. In the opinion in *Hayes v. Railroad* it is said: "In order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed, viz., to take a nonsuit and appeal, has been said to apply ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by the plaintiff. The plaintiff's right to take the course he did was challenged in this court, because the ruling did not cover the whole case, but left him ground upon which a recovery could be had. But we do not find it necessary to resort to said rule of practice in order to dispose of this appeal, and we do not therefore decide that it warranted or did not warrant the action of the plaintiff."

In this case, the contention was strongly presented that the nonsuit was premature and unnecessary.

Being of that opinion, it is ordered that the appeal be dismissed and the judgment be affirmed.

(124 Ga. 796)

CLAY v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—SELF-DEFENSE.

Where, upon the trial of one indicted for the offense of assault with intent to murder by shooting, the defense was that the shot was fired under a fear that the person assailed was about to inflict upon the person of the assailant an injury amounting to a felony, the defendant was entitled to have the question as to the existence and reasonableness of his fears determined by the jury in the light of all the attendant circumstances, and the court by its charge should not have withdrawn from the consideration of the jury the effect of any words, threats, and menaces which may have accompanied the act which, it is claimed, produced the fears.

2. SAME—INSTRUCTIONS.

Such was the effect where the court, while instructing the jury upon the subject of reasonable fears, charged as follows: "Now in passing upon that question, gentlemen, no words, threats, menaces, or contemptuous gestures, or even the drawing of weapons, without a manifest intention to use them presently, would

justify a killing or a shooting." Because of the error in so charging the jury, a new trial should have been granted.

(Syllabus by the Court.)

Error from Superior Court, Schley County; Z. A. Littlejohn, Judge.

Henry Clay was convicted of assault with intent to murder, and brings error. Reversed.

In this case the defendant was prosecuted for the offense of assault with intent to murder. The evidence is conflicting. The prosecutor testified that he was deliberately shot by the defendant without provocation, and that he had made no assault upon the defendant, and that he did not have a pistol or any other weapon at the time of the difficulty. There were other witnesses whose testimony supported the contentions of the prosecutor. On the other hand, there were witnesses who testified that the prosecutor did draw a pistol from his pocket while engaged in heated conversation with the defendant, which they could not hear, but that before an attempt could be made to shoot the defendant fired upon the prosecutor. The defendant, in his statement, says that, while engaged in a quarrel with the prosecutor, the prosecutor drew from his pocket his pistol, with the exclamation that he would shoot the defendant, whereupon the defendant, through fear that he would be killed, drew his own pistol and shot the prosecutor.

Phil Taylor and Williams & Harper, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

ATKINSON, J. 1. From the statement of facts just given, it will be seen that the defense rested solely on the theory that the shot was fired because of a reasonable fear that an injury amounting to a felony was about to be inflicted upon the person of the accused. That was a meritorious defense, if supported by the testimony of witnesses or the statement of the accused. It being purely a question of fact as to whether the attendant circumstances justified a reasonable fear upon the part of the accused that such injury was about to be inflicted upon his person, that question is one exclusively for the jury. There are so many conditions under which grounds for reasonable fear could arise that the Legislature has not undertaken to say that any given state of facts or circumstances shall or shall not be sufficient to constitute grounds of reasonable fear, but has left the matter open for determination by the jury in each instance, without further limitation than that the circumstances must be sufficient to excite the fears of a reasonable man that some one or more of the offenses enumerated in section 70 of the Penal Code of 1895 were about to be committed, or that his life was in imminent danger; thus leaving it to the jury, after all, to pass upon

the sufficiency of the circumstances for that purpose. It will be borne in mind that the theory of defense insisted upon in this case has nothing to do with the theory of shooting under the heat of passion. In cases of that kind, section 65 of the Penal Code of 1895, which relates to voluntary manslaughter, and, among other things, makes provision that if the killing is the result of that sudden, violent impulse of passion, supposed to be irresistible, the offense would be reduced from murder to voluntary manslaughter, and which further expressly provides that "provocation by words, threats, menaces, or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt and crime of murder," would apply, and consequently, because of the express statute, would authorize the court to give, in charge to the jury, the language just quoted. As relates to passion, the Legislature could, with reason, and did prescribe that no words, threats, menaces, or contemptuous gestures should be sufficient to provoke any degree of passion which would authorize one person to slay another solely because of the passion thus produced, without being guilty of the offense of murder; but it could never with reason be said, and it has not been prescribed in this state, that words, threats, and menaces, as a matter of law, could not be sufficient to justify the fears of a reasonable man that a felony was about to be committed upon him. In the case of *Cumming v. State*, 99 Ga. 662, 27 S. E. 177, Chief Justice Simmons goes fully into this subject and draws the distinction between the defenses of shooting through fear and shooting because of passion, and, among other things, holds that the language above quoted from section 65 of the Penal Code of 1895 does not apply to cases where the defense rests upon the theory that the shot

was fired because of a reasonable fear. The facts and questions considered in the *Cumming Case* are very similar to those presented in the case at bar, and the principles announced in that case were afterwards applied in the case of *Johnson v. State*, 105 Ga. 665, 31 S. E. 399, where the facts and questions ruled were more closely analogous to those involved in this case. In the *Cumming Case*, on page 667 of 99 Ga., and page 78 of 27 S. E., the court said: "Whether the circumstances were such as to excite the fears of a reasonable man that a felony was about to be committed upon him, and that it was necessary to kill the other party in order to prevent it, was a question to be determined by the jury, in the light of their own judgment and experience;" citing *Howell v. State*, 5 Ga. 49; *Monroe v. State*, 5 Ga. 135, 136; *Braswell v. State*, 42 Ga. 609; *Cannon v. State*, 80 Ga. 758, 7 S. E. 140. Upon the point that the question was one for determination by the jury, the case of *Daniel v. State*, 103 Ga. 202, 29 S. E. 767, may also be cited.

2. From what has been said, and under the reasoning by Judge Simmons in the case of *Cumming v. State*, supra, it is clear that that part of the charge of the court in the present case, copied in the second headnote, had the effect to withdraw from the jury the consideration of the question as to whether or not the words, threats, menaces, and gestures, as insisted upon as a defense in this case, were sufficient to authorize a reasonable fear that a felony was about to be committed upon the person of the defendant at the time of the shot; and, as that withdrawal was erroneous, we hold that a new trial should have been granted.

Accordingly the judgment of the court below is reversed. All the Justices concur.

(124 Ga. 1077)

BARRON, Ordinary, v. TERRELL, Solicitor General.

(Supreme Court of Georgia. Feb. 21, 1906.)

CONVICTS—HIRING—APPLICATION OF FUND.

Under Pen. Code 1895, § 1097, the fund arising from the hire of misdemeanor convicts shall be first applied to the payment of the fees of the officers of court. This application is to be made by first taking from the hire the costs in the particular cases, including the fees of witnesses, then discharging the orders of the officers of court for insolvent costs in other cases, and paying into the county treasury whatever balance may remain.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Convicts, § 35.]

(Syllabus by the Court.)

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action between J. H. Barron, ordinary, and J. R. Terrell, Solicitor General. From the judgment, the ordinary brings error. Affirmed.

R. D. Jackson, for plaintiff in error. S. W. Harris and W. F. Brown, for defendant in error.

EVANS, J. The sole question presented by this record involves a construction of section 1097 of the Penal Code of 1895: "When a county hires out convicts, the money received as compensation for their labor shall be applied to the payment of the fees of the officers of court, including justices and constables who rendered services in such cases, and to the witnesses' fees, and the balance shall be paid into the county treasury for county purposes." The contention of the plaintiff in error is that, when the county authorities come into possession of a fund arising from the hire of convicts in any county, from this fund shall first be deducted the fees of the officers of court, including justices and constables, and the witnesses' fees in the particular case, and whatever balance remains after payment of the fees in the particular case shall be paid into the county treasury for county purposes, and that the lien of the officers of court for insolvent costs does not attach to such balance. The defendant in error, on the other hand, contends that in the distribution of money arising from the hire of misdemeanor convicts the officers rendering services in such cases are entitled to have not only their fees which arose in the case of the convict whose labor produces the money paid from the fund, but that they are entitled to have any fees that might arise in any other case, and may be due as insolvent costs under a duly approved order, also paid before the county has any claim whatever upon the fund.

Prior to the passage of the act approved October 16, 1891, which is codified in Pen. Code 1895, § 1097, the insolvent costs of the officers of court were paid from the fund arising from the collection of fines and the forfeiture of recognizances, after deduction

of the costs in the particular cases. Under the act of 1874, as codified in section 4814 of the Code of 1882, the county authorities were authorized to hire out misdemeanor convicts upon such terms and restrictions as may subserve the ends of justice. It was held by this court that the fund arising from the hire of misdemeanor convicts under this Code section could not be applied by a Solicitor General to the payment of his insolvent costs, whether the costs accrued in the particular case in which the conviction was had or in other insolvent cases. *Black v. Fite*, 88 Ga. 238, 14 S. E. 563. While this case was pending in the Supreme Court, and before its adjudication, the act of 1891, codified in Pen. Code 1895, § 1097, was passed, and while the court adverted to the act it was held that the act did not apply in cases originating before its passage. The codifiers embraced this act of 1891 in that article of the Penal Code which provided for the compensation of officers of court. The effect of the act adopting the present Code was to enact into one statute all of the provisions embraced in the Code. *Central R. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518. And in construing any section of the Code we must treat it as a single statute forming one homogeneous and consistent body of laws, and each Code section is to be considered in explaining and elucidating every other part of the common system to which it belongs. Inasmuch as the act of 1891 deals with the compensation of officers of court, it is to be construed as in pari materia with the other sections contained in the article of the Penal Code. *Mitchell v. Long*, 74 Ga. 98. In those cases where a defendant convicted of a misdemeanor has been fined, and has paid the fine, no officer of the court shall be required to pay into the treasury any such money until all legal claims on such funds held and owned by the officers bringing the money into court, and the costs due the justices and constables in the particular case by which the funds for distribution were brought into court, shall have been allowed and paid. Pen. Code 1895, § 1089. "The scheme of the law is that the Solicitor General should pay himself his own fees, and also pay the fees of the other officers of the court and of the justices of the peace and constables in the particular cases by which the funds are brought into court, and to his immediate predecessor such moneys as may be due him in cases commenced by him while in office. When this is done, if there be any surplus in his hands, the Solicitor General is required to settle with the county treasurer by paying such surplus over to that officer at the time designated by the Code." *Bartlett v. Brunson*, 115 Ga. 459, 41 S. E. 601. It was the evident purpose of the Legislature to afford additional compensation to the officers of court by the appropriation of the misdemeanor convict hire to the payment of their fees.

If by a narrow construction of this section we should hold that only the fees in the particular case are to be paid over by the county authorities to the officers of court on receiving the convict hire, and the balance paid into the county treasury to be used for county purposes, we will be ascribing to the Legislature a mode of disposition of a fund arising from the hire of convicts different from that of one arising from the payment of fines. It is clear that money in the hands of the officers of court after the payment of the costs in a particular case out of the fine imposed is not to be paid to the county treasurer until all the insolvent orders of these officers have been first liquidated. The balance thus paid does not belong to the general fund of the county, but is subject to disbursement upon the insolvent orders of all officers in the order of their priority. Why, then, should this fund from the hire of convicts be treated differently, and only the costs in the particular case be paid out of it? If it can be gathered "from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning and will govern the construction of the first statute." *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724. By an act approved December 21, 1897, the General Assembly created a prison commission for the state of Georgia and invested that commission, not only with power over the felony convicts, but also placed the misdemeanor convicts under its supervision; and by an amendment to that act, approved August 17, 1903, the authority of the commission over misdemeanor convicts was elaborately defined. See Acts 1897, p. 71; Acts 1903, p. 65. By the terms of this latter act the commission was given general supervision over the misdemeanor convicts of the state; it was made the duty of the commissioners to make quarterly visits to the various camps where misdemeanor convicts were at work, and to advise with the county or municipal authorities working them in making or altering the rules for the government, control, and management of such convicts; and, in case the commissioners and the county or municipal authorities failed to agree upon the government, control, or management of the convicts, then the Governor was authorized to prescribe such rules, and if the county or municipal authorities failed to comply therewith the Governor and the prison commissioners were empowered to take the convicts from the county or municipal authorities and hire them to some

other county or municipal authority willing to comply with the rules and regulations prescribed by the Governor. In disposing of the hire thus collected, the act expressly directed "the net proceeds to go into the treasury of the county, to be kept in the fines and forfeitures fund."

Can any reason be surmised why the Legislature should intend an appropriation of the convict hire under these circumstances different from the appropriation of the hire in cases where the convicts were hired out by the county authorities? This clear and unequivocal statement of the disposition to be made of the convict hire, when collected by the Governor and the prison commission under the act of 1903, clearly shows the legislative construction placed upon the act of 1897, as now embraced in Pen. Code 1895, § 1097. It is admitted that, where an act is clear and unambiguous as to its meaning, subsequent legislation upon the same subject will not affect the statute, except only as to its repugnancy. On the other hand, if the prior act is susceptible of two constructions, the subsequent act, under the authority of *United States v. Freeman*, supra, is controlling as to the meaning to be put upon it. This section (1097) in view of its location in the general chapter of the Code dealing with the compensation of the officers of court, should be given the meaning evidently attached to it by the General Assembly when the act of 1903 was passed, inasmuch as the word "fees," construed in connection with the context, creates a serious doubt whether it was intended to be limited to compensation for services in particular cases, or was to be understood as embracing fees earned by the officers of court in all cases which were included in an order for insolvent costs. We construe the section to mean that the fund arising from the hire of misdemeanor convicts shall be first applied to the particular fees and insolvent costs of the officers of court, this application to be made by first taking from the hire the costs in the particular cases, including the fees of witnesses, then discharging the claim of the officers of court for insolvent costs in all other cases, and paying into the county treasury whatever balance may remain.

The conclusions we have reached are not in conflict with what was decided in *Pulaski County v. De Lacy*, 114 Ga. 583, 40 S. E. 741. The question now presented for decision was not involved in that case.

Judgment affirmed. All the Justices concur, except ATKINSON, J., disqualified.

(124 Ga. 750)

MAYOR, ETC., OF CITY OF GAINESVILLE
et al. v. DEAN.

(Supreme Court of Georgia. Jan. 13, 1906.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — EXECUTION — AFFIDAVIT OF ILLEGALITY.

When a city charter authorizes an improvement of the streets and sidewalks of the city and an assessment for such improvements to be made upon the property abutting thereon, and provides that the assessment shall be enforced by executions to be issued against the real estate and the owners thereof at the date of the ordinance making the assessment, and also provides that "the defendant shall have the right to file an affidavit denying that he owes the whole or some part thereof of the sum for which the execution is issued," and that the issue thus made shall be returned to the superior court of the county in which the city is located for trial, the defendant in execution may, in such an illegality, set up in defense whatever would have the effect of extinguishing liability for such assessment, whether such defense arise from payment, unconstitutionality of the law under which the assessment was made, or such irregularity in the manner in which the assessment was made as to make it illegal, or otherwise.

2. SAME — INJUNCTION — MULTIPLICITY OF SUITS — CLOUDS ON TITLE.

The fact that the city is attempting to enforce two executions for assessments against two different parcels of land belonging to the same person, and that a third execution has been issued against the same person for an assessment the levy of which is threatened, will not authorize the granting of an injunction upon the ground that a multiplicity of suits will be thereby avoided, or upon the ground that the executions constitute clouds upon the title of the owner.

(Syllabus by the Court.)

Error from Superior Court, Hall County;
J. J. Kimsey, Judge.

Action by H. H. Dean against the mayor and council of the city of Gainesville and others. Judgment for plaintiff, and defendants bring error. Reversed.

H. H. Dean brought a petition for injunction against the mayor and council of the city of Gainesville, and alleged: During the year 1902 the city issued bonds to the amount of \$10,000 for the purpose of improving its streets, and macadamized a portion of Main and Green streets. All of this work was done by August 1, 1903. On September 10, 1904, petitioner bought a certain lot of land, fronting on Green street, where this paving had been done, and on November 19, 1904, he bought a lot of land fronting on Main street, where the said paving had been done. Executions were issued against the respective vendors of the two above-mentioned lots, and brought to petitioner for payment, which he refused to make. Thereupon the clerk of the city council issued executions against petitioner, and petitioner was given written notice that said executions were issued for curbing and macadam for the year 1905. Said executions were levied upon the said two lots of petitioner. A third execution has been issued against petitioner, for curbing and macadam, which the city marshal

has threatened to levy upon property of petitioner. It is alleged that all of the work of curbing and macadamizing the streets was done prior to August 17, 1903, when the act of 1892, amending the charter of the city of Gainesville, was of force, and before the repeal of any portion of that act by the act of 1903, and that under the act of 1892 notice to property owners was necessary before such work could be done by the city, and no notice was given petitioner or his vendors. The prayer was for orders restraining the mayor and council and Harbison, the marshal, from proceeding with the execution, that the executions be declared null and void, and that the act of 1903, amending the charter of Gainesville, and repealing that portion of the charter which provided for notice to property owners before paving, etc., be done at their expense, be declared unconstitutional and void, as seeking to attempt to take property without due process of law. The defendants demurred to the petition, on the ground that petitioner had an adequate remedy at law, and answered, and on a hearing the injunction was granted as prayed. To this judgment the defendants excepted.

J. G. Collins, for plaintiffs in error. H. H. Dean, pro se.

COBB, P. J. The first question to be determined by us in the consideration of this case is whether the demurrer to the petition, upon the ground that the petitioner had an adequate remedy at law, was well taken. The act amending the charter of the city of Gainesville, approved December 12, 1892 (Acts 1892, p. 172), provides that, when an execution has been issued against a property owner for work done on the street or sidewalk abutting upon his property, he shall have the right "to file an affidavit denying that he owes the whole or some part thereof of the sum of which the execution issued," and the affidavit "shall be returned to the superior court of Hall county and there be tried and the issue determined as in cases of illegality," etc. The act approved August 17, 1903, amending the charter of the city of Gainesville (Acts 1903, p. 524), does not change the above provision of the charter. It would therefore seem that the defendant had a complete remedy at law to prevent the collection of an assessment which for any reason was illegal.

But it is claimed by the defendant that under the above provision, authorizing the filing of an affidavit of illegality, he would not be entitled to question the constitutionality of the act of 1903, which he claims is void, nor object to the unlawful issuance of the executions upon the ground that each was issued for two separate items—i. e., macadamizing and curbing. We see no reason why these defenses could not be set up by way of illegality. If the defendant has the right to deny his liability for the whole

or any part of the execution which has been issued against him, he can set up any legal defense which would relieve him of such liability. The unconstitutionality of the act providing for the collection of such assessments would be as complete a bar to their collection as proof of payment, and the same may be said of an irregularity in the issuances of the execution which might be fatal. It is true that in the case of *Rice v. Macon*, 117 Ga. 401, 43 S. E. 773, it was held that injunction was not a proper method of preventing the collection of such an execution as the above, for the reason that the charter of Macon specially authorized the defendant in execution, by affidavit of illegality, "to raise any constitutional question," and the charter of the city of Gainesville has not a similar provision. But we think that case might have been put upon the broader ground, and that its reasoning might be applied where the simple right to show no indebtedness by illegality is given. It was there said that it appeared that the Legislature were "apparently apprehensive lest the right to contest the validity of the execution might not be deemed sufficient to cover any and every constitutional question." This apprehension was not well founded. It will be noted that the act of 1892 provides that the affidavit of illegality shall be returned to the superior court of Hall county, "and there be tried and the issue determined as in cases of illegality." The effect of this is to open to the affiant every path of defense he might have taken in an illegality case under the Code, where the plaintiff was proceeding in a summary way. A reading of the charter provision authorizing this proceeding to prevent the collection of such executions where for any reason they were not legally collectible will make it clear that the purpose of the Legislature was not to limit the defense which might be there set up, but to permit any defense which might be set up in a regular illegality case of the character above indicated.

The further claim of the plaintiff that three executions had been issued, and an equitable petition was necessary to prevent a multiplicity of suits, is also without merit. Three executions do not bring about the multiplicity of suits contemplated by the Code as a ground for the exercise of extraordinary powers of a court of equity. The three executions have been issued by the city of Gainesville against the defendant in error. Two have been levied, each upon a separate lot of land. The third has not been levied, and does not seem to be directed against any specific property. But the allegation is that the marshal is threatening

to enforce it by levy. The general rule is that a court of equity will interfere to prevent a multiplicity of actions where they rest upon some common right invaded, or upon some common injury inflicted; that is, where there is one common right in controversy, which is to be established by or against several persons, or one person asserting a right against many, or many against one. Under such circumstances a court of equity will not permit a party to be harassed by a multiplicity of suits, but will determine the whole matter in one action. Civ. Code 1895, § 4894; *Smith v. Dobbins*, 87 Ga. 316, 13 S. E. 498. Even if the issues arising out of the levy of the two executions were identical, the cases would not be within the rule above referred to. It has been said that, where relief can be clearly afforded by a court of law by an order consolidating the suits, an injunction will be refused. *Bispham's Equity* (3d Ed.) § 417. The law requires an affidavit of illegality to the execution of the character now in question to be returned to the superior court for trial, and if it should appear that the two were identical, although the property levied on was different, the court in its discretion might consolidate the cases. We do not think the facts of the case bring it within the rule which authorizes a court of equity to interpose by injunction to prevent a multiplicity of suits.

But it is said that the executions which have been levied, as well as that which has not been levied, constitute clouds upon the title of the owner, the defendant in error. A cloud upon the title of the true owner of the land, such as may be removed in equitable proceedings, is some deed or other writing which by itself, or in connection with proof of possession by a former occupant, or other extrinsic facts, gives the claimant thereunder an apparent right in or to the property. Civ. Code 1895, § 4893; *Waters v. Lewis*, 106 Ga. 758, 32 S. E. 854; *Hanesley v. Bagley*, 109 Ga. 346, 34 S. E. 584. The act of August 22, 1905 (Acts 1905, p. 102), does not change the rule just referred to. The effect of that act is merely to authorize a proceeding to remove a cloud when the cloud consists of an instrument which is void upon its face. An execution, whether issued upon an ordinary judgment, or for taxes or an assessment, does not give the plaintiff in execution any real or apparent right "in or to the property" of the defendant in the execution. The judge erred in granting the injunction.

Judgment reversed. All the Justices concurring.

(124 Ga. 581)

SOUTHERN EXPRESS CO. v. R. M. ROSE CO.

(Supreme Court of Georgia. Jan. 9, 1906.)

1. CARRIERS—DUTY TO TRANSPORT GOODS—ENFORCEMENT.

A corporation engaged in business as a common carrier is bound to receive all goods offered it for transportation, which it is able and accustomed to carry, upon compliance with such reasonable regulations as it may adopt for its own safety and the benefit of the public; and a private party may, by mandamus, enforce the performance of this public duty by such common carrier as to matters in which such party has a special interest.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 98, 99; vol. 33, Cent. Dig. Mandamus, § 268.]

2. MANDAMUS—SPECIAL INTEREST OF RELATOR.

A merchant, located and carrying on business in the city of Atlanta, and who has been accustomed for many years to sell therein the goods in which he deals to persons residing in Lawrenceville, upon orders received from them by mail, and to ship the goods to such persons by express, has such a special interest in the performance by an express company, operating a line of transportation between such cities, of its public duty relatively to packages containing goods, such as it is able and accustomed to carry, which he has sold to customers residing in Lawrenceville, and which he, under the reasonable regulations of such common carrier, offers to it for shipment and delivery to the owners of such goods, as entitles him to the writ of mandamus to compel such express company to accept, transport, and deliver such goods, when it, without lawful excuse, refuses to do so.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 55, 56.]

3. MUNICIPAL CORPORATIONS—CHARTER POWERS—LICENSING CARRIERS.

The municipal ordinance of the city of Lawrenceville which declares it to be unlawful for any railroad or express company, or any other person or persons, to deliver or cause to be delivered, in such city, any package containing wine, whisky, beer, or any other intoxicating liquors, "without first paying into the treasury of said city the sum of \$1,000 per annum as a license for carrying on said business in said city," and which prescribes a penalty for its violation, is void, as the mayor and council of the city had no power, under its charter, to enact such ordinance.

4. CARRIERS—DUTY TO CARRY GOODS—ENFORCEMENT—MANDAMUS—DEFENSES.

A common carrier, able and accustomed to transport such goods from Atlanta to Lawrenceville and to deliver the same to the consignees thereof in the latter city, cannot lawfully refuse to do so merely because of the passage of such invalid municipal ordinance.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Mandamus proceeding by the R. M. Rose Company against the Southern Express Company. The writ was granted, and defendant brings error. Affirmed.

On the 16th day of March, 1905, the mayor and council of the city of Lawrenceville passed the following ordinance: "Be it ordained by the mayor and council of the city of Lawrenceville, Ga., that it shall be unlawful for any railroad company, any express

company, or any other person or persons to deliver or cause to be delivered any package in the city of Lawrenceville, Ga., containing wine, whisky, beer, or any other intoxicating liquors or whisky, without first paying into the treasury of said city the sum of \$1,000 per annum as a license for carrying on said business in said city. Any person or persons engaged in this business, failing or refusing to pay said license, shall, upon conviction thereof, be punished as prescribed in Ordinance No. 1 of the by-laws of said city. Each day in which said business is carried on, without a license, shall be held to constitute a new offense. This ordinance to take effect on the 25th day of March, 1905. By order of the city council of Lawrenceville, Ga., this the 16th day of March, 1905." Ordinance No. 1, herein referred to, defined disorderly conduct within the city and prescribed the punishment for the same. On March 25, 1905, the R. M. Rose Company, a corporation engaged in the wholesale liquor business in the city of Atlanta, received by mail, from J. L. Exum, of Lawrenceville, Ga., an order for one gallon of whisky of a designated brand. Accompanying this order was an express money order in full payment for the whisky. Thereupon the R. M. Rose Company put a gallon of whisky in a jug, which was properly sealed and directed to J. L. Exum, at Lawrenceville, Ga., and this jug was taken by its agent to the office of the Southern Express Company in the city of Atlanta, and there tendered to the agent of the express company for shipment and delivery to Exum at Lawrenceville; the agent of R. M. Rose Company at the same time offering to prepay the express charges on the package. The agent of the express company refused to receive the jug of whisky for shipment to Lawrenceville, and stated that he would not receive any other such shipment until the ordinance of the city of Lawrenceville relative to the matter should be repealed. The Atlanta agent of the express company was acting in accordance with the following instructions from the express company: "Southern Express Company. Office of Second Vice President. Chattanooga, Tenn., March 22, 1905. The city of Lawrenceville, Ga., has passed an ordinance imposing a tax of \$1,000 on any railroad company, express company, or any one else delivering intoxicating liquors within the corporate limits of that city. All agents in Georgia are hereby instructed not to accept such shipments for Lawrenceville until further notice. Charles L. Loop, Second Vice President."

The R. M. Rose Company then brought, in the superior court of Fulton county, a petition for a mandamus to compel the Southern Express Company to receive, transport, and deliver the jug of whisky to the consignee in Lawrenceville, and to compel it to receive from the petitioner, upon receiving its fair charges therefor, packages containing wine, beer, and other liquors, when properly packed

under the rules and regulations of the express company, for transportation to Lawrenceville, and to there deliver the same to the parties to whom such packages should be consigned. Upon this petition, the judge granted a mandamus nisi, requiring the express company to show cause why a mandamus absolute should not be granted as prayed for. The answer of the express company raised certain issues of fact as well as issues of law, and, when the case came on for trial in term, by consent of counsel, both the questions of fact and the questions of law were submitted to the judge for determination; the right of either party to except to the judgment and carry the case to the Supreme Court being reserved. Upon the trial the facts alleged in the petition to have occurred were established, and the express company, in support of the defense set up in its answer, showed the existence of the municipal ordinance above set forth, contended that the ordinance was, in effect, prohibitory, and that so long as the ordinance was in force it had the right to refuse to accept any package of intoxicating liquor for shipment to and delivery in Lawrenceville. It also made certain other legal contentions which are sufficiently indicated in the opinion. The trial resulted in the grant of a mandamus absolute, requiring the express company to receive the jug of whisky in question, upon the payment of the express charges, and to transport the same to the city of Lawrenceville, and there deliver it to the consignee, Exum, and also to receive, at its public offices in the city of Atlanta, from the plaintiff, all other packages of intoxicating liquors, when properly packed and directed, under the reasonable rules and regulations of the express company, and when delivered on straight shipments as opposed to collect on delivery shipments, and transport the same to the city of Lawrenceville and there deliver them to the consignees thereof. The express company excepted to this judgment, and the case is accordingly before us for review.

C. H. Brand and Du Bignon & Alston, for plaintiff in error. Rosser & Brandon, for defendant in error.

FISH, C. J. (after stating the facts).

(1) One of the contentions of the express company is, that the applicant for the writ of mandamus had an adequate and complete remedy at law by an action for damages, without resorting to the extraordinary writ of mandamus, and therefore the writ should have been denied. In support of this contention, the plaintiff in error cites Hutchinson on Carriers, § 115b, to the effect that: "If the carrier refuses without lawful reason to accept and carry goods, the owner may maintain an action against the carrier for the damages sustained by such wrongful refusal. This remedy by action is usually adequate to secure the plaintiff's rights, and therefore, in accordance with well-settled principles,

mandamus will not lie to enforce the performance of the duty." In the same section, however, this author says: "Where the duty was expressly imposed by state statute and by the United States interstate commerce act, and the refusal was continuing and the injury irreparable, a mandatory injunction was granted to secure performance"—citing *Chicago Railway Co. v. Burlington Railway Co.* (C. C.) 34 Fed. 481. We are of the opinion that, even under the rule as laid down by this author, the judge below properly held that mandamus would lie in the present case. For, as we shall presently see, the duty of the express company which the petitioner sought to enforce by mandamus is one which, in this state, is expressly imposed by statute, and we think it is obvious, from the evidence, that the damages which would ensue to the petitioner by the continued refusal of the express company to transport intoxicating liquors from Atlanta to Lawrenceville would be incapable of being ascertained.

But it is clear, however, that the general rule laid down by Hutchinson is not applicable in this state. Section 2278 of the Civil Code of 1895 provides: "A common carrier, holding himself out to the public as such, is bound to receive all goods and passengers offered that he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public." Here we have a public duty of the common carrier defined and imposed by statute. Section 4869 provides: "A private person may by mandamus enforce the performance by a corporation of a public duty as to matters in which he has a special interest." Here the right to enforce, by mandamus, the performance of this public duty by a corporation is given to a private party having a special interest in the matter, and this right is clearly not dependent upon his being without adequate remedy by a suit for damages for its nonperformance in his behalf. He has the right to compel the performance of the public duty, and is not compelled to seek redress in damages for its nonperformance at his instance. The defendant admitted that it was chartered under the laws of this state as an express company. "An express company which pursues continuously, for any period of time, the business of transporting goods, packages, etc., is a common carrier." *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872; *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68; *Kirby v. Adams Express Co.*, 2 Mo. App. 869. In the present case, therefore, the respondent was under the public duty of receiving and transporting all goods, which it was able and accustomed to carry, which were offered to it for transportation, upon compliance by the intending shippers with its reasonable rules and regulations. It admitted in its answer that it was "engaged in transporting liquors,

wines, and beers, when properly packed, from stations on its line to other stations on its line, when not prohibited by law," and "that up to the 25th day of March, 1905, it was engaged in transporting from stations on its line to Lawrenceville, Guinnett county, Ga., for such persons as should so demand its services, packages of liquors, wines, and beer when properly packed and when delivered on straight shipments as opposed to collect on delivery shipments," and "that it was up to said date engaged in the business of accepting from the said R. M. Rose Company packages of wines, beer, and liquors at its place of business in the city of Atlanta, Ga., for shipments in the manner above described to Lawrenceville, Ga." It is obvious, therefore, that the writ of mandamus absolute was properly granted, unless some other contention of the express company is meritorious.

2. Another contention of the express company is that if the writ of mandamus would lie at all, Exum, who had purchased the liquor from R. M. Rose Company and paid for it, and to whom, therefore, it belonged when that company offered it to the express company for shipment to Lawrenceville, was the proper party to apply for the writ, and the only one in whose behalf it could be issued. We think this contention is fully answered by the mere reading of section 4869 of the Civil Code of 1895, which is quoted above. It seems very evident to us that a wholesale liquor dealer, located in Atlanta, which, as the evidence shows, had been for many years engaged in selling, in Atlanta, liquors to persons living in Lawrenceville and vicinity, upon orders therefor received by mail, and shipping the goods to the purchasers at Lawrenceville by express, has a special interest in seeing that the express company shall perform its duty by accepting from such dealer shipments of liquors to its customers in Lawrenceville and transporting and delivering the same to the consignees thereof. Its interest in the matter is far greater than that of any one of its Lawrenceville customers, because its business dealings with people living in Lawrenceville and vicinity would be greatly restricted and diminished if it was denied the right to ship its goods by express to its customers at Lawrenceville. And if such a right could be lawfully denied to the petitioner by the express company, it could, for like reasons, be denied to the petitioner by a railroad company, so that the petitioner would be practically without the means of shipping its goods to Lawrenceville.

3, 4. Coming down to the merits of the case itself, the defense set up by the express company was that it had not paid the license tax required by the above-quoted municipal ordinance for delivering or causing to be delivered, in the city of Lawrenceville, any package containing wine, whiskey, beer, or other intoxicating liquor, and it would therefore subject itself to prosecution and punishment by undertaking to transport such liquors

to Lawrenceville and there deliver them to the consignees thereof. It further contended that the ordinance requiring the payment of \$1,000 for a license to deliver intoxicating liquors in Lawrenceville was in effect prohibitive, and was so intended, and that upon the trial it was admitted that the gross sum received by the express company for the shipping of intoxicants to Lawrenceville for one year is \$469.50. There was no merit in this defense, as in our opinion the municipal ordinance in question is invalid, as the mayor and council of the city of Lawrenceville had no power under the charter of the city to pass it. Authority to enact this ordinance is claimed under each of several sections of the city's charter, which is found in Acts 1904, p. 489 et seq. One of these is section 1, wherein it is provided that the city "may sue and be sued, contract and be contracted with, plead and be impleaded, have and use a common seal, make and enact, through its mayor and council, such ordinances, rules, regulations and resolutions for the transaction of its business and the welfare and proper government of said city as the mayor and council may deem best, and which shall be consistent with the laws of the state of Georgia, and the United States." Another is section 32 (page 500), which provides "that the mayor and council of said city shall have full power and authority to pass all by-laws and ordinances for the prevention and punishment of disorderly conduct and conduct liable to disturb the peace and tranquility of any citizen or citizens thereof and any other by-law, regulation and ordinance that they may deem proper for the security of the peace, health, order and good government of said city." Provisions substantially the same as those here relied on are found in most, if not all, of the municipal charters of this state. They are usually embraced in what is commonly called the "general welfare" clause, and they deal with the police, and not the taxing, power of the municipality. Construing the ordinance in question as a taxing or licensing ordinance, the power to pass it cannot be derived from these sections of the city's charter. The power "to pass all by-laws and ordinances for the prevention and punishment of disorderly conduct and conduct liable to disturb the peace and tranquility of any citizen or citizens . . . and any other by-law, regulation and ordinance that they may deem proper for the security of the peace, health, order and good government of said city," or, in the language of section 1, "the welfare and proper government of said city," does not include the power to levy a tax upon property or upon the carrying on of a business or vocation within the city. The rule is well established that municipal corporations can levy no tax, general or special, upon the inhabitants of the municipality or upon property therein, unless the power to do so be plainly and unmistakably conferred upon them by the state. *Albany Bottling Co. v.*

Watson, 103 Ga. 503, 30 S. E. 270; 2 Dillon's Municipal Corp. (4th Ed.) 763; Cooley on Taxation (2 Ed.) 678. As was said by Mr. Justice Little in the above-cited case: The power to tax is incident to the state. Neither counties nor municipal corporations of any character possess this power to any extent unless conferred by the Constitution or laws of the state, and therefore such power can only be exercised when delegated in plain and unmistakable terms, or when it results by necessary implication from other powers expressly granted. 25 Am. & Eng. Enc. L. 580. The exercise of this power being so limited and restricted, the burden is on every political division of the state, which demands taxes from the people, to show the authority to exercise it in the manner in which it has been imposed." It is obvious that no such power is plainly and unmistakably conferred by the charter sections under consideration.

It is contended, however, that this ordinance was a valid exercise of the police power conferred upon the municipality by section 32 of the charter. A similar contention was unsuccessfully made in *Henderson v. Heyward*, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. Rep. 384, which involved the validity of an ordinance of the city of Cartersville, which undertook to make it penal for one who had lawfully purchased, without the limits of the municipality, alcoholic liquors, to receive the same therein from any common carrier or person, without paying a specific tax of a designated amount for the privilege of so doing. The "general welfare" clause of the charter of the city was as follows: "The mayor and aldermen shall have power to pass all ordinances that they may consider necessary to the peace, good order, health, prosperity, comfort and security of the city and the citizens thereof, not inconsistent with the Constitution and laws of this state, and of the United States." It will be seen that these provisions are substantially the same as those of section 32 of the charter now under consideration. The power conferred upon the municipal government of the city of Cartersville by the above-quoted section or clause of its charter is no more restricted than that conferred upon the municipal authorities of the city of Lawrenceville in the charter provisions with which we are dealing. The qualification of the power, in the Cartersville charter, by the words "not inconsistent with the Constitution and laws of this state, and of the United States," would have been necessarily implied, if it had not been expressed; and the same qualification of the power to pass ordinances, etc., "for the welfare and proper government of [the] city" appears in section 1 of the charter of Lawrenceville, although not expressed in section 32 thereof. In reaching the conclusion announced in the Cartersville Case, this court held "that a municipal corporation can not, without express legislative authority so to do, pass any ordinance making

penal the buying of alcoholic liquors from one lawfully authorized to sell the same," and that it therefore followed "that the reception by the purchaser of liquor so bought is not an act which can be legitimately dealt with by the authorities of a municipal corporation as an act within the police power of the state, in the absence of express power so to do." In that case, as we have seen, the municipal authorities undertook to prohibit the reception, in Cartersville, of liquors lawfully purchased elsewhere; and it was held that this could not be done. In the present case, if we construe the ordinance in question as being prohibitory in its purpose, the municipal authorities of Lawrenceville have undertaken to prohibit the delivery in that city of liquors lawfully purchased elsewhere. It is obvious that under the decision in the Cartersville Case they could not lawfully do this, for to prevent the delivery would be to prevent the reception, as the one can not occur without the other.

Another of the sections of the city charter invoked to sustain the validity of the ordinance is section 48 (page 506), the language of which is as follows: "That said mayor and council shall, in the exercise of their police powers, have full power and authority to pass such ordinances as they may think proper to more effectually prohibit the illegal sale of spirituous, vinous, malt or intoxicating liquors within the corporate limits of the city of Lawrenceville, and to that end may provide ordinances punishing any person or persons keeping in said city spirituous, vinous, malt or intoxicating liquors for illegal sale." The contention that this section of the city charter conferred upon the municipal authorities power and authority to pass the ordinance in question scarcely deserves serious discussion. The ordinance does not deal with the sale of intoxicating liquors within the limits of the city, nor with the keeping, in the city, of such liquors for sale. It is admitted that the sale of such liquors within the city of Lawrenceville, or elsewhere in the county of Guinnett, is prohibited by law; and the manifest purpose of the ordinance, construed as an effort to exercise the police power, was to prevent the delivery in Lawrenceville of liquors lawfully purchased outside of Guinnett county. The other sections of the municipal charter which are invoked to support the ordinance are sections 28 and 30 (pages 498, 499); and here the effort is to uphold the ordinance as a valid exercise of the power of the municipal authorities to impose, and enforce the payment of, license taxes upon any business, profession, or vocation carried on within the city. The first of these sections provided "that said mayor and council shall have full power and authority to require any person," etc., "engaged in or carrying on, or who may engage in or carry on, any trade, business, calling, vocation or profession within the corporate limits of said city, * * * to obtain license to carry on

such business or profession and pay for such * * * license such amount as the mayor and council may by ordinance prescribe." It also provides that, "Said mayor and council may provide by ordinance for the punishment" of any one "required to pay such license, who [engages] in or [offers] to engage in such business or occupation before paying such tax, or taking out such license." Section 30 confers upon the municipal authorities power to license billiard tables, theatrical companies, and other enumerated things, to place a tax upon brokers, and to regulate markets, etc., auctioneers, itinerant traders, etc., and concludes as follows: "Also all solicitors or canvassers, selling goods or wares by sample at retail to consumers; and all other establishments, businesses, calling or vocations which under the Constitution and laws of this state are subject to taxes." The power claimed for the city under section 28 is the power to impose a license tax upon every person, etc., "who may engage in or carry on, any trade, business, calling, vocation or profession within the corporate limits of said city"; and the power relied on under section 30 is the power to impose such a tax upon all "establishments, businesses, callings and vocations which under the Constitution and laws of this state are subject to taxation."

It is clear that the mere delivery by a common carrier of goods of a particular class to the consignees to whom they have been shipped is not a trade, profession, or establishment. Is it a business, calling or vocation? We think not. It is termed in the ordinance in question a business, and the effort is made to tax it as such. But it seems very clear to us that the mere delivery of goods of a particular class at the point of destination by a common carrier to the consignee of such goods is not a business engaged in by the carrier, but a mere incident to the carrier's business. In and of itself, it is no more a business than is the measuring of calico, homespun, or silk by a retail dry goods merchant, when he sells the same to his customers, or the delivery by such a merchant of the cloth to the purchaser thereof, a business conducted by him. It is no more a calling or vocation than is the mere delivery of shoes by a shoemaker, or plows by a blacksmith, to the customer for whom the shoemaker or the blacksmith has made them. It is but a fragmentary part of the business of the carrier. If the city has the power to arbitrarily declare that the mere delivery by a railroad or express company of intoxicating liquors, within its limits, is a business, and to impose a license tax upon it as such, then it must necessarily have the power to deal in a like manner with the mere delivery by such carriers of each and every other class of goods transported by them for the public. Under such a construction of the city's power to tax a business, it could separately tax, as a separate business, the delivery by a common

carrier of dry goods, of shoes, of drugs, of hardware, and so on and on, through the vast variety of goods handled by the carrier, making, for the purposes of taxation, a separate business of the delivery of each variety of goods. Further, if the city can, for the purposes of taxation, make a separate business of the mere delivery of a particular kind of goods by a common carrier, it can make a separate business of every other incident involved in the carrier's handling of such goods, within the incorporate limits. For instance, it could make a separate business of the receiving for shipment of each variety of goods, another of the mere keeping of each kind of goods until transported or delivered, and still another of the transporting, within the limits of the municipality, of each kind of goods to or from the warehouse or storeroom of the carrier. Under this construction of the power of the city to tax a business, there would be practically no limit whatever to the divisions and subdivisions which it might make of a common carrier's business for the purpose of taxation. Where a municipality is simply given the power to impose a license tax upon a business, it cannot divide such business into its constituent elements, parts or incidents and levy a separate tax on each or any element, part or incident thereof.

The case of *Hewin v. Atlanta*, 121 Ga. 723, 49 S. E. 766, 67 L. R. A. 795, is directly in point here. There it was held: "(1) That the furnishing of trading stamps by a merchant to his customers did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or incident to that business, being in its nature incapable of such separate existence as to constitute of itself a business in either a commercial or legal sense. (2) That authority in a municipal charter 'to make just and proper classification of business for taxation,' and 'to classify business and arrange the various businesses, trades and professions carried on in said city into such classes of subjects for taxation as may be just and proper,' did not authorize the passage of an ordinance separating from the business of selling merchandise the incident of furnishing trading stamps for the purpose of increasing the sale of merchandise and classifying the furnishing of such stamps as a separate business subject to taxation. (3) That, whether the furnishing of the trading stamps be treated as a gift or as a part of the contract of sale of the merchandise which is delivered at the time the stamps are furnished, the furnishing of the stamps does not constitute a business subject to be taxed under charter authority to classify and tax business. (4) That the word 'business' in a commercial or legal sense means something done or carried on for a livelihood, profit, or the like." If the city of Atlanta which not only "has," to quote the language of Mr. Justice Cobb in the opinion in that case, "au-

thority under its charter to impose a tax upon any person carrying on 'any trade, business, calling, or avocation, or profession' within the city," but "has also power to classify business, and arrange the various businesses, trades, and professions carried on in said city into such classes of subjects for taxation as may be just and proper," could not, for the purpose of taxation, make a separate business of a mere incident to the business of a retail merchant, it necessarily follows that the city of Lawrenceville cannot, under the power granted in its charter, make a separate business of the mere delivery by a common carrier of a particular class of goods and levy a license tax thereon. Under the view we take of the case it is unnecessary to discuss the question as to the power of the municipality of Lawrenceville to make a reasonable and proper classification of the business of common carriers for the purpose of taxation. The ordinance of the city of Lawrenceville involved in this case is void, as the municipality had no power, under its charter, to enact it. Having reached this conclusion, for the reasons above given, it is unnecessary for us to determine whether the ordinance is, as contended by the defendant in error, violative of the interstate commerce clause of the Constitution of the United States.

The express company, however, contends that even if the municipal ordinance in question be invalid, it can elect to obey it, and refuse to accept, at its office in the city of Atlanta, shipments of intoxicating liquors consigned to the owners thereof at Lawrenceville. As was said by Mr. Justice Little, in *Southern Express Company v. State*, 107 Ga. 670, 672, 33 S. E. 637, 638, 46 L. R. A. 417, 73 Am. St. Rep. 146: "The plaintiff in error is a common carrier, and as such is bound to receive and transport articles and property offered it for shipment under reasonable rules and regulations. In the case of *Fears v. State*, 102 Ga. 274, 29 S. E. 463, this court held that, notwithstanding the local option liquor law was in force in a particular county, a right of property in spirituous and malt liquors existed in that county. Being property, it was, under existing law, the duty of a common carrier to receive and transport it for a reasonable hire, according to the direction of the owner or sender of the same, unless such transportation has been prohibited by the lawmaking power. * * * The lawmaking power of this state has not yet seen proper to declare the transportation of liquors by common carriers illegal; and inasmuch as rights are vested in liquors, just as they are in any other property, it is, in the absence of such a statute as we have indicated, the public duty of the carrier to receive and transport liquors." Such being the public duty of the carrier, it cannot lawfully decline to discharge it, by electing to obey an invalid municipal ordinance, instead of the valid and peremptory law of the state

which imposes upon it such public duty. It cannot escape the force of the living law of the land by taking refuge behind a lifeless municipal ordinance.

The court below did not err in granting the mandamus absolute, and the judgment complained of is affirmed. All the Justices concur.

COBB, P. J. I concur in the judgment, but cannot agree to all of the reasoning of the Chief Justice. I do not think that the ordinance in question seeks to tax merely the act of delivering articles mentioned in the ordinance. It seems to me that a proper construction of the ordinance is that an occupation tax is levied upon persons engaged in the business of carriers, who in that capacity transport into the city of Lawrenceville and there deliver articles of the character mentioned in the ordinance. It is true that the ordinance declares it to be unlawful "to deliver or cause to be delivered" the articles of the character mentioned; but I do not think that the word "deliver" there is to be construed in its limited sense, the mere final act of transportation, but the ordinance construed as a whole is an effort to impose an occupation tax upon all persons engaged in the business of transporting intoxicating liquors into the town of Lawrenceville.

I fully concur with what has been said by the Chief Justice as to the ordinance not being justified under the police power. The ordinance not being authorized under the police power, it is therefore to be determined whether it can be justified under the taxing power. The charter of the city of Lawrenceville in broad terms authorizes the imposition of an occupation tax upon persons engaged in business in that city. The authority to impose an occupation tax carries with it the authority to classify the occupations for taxation. *City Council of Augusta v. Clark & Co.*, 124 Ga. 254, 52 S. E. 881. In exercising the power of classification the city authorities must, however, be reasonable, and an arbitrary or unreasonable classification will not be permitted, and the court will declare invalid a tax upon a given class when the classification is palpably arbitrary and unreasonable. The ordinance in question deals with the occupation of carriers. It has been held that a municipal corporation, under a general power to levy occupation taxes, cannot impose an occupation tax upon what is known as a commercial railroad, as distinguished from a street railroad. *City Council of Augusta v. Central Railroad*, 78 Ga. 119. I do not think that this decision is sound, but, of course, it must be respected as the law until it is overruled. I see no reason why a municipal corporation, under a general power to levy occupation taxes, cannot levy an occupation tax upon commercial railroad companies engaged in the business of common carriers in the city, just as they levy an occupation tax upon telegraph,

telephone, and similar companies. The city of Lawrenceville undoubtedly has power to impose an occupation tax upon carriers, subject only to the restrictions imposed by the decision above referred to. They, therefore, have the right to classify carriers for the purpose of taxation. They may place common carriers in a class to themselves, and carriers other than common carriers in another class, and possibly might make a further subdivision of the general business of carriers. When they are dealing with the subject of common carriers, it certainly would not be unreasonable to place common carriers of goods, common carriers of passengers, and common carriers of live stock in different classes. There would be nothing unreasonable or arbitrary about such a classification, because it is a classification that not only the law, but the commercial world, recognizes as just and reasonable. But if it put into one class common carriers of goods, how much further can the classification extend? Can they divide this class into subordinate classes of carriers of liquors, carriers of dry goods, carriers of hardware, etc.? If so, in any city where a common carrier is engaged in business a separate tax upon such a carrier for every character of goods known to the commercial world could be imposed, and a tax, although small and insignificant in amount on each class of goods, would in many places amount to a confiscation of the entire earnings of the carrier derived from the business going to that place. I do not think that a classification further than into the three great classes known to the law and the commercial world would be reasonable and proper, and to allow the classification to extend further would be placing into the hands of a municipal cor-

poration a power that it cannot be presumed that the General Assembly ever intended should pass to the subordinate public corporations of the state under a general power to impose a tax upon occupations.

The ordinance in question imposes a tax upon carriers of liquors and makes this a business. A person engaged in the business of carrying liquors into the town of Lawrenceville and in no other business could be compelled to pay the tax. But, applied to a common carrier who is not only engaged in carrying all the legitimate articles of commerce, but is compelled by law to receive for shipment all of such articles, an ordinance requiring that a common carrier should pay a tax for the privilege of carrying this one class of the articles transported by it, and a very small class compared to the entire business of the company, is unreasonable and arbitrary, and should be declared void for want of power in the city to enact the ordinance providing for it, in so far as it attempts to levy a tax upon a common carrier of goods.

CANDLER, J. (specially concurring.) In my opinion, it is immaterial whether the ordinance in question is valid or not. The Southern Express Company is a common carrier, and, regardless of the ordinance of the town of Lawrenceville, it must accept the liquor, carry it to its destination, and deliver it to the consignee. This being expressly held by the opinion of the Chief Justice, I think that it will be proper to deal with the validity of the ordinance in question only when it is properly brought in question by the party who, under its provisions, is required to pay the license fee.

(124 Ga. 791)

PRIDE v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

ROBBERY—INSTRUCTIONS.

On the trial of one charged, under the Penal Code 1895, § 151, with robbery by force and intimidation, it is error to charge the provisions of the amendment to that section (Acts 1903, p. 43), declaring that the sudden snatching, taking, or carrying away any money, etc., from the owner or person in possession thereof, without the consent of the owner or person in control thereof, shall also be robbery.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Jesse Pride was convicted of robbery, and brings error. Reversed.

Robt. L. Rogers, for plaintiff in error.
C. D. Hill, Sol. Gen., for the State.

FISH, C. J. Jesse Pride was indicted for robbery. The indictment charged that on a given day, in Fulton county, he "did, from the person of Mrs. B. F. Allen, wrongfully, fraudulently, by force and intimidation, violently take, without the consent of her, the said Mrs. B. F. Allen, and with intent to steal the same, four dollars and forty-four cents in money," etc. On the trial Mrs. Allen testified that the accused came to her and her husband, in Fulton county, ostensibly for the purpose of buying butter from them, and asked if they could change a five-dollar bill. She said: "I first told him we could not; but I counted the money and said, 'Yes; I believe I can.' And I had it in my hand and went to hand it to him, and he had the five in his hand, and I thought he was going to hand it to me, but he just grabbed mine and ran. Of course, he hurt my hand. He scratched my hand." The court, in charging the jury, read section 151 of the Penal Code of 1895, which is as follows: "Robbery is the wrongful, fraudulent and violent taking of money, goods or chattels from the person of another by force or intimidation, without the consent of the owner." He then instructed the jury that this section had been amended by the act of August 6, 1903, and then read to them the amendment, which added to such section the following: "Or the sudden snatching, taking or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof." The accused was found guilty, and thereupon moved for a new trial; one of the grounds of the motion being that the court erred in giving in charge the amendment to section 151 of the Penal Code of 1895, because the provisions of such amendments

were not applicable to the charge in the indictment. A new trial was refused, and the accused excepted.

Section 151 of the Penal Code, prior to its amendment by the act of 1903, defined two grades of robbery, viz., robbery by force, and robbery by intimidation. *Long v. State*, 12 Ga. 293. In *Spencer v. State*, 106 Ga. 692, 32 S. E. 849, it was held, in accordance with previous decisions of this court: "Suddenly snatching a purse, with intent to steal the same, from the hand of another, without using intimidation, and where there is no resistance by the owner, or injury to his person, does not constitute robbery." This decision was rendered in 1898, and was followed in *Jackson v. State*, 114 Ga. 826, 40 S. E. 1001, 88 Am. St. Rep. 60, the decision in which was rendered in 1902. In 1903 section 151 of the Penal Code of 1895 was amended so as to make that section read as follows: "Robbery is the wrongful, fraudulent and violent taking of money, goods or chattels from the person of another by force or intimidation, without the consent of the owner, or the sudden snatching, taking or carrying away any money, goods, chattels or anything of value from the owner or person in possession or control thereof, without the consent of the owner or person in possession or control thereof." Acts 1903, p. 43. This amendment added another distinct grade of robbery to the two which had previously existed under the laws of this state. While all three of the grades of that offense now provided for may be charged in the same indictment, manifestly it is not proper, where only one grade is charged, to instruct the jury as to the law applicable to the other two grades; and, of course, it is equally improper, where two of the grades only are charged in the indictment, to instruct the jury as to the other grade. No citation of authority is required to support this plain legal proposition. It is also manifest that if in a case where the indictment charges only two of the grades the court gives in charge to the jury the law applicable to the other, which is not covered by the indictment, and the evidence introduced upon the trial is such that the accused was likely injured by such erroneous instruction, it is cause for a new trial. The charge of the court complained of in the present case, in view of the evidence as to how the money was taken from Mrs. Allen, was certainly calculated to prejudice the accused, who was entitled to be tried for the offense of robbery only as it was charged in the indictment.

The judgment refusing a new trial must therefore be reversed. All the Justices concur.

(124 Ga. 788)

COLLINS et al. v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW—NEW TRIAL—AFFIDAVIT IN REBUTTAL.

Where, on the hearing of a motion for a new trial, the movant tenders affidavits as to certain newly discovered evidence, it is not error for the court to grant the Solicitor General time to procure an affidavit in rebuttal from a nonresident witness, and, after such affidavit is obtained, to consider it in passing upon that ground of the motion which is based on newly discovered evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2402.]

2. SAME—GROUNDS.

It is not cause for a new trial that the witness upon whose testimony the state relied had made, since the trial, a statement contradictory to his testimony. *Jordan v. State* (decided December 21, 1905) 52 S. E. 768.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2309, 2316, 2331-2334.]

3. SAME—SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, which is approved by the trial judge, and there was no abuse of discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

C. B. Collins and others were convicted of crime, and bring error. Affirmed.

Robt. L. Rogers, for plaintiffs in error. C. D. Hill, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 623)

RAILROAD COMMISSION OF GEORGIA v. PALMER HARDWARE CO.

(Supreme Court of Georgia. Jan. 9, 1906.)

1. ERROR, WRIT OF—BILL OF EXCEPTIONS—DELAY IN FILING—EFFECT.

Where an injunction was granted on August 16, 1905, and the presiding judge left the state on the same day, and did not return until after the lapse of more than 20 days, and where the plaintiffs in error sought to tender the bill of exceptions in due time, and after the return of the judge he certified it at the earliest possible date, stating the cause of the delay, and the plaintiffs in error were without fault, the writ of error will not be dismissed.

[Ed. Note.—For cases in point see vol. 21, Cent. Dig. Exceptions, Bill of, § 72½.]

2. SAME—CASES OVERRULED.

The decision in *Jackson v. State*, 18 S. E. 558, 93 Ga. 216, and *Gibson v. Thornton*, 26 S. E. 78, 99 Ga. 647, reviewed and reversed. *Markham v. Huff*, 72 Ga. 106, distinguished.

3. VENUE—ACTION AGAINST RAILROAD AND RAILROAD COMMISSIONERS.

Certain dealers in stoves, plates, etc., in Savannah filed an equitable petition against the railroad commissioners of the state and certain railroad companies. It was alleged that the commissioners had issued a circular fixing freight rates which the railroads should charge on articles of the character mentioned, from Atlanta to various other places in the state; that these rates were so low that they discriminated in favor of Atlanta shippers against those in Savannah shipping in the same places

under like circumstances; that this was done under a policy of discrimination on the part of the commissioners for that purpose; that they considered interstate rates for freight in fixing interstate rates; and that the railroad companies would obey the commissioners and charge the reduced rates from Atlanta without changing the rates previously existing from Savannah. By amendment it was alleged that the lower rates had been by the commissioners made to apply to shipments from Rome, Dalton, and Rockmart. None of the railroad commissioners lived in Chatham county where the proceeding was instituted, but in other counties of the state; and only one of the railroad companies had its main office there. An injunction was prayed against the commissioners and the railroad companies. Held that, on demurrer by the commissioners to the jurisdiction, it was error for the judge of the superior court of Chatham county to entertain jurisdiction and grant the injunction prayed.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 20.]

4. SAME—PROPER VENUE.

The action, if meritorious, should have been brought in the county where one or more of the railroad commissioners resided.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 20.]

5. ERROR, WRIT OF—QUESTIONS REVIEWABLE—DECISION NOT NECESSARY.

As the superior court of Chatham county was without jurisdiction to pass on the merits of the questions involved (the point having been duly made by the commissioners), and the grant of an injunction was therefore error, this court will not now pass on the reasons given by the presiding judge for such grant, or discuss the question whether, if the court had had jurisdiction, the judge could have granted an injunction in such a case.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 8332.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. L. Cann, Judge.

Suit by the Palmer Hardware Company against the Railroad Commission of Georgia. There was a decree for plaintiff, and defendant brings error. Reversed.

Jno. C. Hart, Atty. Gen., and Ellis, Wimble & Ellis, for plaintiff in error. Cann & Barrow, Lawton & Cunningham, J. Randolph Anderson, Osborne & Lawrence, W. L. Clay, and Wm. Garrard, for defendant in error.

LUMPKIN, J. 1, 2. The injunction was granted on August 16, 1905. The bill of exceptions was certified on October 7th, the presiding judge adding to his certificate the following statement: "I further certify that I left the state of Georgia, on the afternoon of August 16, 1905, and did not return until September 29, 1905; that, owing to necessary corrections and the public business, this is the earliest date upon which the bill of exceptions could be signed by me within the state of Georgia. This October 7, 1905. The bill of exceptions was handed the sheriff of Chatham county for me on September 1, 1905." If the decision in *Jackson v. State*, 18 S. E. 558, and that in *Gibson v. Thornton*, 99 Ga. 647, 26 S. E. 78, should be followed, the certificate must be held to

have been signed too late, and the writ of error must be dismissed. In the first mentioned case it was held that the practice in reference to bills of exceptions in cases of injunction had been made applicable to criminal cases by the act of September 7, 1891; that the certificate must be signed within 20 days from the date of the judgment complained of; and that, although the absence of the judge from the state caused the delay and it was so certified, the writ of error must be dismissed. A similar ruling was made in the case of *Gibson v. Thornton*, supra. Leave was asked to review these decisions, and also that in *Markham v. Huff*, 72 Ga. 106, so far as necessary. The leave was granted.

Prior to the act of September 12, 1881 (Acts 1880-81, p. 114), the Code contained the following section in regard to verifying or certifying bills of exceptions after the time regularly prescribed therefor: "If the judge trying the cause resigns, or otherwise ceases to hold his office as judge, when the bill of exceptions is tendered, he may nevertheless sign and certify; and if he should die before certifying the same, or otherwise become incapable of acting, then the party may verify his bill of exceptions by his own oath, or that of his attorney, together with the oath of at least one disinterested member of the bar who was present at the trial; and such verifications shall operate in the same manner as the certificate of the judge. If the judge is absent from home, or by other casualty fails to certify the bill of exceptions within the time specified (and without fault of the party tendering), he may still sign and certify as soon as possible, which shall be held and deemed valid." Civ. Code 1895, § 5542. This section provides for several contingencies: (1) If the judge trying the cause resigns, or otherwise ceases to hold office; (2) if he should die before certifying, or otherwise becomes incapable of acting; (3) if the judge is absent from home, or by other casualty fails to certify the bill of exceptions within the time prescribed, without fault of the party tendering it. It was held several times that these provisions applied only to ordinary bills of exceptions, and not to what are called "fast" bills of exceptions, such as those excepting to the grant or refusal of interlocutory injunctions and the like. *Gray v. Field*, 60 Ga. 315; *Roberts v. Leonard*, 62 Ga. 209; *Moring v. Ross*, 63 Ga. 308; *Hardin v. Swann*, 66 Ga. 244; *Sewell v. Edmonston*, Id. 353. Thereupon, and no doubt on account of those decisions, the act of September 12, 1881, was passed. Its caption was: "An act to provide for the signing and certifying of bills of exceptions now required by law to be signed in twenty days, after said twenty days, in certain cases." It declared that "all the laws of this state now in force, having reference to the signing and certifying of bills of exceptions after the expiration of thirty days from the adjournment of the

court and the rendition of the decision, and in case of the death of the judge, shall apply, so far as the same will conform, to all bills of exceptions which are now required by law to be signed and certified in twenty days after the rendition of the decision." This has been codified, and appears in Code 1895, § 5543.

In the case of *Markham v. Huff*, 72 Ga. 106, no point was made as to the time when the judge certified the bill of exceptions, but as to the time when the clerk transmitted the bill of exceptions and record to this court. In the opinion Chief Justice Jackson made use of the following language: "It is true, that in 1880 an act was passed to remedy this hardship in case of the death of the judge; but in other misadventures, it would seem that this act made no alteration in the law, as ruled by this court, in reference to the judge's certificate." But it is evidence that this was an obiter dictum, and we think an erroneous one. The caption of the act of 1881 provides for the "signing and certifying of bills of exceptions," etc. Certainly the Legislature did not contemplate that a judge could sign and certify a "fast" bill of exceptions after his death. In the event of death, verification was to be made as provided in cases of ordinary bills of exceptions. "All the laws," not some of them as to signing and certifying bills of exceptions after the lapse of 30 days from the decision or the adjournment of court, were made to apply to "fast" bills of exceptions after the lapse of 20 days from the decision complained of; and also the provision for verification in case of the death of a judge was declared applicable. The expression "and in case of the death of the judge" did not limit or qualify all of the preceding portion of the act, but referred to a distinct contingency. This is a remedial act, and should be construed liberally to carry into effect the purpose of the Legislature; and in doing so we should not lose sight of the trend of legislation to prevent the dismissal of bills of exceptions on account of the absence of the judge from home, or other casualties affecting him, without fault of the excepting party. At the same session of the Legislature another act was passed tending to diminish dismissals (Acts 1880-81, p. 123), now embodied in Civ. Code, §§ 5556, 5557. The case of *Jackson v. State*, 93 Ga. 216, 18 S. E. 558, cited only decisions rendered prior to the act of 1881, except *Markham v. Huff*, 72 Ga. 874, and made no reference at all to that act. The decision in *Gibson v. Thornton*, 99 Ga. 647, 26 S. E. 78, apparently followed that just referred to. In both of them only headnotes were written. We think it is plain that a misconception of the meaning of the act of 1881 has grown out of the obiter dictum in *Markham v. Huff*, and it should be corrected. If the presiding judge is prevented from signing a "fast" bill of exceptions within 20 days from the date of the judgment, decree, or order to which excep-

tion is taken, by reason of absence from home or other casualty, and without fault of the parties tendering it, he may still sign and certify as soon as possible. The cause of delay stated in this case was sufficient. In so far as the decisions above referred to conflict with the views here expressed, they are overruled. Indeed, in *Grace v. Gordon*, 113 Ga. 88, 38 S. E. 404, the opinion shows dissatisfaction with them.

3-5. The demurrer was based on substantially two grounds: That the superior court of Chatham county had no jurisdiction of the parties, and that county was not the proper venue of the suit; and that the petition set forth no cause of action which entitled the plaintiffs to the relief prayed. The second proposition was divided into several grounds in the demurrer, stating the reasons with greater specification. Was the case properly brought in the superior court of Chatham county, and could that court require all the defendants to appear and answer there? None of the defendants are residents of that county except the Central of Georgia Railway Company, which has its main office there. The argument that the proper venue of the suit was in Chatham county rests practically on three positions: (1) That the Central of Georgia Railway Company was an indispensable party, or, if not, then a necessary party, or at least a proper party; (2) that injunction was necessary against that company to prevent its obeying the order of the railroad commissioners and putting rates prescribed by it in the circulars known, respectively, as Nos. 805 and 308 into effect and charging the reduced rates from Atlanta and other named places therein declared; (3) that the company named had an interest in the subject-matter of the suit, and this case is therefore different from those in which the defendant in the county of whose residence suit was brought was without interest. Sometimes parties to suits in equity have been divided into three classes—formal, necessary, and indispensable parties. *Shields v. Barrow*, 17 How. 139, 15 L. Ed. 158; *Chadbourn v. Coe*, 51 Fed. 479, 480, 2 C. C. A. 327; *Williams v. Bankhead*, 86 U. S. 563, 571, 22 L. Ed. 184. Sometimes the words “necessary” and “indispensable” have been considered synonymous, and parties in equity have been classified as necessary parties and proper parties. *Fletcher's Eq. Pl. & Pr.* § 40; *Pom. Rem.* (2d Ed.) 329; *Donovan v. Camplon*, 85 Fed. 71, 29 C. C. A. 30; *Lynch v. Rotan*, 39 Ill. 14. Civ. Code, § 4844, states the rule to be that “generally all persons interested in the litigation should be parties to proceedings for equitable relief.” We need not enter into an extended discussion of the classes of parties to equitable proceedings, or the correct mode of designating them. The test for determining the venue of an equitable action in this state is not made to depend merely on the

technical name given to the parties defendant.

It will not be unprofitable to trace the history of the present law on the subject. In *Carter v. Jordan*, 15 Ga. 81, 82, Benning, J., said: “The question of the residence of the defendant, as affecting the right of suit against him, cannot arise there [in England], because the Court of Chancery there sits at but one place, and every person who can be sued at all has, of course, to be sued at that place, no matter where he resides.” See, also, on this subject, 1 Dan. Ch. Pr. 550. In this state, where equitable relief is administered by the superior courts, the effect of residence on jurisdiction of the person arises. Const. 1777, art. 38, contained the following provision as to the venue of suits: “All matters in dispute between contending parties, residing in different counties, shall be tried in the county where the defendant resides, except in cases of real estate, which shall be tried in the county where such real estate lies.” Section 38, p. 18, *Watk. Dig.* Const. 1789, art. 3, § 4, provides as follows: “All causes shall be tried in the county where the defendant resides; except in cases of real estate, which shall be tried in the county where such estate lies; and in criminal cases, which shall be tried in the county where the crime shall be committed.” The Constitution of 1798, as amended (article 3, § 1), after specifying cases in which the superior courts had exclusive jurisdiction, added: “The inferior courts shall also have concurrent jurisdiction in all civil cases (except cases respecting the title to lands) which shall be tried in the county wherein the defendant resides.” Provision was then made for cases of joint obligors or joint promissors, or cases against makers and indorsers of promissory notes residing in different counties. In *Gilbert v. Thomas*, 3 Ga. 581, it was held that the words “civil cases,” thus used, were not intended to apply to or fix the venue of equity causes. This ruling was repeated in *Rice v. Tarver*, 4 Ga. 571, and it was said: “According to the spirit and analogies of our Constitution and laws, and the usage of courts of chancery, the inception of a proceeding in equity must be in some one county, where, on account of the residence of a defendant, or on some other account, the court has jurisdiction.” On page 582, however, it was said: “But because equity causes are not within the limitation of the Constitution, it does not follow that a complainant in equity has a rambling commission (to use the language of the counsel for the defendant in error) to bring his suit in any county in the state where he may choose to locate it. Nor does it follow that, where the suit is properly located, the complainant may draw defendants out of their own counties necessarily and universally to answer in the county where the suit is brought.” As to following the

spirit of the Constitution and laws, in regard to venue, as nearly as practicable, and the usages of the courts, in the absence of direct legislation or constitutional provision, see *Jordan v. Jordan*, 12 Ga. 77; *Carter v. Jordan*, 15 Ga. 76; *Jordan v. Jordan*, 16 Ga. 446, 452, 454, 455; *Lavender v. Thomas*, 18 Ga. 668 (5), 678; *Anderson v. Sego*, 19 Ga. 501; *Kendrick v. Whitfield*, 20 Ga. 379; *Wade v. Powell*, Id. 645; *Smith v. Iverson*, 22 Ga. 190; *Rawson v. Mills*, 23 Ga. 597. Perhaps it might fairly be said that the general rule deducible from these cases was that the residence of a necessary party was sufficient to confer jurisdiction or determine the venue, although it was not always clear, and doubts were sometimes expressed. The amended Constitution adopted in 1861 for the first time specifically referred to the venue of equitable causes. It declared that they "shall be tried in the county where one or more of the defendants reside, against whom substantial relief is prayed." Const. 1861, art. 4, § 2, par. 5 (Code 1863, § 4977). The framers of the Constitution doubtless knew of the decisions above cited, and were unwilling to leave the matter as there determined. They did not, therefore, say that equity cases might be tried in any county where a proper party or a necessary party resided, or according to the usages of the courts theretofore, or by seeking to apply analogies, but required, further, that such cases should be tried in the county where one or more parties resided against whom substantial relief was prayed. Substance, not form alone, was here brought into consideration. If analogy to the requirement in regard to cases at law could not ordinarily determine by construction the venue further than by looking to the question of proper or necessary parties defendant, the Constitution sought to make the analogy still closer by fixing the venue with a view to real substance. We do not mean that there must be a sort of testing by exact measure, or that equity will resort to niceties of differences, as if it determined venue by troy weight. But as between two defendants resident in the state the venue should be in the county where resides that one against whom substantial relief is prayed, although the other may be a proper party to the case. A similar provision to that contained in the Constitution of 1861 has been retained in each of the Constitutions since adopted, in 1868 and 1877. See Code 1873, § 5120; Civ. Code 1895, § 5871.

Under this requirement, how stand the decisions? Could this equitable action be brought in Chatham county solely because the Central of Georgia Railway Company had its main office in that county, and could the railroad commissioners, who resided elsewhere in the state, be required to answer there? It has been held that an equitable petition, brought against a sheriff and others, to enjoin the former from proceed-

ing with the levy of an execution, was improperly filed in the county of his residence; the other defendants, who were the owners of the execution, not being residents of that county. *Dade Coal Co. v. Anderson*, 108 Ga. 809, 30 S. E. 640; *Rounsaville v. McGinnis*, 93 Ga. 579, 21 S. E. 123; *Woolley v. Georgia Loan & Trust Co.*, 102 Ga. 591, 29 S. E. 119; *Reynolds & Hamby Co. v. Martin*, 116 Ga. 495, 42 S. E. 796; *Smith v. Coker*, 74 Ga. 390. Indeed, this was ruled prior to 1861. *Mays v. Taylor*, 7 Ga. 238. And though injunction, standing alone, might appear to be substantial relief, and very necessary relief to stop a sale or levy, yet a prayer for injunction against a sheriff was not considered substantial in such sense as to confer jurisdiction over a person for whose benefit the process was proceeding and who resided in another county of the state. The real controversy was with him, and the substantial relief sought was against him. So an equitable petition seeking to cancel a sheriff's deed must be brought in the county of the grantee's residence, though the sheriff who made the deed should certainly be a party to the proceeding to cancel it. *Caswell v. Bunch*, 77 Ga. 504; *Coker v. Montgomery*, 110 Ga. 20, 35 S. E. 273; *Palmer v. Inman*, 122 Ga. 226, 50 S. E. 86; *Paulk v. Ensign-Oskamp Co.*, 123 Ga. 467, 51 S. E. 344. Thus it will be seen that the mere fact of praying an injunction against a defendant does not, in all events, confer the right to file the equitable petition in the county of his residence, and to draw to that county residents of other counties. In *Townsend v. Brinson*, 117 Ga. 380, 43 S. E. 743, joint trespassers were sued in the county of the residence of some of them. Equitable relief was prayed against one of the defendants, who was a nonresident of the county, but no substantial equitable relief was prayed against the resident defendants. It was held that the court was without jurisdiction to grant the equitable relief against the nonresident defendant, and that the demurrer on that ground should have been sustained. See, also, *Johnson v. Griffin*, 80 Ga. 551, 7 S. E. 94; *Vizard v. Moody*, 115 Ga. 491, 41 S. E. 997; *Orr Shoe Co. v. Kimbrough*, 99 Ga. 143, 25 S. E. 204. In *Ellis v. Lamar*, 44 Ga. 9, a bill in equity was filed in Spalding county against Brewer, who resided in that county, and Lamar who resided in Chatham county. It was alleged that Brewer was the agent of Lamar, and as such had made fraudulent representations to the complainant and had sold him guano which was found to be worthless; that Brewer made the sale on commission and was interested to that extent; and that he had in his hands property of Lamar, his principal. The prayers were that Brewer be enjoined from putting the assets out of his possession and for a decree against Lamar for loss or damage. A demurrer was sustained, and the judgment was affirmed. The court said: "Equity will not entertain jurisdiction over a principal out of

the county of his residence, by linking him with the party who acted as his commission merchant, upon general allegations of fraud and interest by commissions on sales of the property consigned." In *Meeks v. Roan*, 117 Ga. 865, 45 S. E. 252, it was held that where a deed was executed to secure a debt, and under authority conferred in it a person was appointed to make sale of the property upon default of payment, who was called a trustee, though not vested with title to the property or interest in it, and where he was advertising and preparing to make the sale, this did not give the superior court of his residence jurisdiction to grant any relief against the grantee in the security deed who resided in another county, although the petition prayed an injunction against the sale by such trustee or appointee. In *Ellis v. Farmer*, 119 Ga. 238, 46 S. E. 105, an equitable proceeding was brought in the county where the land involved in the controversy lay, and where the tenant in possession of it resided. The plaintiff claimed under a bond for title from the holder of the title, who was the landlord of the resident tenant, and who lived in another county. The plaintiff joined in the suit the nonresident landlord and the resident tenant, and prayed for the former to be required to execute a conveyance to him, that the title be decreed to be in him, and that he recover mesne profits from both the landlord and the tenant. It was held that the court of the county of the tenant's residence had no jurisdiction to grant the equitable relief prayed against the nonresident landlord. In *Edwards v. Kilpatrick*, 70 Ga. 328, where suit was brought by heirs to cancel a deed and for an accounting, joining the administrator of their ancestor as a party defendant, and charging collusion between him and the holder of the deed, and the refusal of the administrator to bring suit, it was held that this did not give jurisdiction in the county of the administrator's residence. See, also, *Lawson v. Cunningham*, 34 Ga. 530. In Alabama there is a statute which requires that an original bill shall be "filed in the district in which the defendants, or a material defendant resides." It has been held that a material defendant is a defendant who is a necessary party, really interested in the result of the suit, and against whom a decree is sought. *Gay v. Brierfield*, 106 Ala. 615, 17 South. 618. In another case it is said that a party is a material defendant, within the meaning of the rule, whose interest is antagonistic to the complainants, and against whom relief is prayed." *Waddell v. Lanier*, 54 Ala. 440. *Story's Eq. Pl.* (10th Ed.) § 136, after referring to the rule in regard to necessary parties, says: "In a general view, all parties in interest are the proper objects of the rule. But the nature of that interest must still remain to be ascertained, as well as the point how far it is liable to be affected injuriously by the decree." See, also, *Webb v. Parks*, 110 Ga. 639, 36 S. E. 70; *Dawson v.*

Columbia Avenue etc. Trust Co., 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713.

Under the original petition the real, substantial controversy was whether the rates fixed by the railroad commissioners injuriously discriminated in favor of shippers in Atlanta against shippers in Savannah, and whether the commissioners were authorized to make the order which they promulgated. It was not alleged that the rates, formerly established and still existing from Savannah to various points, were excessive in themselves. But it was alleged that the railroad commissioners issued a circular solely in the interest of the shippers from the city of Atlanta, reducing the rates on certain commodities from that place to certain other places in the state of Georgia, and that this was "an attempt to injuriously discriminate in favor of the city of Atlanta and the shippers of that city against the interests of the shippers of the city of Savannah and other places in the state of Georgia." It was further alleged that "said rates, as promulgated in said circular No. 305, are made with the single view and purpose to accommodate and give a preference to the manufacturers and shippers of the city of Atlanta over the manufacturers and shippers of other cities." This was charged to be in violation of law and in contravention of the rate-making power conferred upon them by the act creating the commission. It was not alleged that the railroads will charge the plaintiffs any higher freight rate than they have hitherto charged, but rather that those rates will remain the same, while rates from Atlanta to certain other points in the state will be diminished. It is evident that the gravamen of this petition was an alleged discrimination on the part of the railroad commissioners in favor of shippers in Atlanta, whereby they were alleged to be given less rates than shippers in Savannah under similar circumstances. The real attack was upon the act of the commissioners in promulgating the circular known as No. 305. The Central of Georgia Railway Company has no direct interest in the question as to whether the railroad commissioners are discriminating in favor of Atlanta against Savannah, or giving Atlanta shippers more advantageous rates than Savannah shippers. The railway company may be interested in the rates fixed so far as they affect it, but it has no direct legal interest in determining whether the railroad commissioners are discriminating in favor of Atlanta shippers as against shippers in Savannah and other places. It is true that it was suggested in the petition and alleged in an amendment that the railway companies will obey the order of the commissioners and charge Atlanta shippers less rates than hitherto, while continuing to charge Savannah shippers the rates already established from that place. But this is not the real substance of the controversy, but an incident in the contention of discrim-

ination on the part of the railroad commissioners. As to the railroad, this does not present a case of a trespass on property and an effort to enjoin the trespasser in the county of his residence. Nor do we think that the amendments to the petition materially changed the status. What has just been said in regard to the original petition applies also to them. There was some elaboration, and it was alleged that the commissioners had inaugurated a policy, and were taking into consideration interstate rates, and that the reduction in rates from Atlanta had been extended so as to reduce rates from Rome, Dalton, and Rockmart.

The argument is strongly urged, however, that the Central of Georgia Railway Company is interested, and that this differentiates the present case from those above cited. As already appears, in one of those cases (*Ellis v. Lamar*) there was an allegation of fraud on the part of the agent and of an interest in him to the extent of his commission, and in the case last cited (*Ellis v. Farmer*) a judgment for mesne profits was prayed against the tenant in possession as well as against the landlord. In a number of the cases cited injunction was prayed against the resident of the county where the suit was brought, but that fact alone did not establish such county as the venue, or give jurisdiction there of the person of the nonresident defendant, against whom the substantial relief was prayed. If an interest on the part of the Central of Georgia Railway Company is relied on as authorizing the suit to be brought in Chatham county, it appears that the interest of that company is not antagonistic to the plaintiffs or in common with the railroad commissioners, but is adverse to them and on the same side as that of the plaintiffs. The railroad commissioners reduced the amount which that company and others will be permitted to charge as freight from Atlanta and other places, to certain points named in the circulars. It is alleged that they will enforce these rates and that the railroads will obey them and put the rates into effect. With this order or circular, both the railroad company and the plaintiffs are dissatisfied, claiming to be injured by it, and that it is unreasonable and unlawful. If we should look beyond the petition (and as the case comes to this court on exception to the grant of an injunction, not from a direct ruling on the demurrer as such, there would seem to be no reason why we are confined to inspecting the petition alone) it is manifest that the railroads are active, along with the plaintiffs in seeking to have the railroad commissioners enjoined. The Central of Georgia Railway Company filed an elaborate cross-bill, not against the plaintiffs, but against the railroad commissioners, alleging that the reduced rates would be illegal as against it and would work injury to it and praying that they be enjoined from enforcing such rates, and each of the

other railroad companies, with one exception, filed a cross-bill against the commissioners, and joined in the prayers for injunction. The company named as an exception did not oppose the grant of an injunction, though it filed no cross-bill. Indeed the plaintiffs and the railroad companies made common cause against the commissioners.

If, however, we confine ourselves to a consideration of the petition and demurrer, as if the case were being heard on the demurrer alone, it still is patent that the interest of the railroad company is not adverse to the plaintiffs, but that the interests of both are adverse to the railroad commissioners. So that, if it is sought to differentiate this case from others cited on the ground of interest in the Central of Georgia Railway Company, and to rest the jurisdiction on that ground, the question might be thus tersely stated: If two persons living in the same county in this state both have interests adverse to a third person who resides in another county and each claims to have a cause of complaint against such third person because of an act done by him; can one of the residents of the county file an equitable petition against the other and the nonresident, and thus confer jurisdiction upon the superior court in the county of their common residence, and require the nonresident to come there and litigate? Of course, the prayer for injunction against the railroad companies furnishes another ground for the argument in favor of the jurisdiction. With that we have already dealt. We are now considering the argument that the Central of Georgia Railway Company has an interest in the subject-matter, and that this fact distinguishes this case from others which we have cited. Let us now consider some of the decisions of this court cited by counsel, and by our learned brother of the circuit bench, in support of the position that the venue was in Chatham county. The decision in *Rice v. Tarver*, 4 Ga. 571, *supra*, was decided prior to the Constitution of 1861; and, moreover, the jurisdiction in the county where the bill was filed was established by several facts: (1) An action of law had been brought there, which it was necessary to enjoin. (2) An indorser on a note lived there, whom it was sought to hold liable as a debtor. (3) The nonresident defendants in *Jones and Houston* counties did not raise any objection to the jurisdiction, but a co-defendant sought to do so for them. The venue being thus established, other parties, necessary or proper, could be enjoined. In *Wynne v. Lumpkin*, 35 Ga. 208, it was charged that a collusive agreement between certain legatees and others was entered into under which an administrator with the will annexed (who was also named as trustee for one beneficiary) illegally and without authority sold land to a nonresident of the state, who purchased with notice and was in

collusion with the administrator and the other parties; that the purchaser went into possession and placed upon the land a tenant, who, by his engagement with the purchaser, would pay the rents and profits to him, and they would thus pass beyond the limits of the state; that by reason of the financial condition of the defendants residing in Georgia the complainants believed that they "will be benefited by no decree except such as may be enforced upon said land, and the rents and profits thereof, three-fourths of which they claim as their property." The prayers were that the tenant be enjoined from paying rents and profits to the purchaser and that a receiver be appointed therefor; that the sale be rescinded and declared void, and the deed be canceled; that, if it were not void as to all the interests, it should be declared so as to some of them; that an accounting should be had for rents and profits; that there should be partition; that, if other relief could not be had, the defendants, except the tenant, should be required to account for the value of the land, with damages for withholding it; for general relief; and for discovery from the tenant. The demurrer was filed only by the administrator and trustee, who resided in another county. It was held that the bill was properly filed in the county where the tenant and other defendants resided, and where the land lay. Here all the defendants were charged to be connected with the fraud. *Van Dyke v. Van Dyke*, 120 Ga. 989, 48 S. E. 380. The facts stated above distinguish this case from that of *Ellis v. Lamar*, 44 Ga. 9, and show that it was entirely different from the case at bar. In *Austin v. Raiford*, 61 Ga. 125, a bill sought an accounting and decree against both the principal and surety on an administrator's bond, the latter having also been surety on the bond of a former administrator, and it was alleged that the two defendants had possessed themselves of the whole estate in controversy, but how much each had the complainant did not know, and asked discovery. It was held that the suit was properly brought in the county of the residence of the principal. In *Delacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052, it was held that "the action containing the legal right to have judgment against D. (who resides in Meriwether county) on his indebtedness to the plaintiffs and the equitable right to have set aside an alleged fraudulent sale by D. to S. (who resides in another county), the superior court of Meriwether county had jurisdiction of the cause." Clearly, substantial relief was prayed against D., and it appears that his grantee was alleged to have colluded with him to delay and defraud creditors. A receiver, the setting aside of the conveyance or conveyances, and other relief was prayed, and the decision was substantially similar to that in *Kruger v. Walker*, 111 Ga. 333, 36 S. E. 794. In that

case a judgment creditor filed an equitable petition for the purpose of reviving a dormant judgment and subjecting certain property to it. It was said, "Nothing could be more substantial than to convert a dormant judgment without a lien into a living judgment binding upon specific property," and the case was held to have been properly brought in the county of the debtor's residence, although there was joined with him a resident of another county who was alleged to have colluded with him to conceal, by means of a fraudulent conveyance, the real ownership of the property sought to be subjected. In each of the cases of *Wright v. Southwestern Railroad Co.*, 64 Ga. 794, and *Mayo v. Wilson*, 68 Ga. 408, the state was the substantial party in whose behalf the execution was proceeding; and as it could not be sued, and therefore the venue could not be fixed with reference to it, it was held that a bill to enjoin the levy could be brought in the county of the residence of the sheriff who was proceeding to act. That this was an exceptional situation, and that the decisions are based on the ground stated, see *Rounsaville v. McGinnis*, 93 Ga. 581, 21 S. E. 123, and *Dade Coal Co. v. Anderson*, 103 Ga. 810, 30 S. E. 640. The remark cited from the concurring opinion of Mr. Justice Miller in *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S. 460, 10 Sup. Ct. 462, 33 L. Ed. 970, as to filing a bill in chancery, has no reference to the question of venue. In our opinion none of the authorities cited to sustain the jurisdiction in Chatham county are sufficient to accomplish that result.

We hold, under the facts of this case, that Chatham county was not the proper venue, and the objection of the railroad commissioners to the bringing of the cause there was well-founded. It needs no discussion to show that, if the original suit was not brought in the proper county, jurisdiction could not be conferred there by the filing of answers in the nature of cross-bills by one or more of the defendants against the commissioners. The ruling to the effect that, where a plaintiff voluntarily submits himself to a jurisdiction by bringing suit in a certain county, the defendant may file an equitable petition against him, in order to have adjudicated all matters necessary for his complete defense, has no relevancy to this case. *Moore v. Medlock*, 101 Ga. 94, 28 S. E. 836. If this equitable proceeding cannot properly be brought in Chatham county, in what county should it be brought? It is urged by counsel for plaintiffs in error that it must be brought in Fulton county. This argument is based upon section 2186 of the Civil Code of 1895, which, among other things, declares that "the office of said commissioners shall be kept at Atlanta." It is argued that this creates an official residence or domicile where suit must be brought. All suits must be brought against some person, either natural or artificial. *Barbour v. Al-*

bany Lodge, 73 Ga. 474; *Western & Atlantic R. R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978. Only a person can be a party. In fixing the venue of a suit against the railroad commissioners of this state, it must be determined whether the commission as a body is a corporation, and therefore an artificial person, which can be made a party, or whether it is simply an aggregate body composed of the individual commissioners, and they are the parties to the action. The law of this state nowhere declares the commission as such to be a corporation, or to have power to sue or be sued in that name. On the contrary, it more frequently speaks of the commissioners than of the commission. See Civ. Code, § 2185 et seq. In the two instances where provision is made for suit to be brought for a penalty incurred by a railroad company, it is expressly declared that it shall be brought in the name of the state. Civ. Code, §§ 2195, 2196. A mere declaration that the office of the commissioners shall be kept at Atlanta does not create a corporation. The decision in the case of *Texas & Pacific Ry. v. Interstate Commerce Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, is relied on; but an examination of that case will show that the act of Congress creating the interstate commerce commission, and providing that it shall be lawful for it to apply by petition to the circuit court sitting in equity, was held sufficient to create a body corporate with legal capacity to be a party plaintiff or defendant in the federal courts. In this respect the act of Congress is entirely different from the act creating the state railroad commissioners. The commission not being a body corporate, if the venue of a suit is to be fixed with reference to the commissioners, it follows, under the constitutional provision already quoted, that it would be in the county where one or more of the commissioners reside.

Inasmuch as we have held that this suit was not properly brought in Chatham county, and that on objection duly made the superior

court of that county was without jurisdiction over the persons of the railroad commissioners, and could not render the decree which is before us for consideration, we do not think we should enter into a discussion of whether the decree would have been right or erroneous, if rendered by a court having jurisdiction over the parties. In other words, if the superior court of Chatham county was without jurisdiction to pass on the case at all, it is unnecessary to go further and consider what some other court might or might not do. We are aware that decisions determining that a court has no jurisdiction, or that cases are not brought by proper parties, are sometimes spoken of as resting on a technicality, and there is a disposition on the part of some to treat with great indifference, if not actual disdain, everything which they refer to as "technical." But this spirit may be carried to an extreme. Certainly technical forms and ceremonies should not be carried to such a point as to hamper or obscure a proper administration of justice. But, on the other hand, the laws must be administered according to law, and justice must be determined with proper system and method. A suit must be brought by a person having the right to sue; and against a person who is properly sued; otherwise, cases might be decided and rights of the real parties adjudicated in their absence. The right to be sued in the proper county is not merely technical, but is a substantial, constitutional right. On this subject the language of the distinguished jurist, ex-Chief Justice Bleckley, may well be quoted: "Those who are impatient with the forms of law ought to reflect that it is through form that all organization is reached. Matter without form is chaos; power without form is anarchy. The state, were it to disregard forms, would not be a government, but a mob. Its action would not be administration, but violence."

Judgment reversed. All the Justices concurring.

(124 Ga. 742)

FURR v. BURNS et al.

(Supreme Court of Georgia. Jan. 13, 1906.)

1. EJECTMENT—PETITION—SUFFICIENCY.

Where a deceased devised land to his wife for life, with remainder to four named persons, and provided that, if one or more of such persons should be dead at the time of the death of the life tenant, their children should take such parts as their parents would have taken if living, on a suit to recover the estate from one in possession, brought by parties claiming under one of the remaindermen named in the will, an allegation that the other three remaindermen had been gone and unheard of for more than 7 years at the time when the will was made, that no one knows whether they are dead or alive, and, if dead, whether any children survive them, and that they had been unheard of for more than 30 years at the time of the death of the life tenant, was demurrable. The allegation may have been sufficient to show prima facie that the remaindermen were dead, but did not show whether they ever had children, or, if so, what became of them.

2. GUARDIAN AND WARD—SALE OF LAND—PROCEEDING—SERVICE ON WARD.

In a proceeding under Civ. Code 1895, § 4987, brought by a guardian for the purpose of making the sale of property of minors and a reinvestment of the proceeds, it is not necessary that minors under the age of 14 years should be served.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 838.]

3. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNOR.

A lease executed by a life tenant of real estate and the widow of one of the remaindermen, which recited that she acted by reason of being such widow and as mother of the children of her deceased husband, and which had been transferred by the lessee to others, did not confer upon persons claiming to have bought at a guardian's sale the interest of the minor a right to recover against one of the transferees of the original lessee, pending the term of the lease, on the ground that such transferee had failed to pay the rent and refused to deliver possession.

4. EJECTMENT—TITLE OF PLAINTIFFS.

Plaintiffs, seeking to recover possession of land, show no title by alleging that they were heirs of a life tenant, after her death.

5. PLEADING—FORM OF ALLEGATIONS.

Pleadings should allege as a basis of recovery facts, not mere general conclusions.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 12-28½.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by J. K. Burns and others against W. P. Furr. There was judgment for plaintiffs, and defendant brings error. Reversed.

J. K. Burns and others brought their suit in the superior court of Habersham county to recover of W. P. Furr a certain house and lot situated in the town of Clarkesville. Their petition alleged as follows: "The lot sued for was known as the 'Charles Deas Place.' For a long time prior to 1873 he owned it and lived on it, and in that year he died on it. In 1873 he made his last will, the third item of which was as follows: 'I give, devise, and bequeath to my executor, hereinafter named, for the

use, benefit, and advantage of my wife, Amanda, during natural life, my house and lot in Clarkesville wherein I now live, to be occupied by her as a home if she desires it, and, if not, the rents, issues, and profits to be paid to her for her own use during her natural life; and after her death said house and lot is bequeathed to and is to become the property of four persons or their children, Joseph Jenkins, son of my wife, Amanda, and Viena, Mary, and Jane, my children by Lucy, formerly servant of John R. Stanford. Said persons, if alive at my wife's death, to take said property share and share alike, and, if any one or more be then dead, their children to take such parts as their parents would have taken if alive." At the time the will was made the son, Joseph Jenkins, referred to in the will, lived with his parent on the property. The other children named in the will had at that time been gone and unheard of for more than 7 years, and no one knew where they were, whether dead or alive, and, if dead, whether any children survived them, having been unheard of for more than 30 years at the death of Amanda, the life tenant. A short while after making his will Charles Deas died, leaving his widow, Amanda, living on the property sued for, where she remained until her death. At the time of her death the family of her son, Joseph Jenkins, lived on the property with her. A short time before the death of Amanda, the life tenant, her son, Joseph Jenkins, died, leaving a wife and four children. A guardian was duly appointed for the children of Joseph Deas, who were minors, and an application was made for the sale and reinvestment of this property, which was granted. In pursuance of legal authority the property was exposed for sale in terms of the law, and was bought by the petitioners for the sum of \$1,500, and a deed was made them. Petitioners show that W. P. Furr, the defendant, has taken possession of a part of the property, to wit, a house and lot, and it is this they seek to recover. When the case was called for trial the plaintiffs offered an amendment to their petition, to which the defendant objected on the ground that it set forth a new cause of action. The court allowed the amendment, whereupon the defendant demurred to the original petition and to the amendment, and moved to dismiss the petition. The court overruled the demurrer, and refused to dismiss the petition, and the defendant excepted.

H. H. Dean and J. C. Edwards, for plaintiff in error. J. B. Jones, for defendants in error.

CANDLER, J. (after stating the foregoing facts). The devise was to the testator's wife for life, with remainder to four persons, with the provision that, if one or more of them should be dead at the time of

the death of the life tenant, their children to take such parts as their parents would have taken if alive. It was alleged that at the time when the will was made three of the remaindermen had been gone and unheard of for more than 7 years, and that no one knows whether they are dead or alive, and, if dead, whether any children survive them; they having been unheard of for more than 80 years at the time of the death of the life tenant. There is no allegation that they in fact had no children, or whether they had any children when they left or not, or, if so, when such children were last heard from. In order for this part of the legacy to fail, the remaindermen must have died before the life tenant, and must have left no children then living. If they had children, it must appear that such children had died. The only allegation on the subject is that no one knows. Pleadings must allege facts as a basis of recovery, not ignorance of facts. Whether, if there were children, their death might be shown by a similar presumption to that as to their parents, or whether, if the remaindermen were unmarried and childless when last heard from, a presumption that they so continued would arise, is not in question. There is no such allegation.

2. Generally, in cases of sales by trustees, all persons in interest should be notified. Civ. Code 1895, § 4865. But in regard to application for sale and reinvestment by guardians the Legislature appears to have entertained a different purpose. The act of November 11, 1889 (Acts 1889, p. 156), gave to the judge of the superior court of the county of the guardian's appointment power to order such sale and reinvestment, and provided that service of a copy of the petition be made personally on each of his wards, and also for service upon at least one of the next of kin, and for publication. This was amended by the Act of October 14, 1891 (Acts 1890-91, p. 229; Civ. Code 1895, § 2546), which retained the requirement of publication and of service on at least one of the next of kin, but changed the provision as to service on the minors so as to read "on each of his wards over the age of fourteen," thus apparently intentionally omitting those less than 14 years of age. Perhaps they considered service of some near kinsman, coupled with publication, sufficient in such cases. We think it would be well to require service on all children whose property is to be sold. It may seem anomalous to serve an infant in its cradle, but the very singularity of doing so is very apt to attract the attention of the person or persons having charge of the child and most interested in it, while, if an applicant is left to select which one or more of the next of kin he will serve, without serving the child, he may select some complaisant kinsman, not the one really interested. Still this is a matter for the Legislature, not for the courts. Section

4987 of the Civil Code of 1895 merely declares the mode of service on minors, not when it is necessary.

3. The amendment allowed in the present case showed that the life tenant and the widow of one of the remaindermen entered into a lease with one L. C. Furr, which recited that "Dolly Deas, widow of Joseph Deas, deceased, who by reason of her being the widow of Joseph Deas, deceased, and as mother of his children," entered into the contract. Attached to this lease was an assignment by L. C. Furr to the defendant and two other named persons. It will be seen that this contract was not made by the children themselves, nor by any one authorized to act for them. Nor did they ratify it, if they could have done so during their minority. She did not purport to act as guardian or by any legal authority. She claimed to be interested with the children as an heir of her deceased husband. The lease had not expired at the time of the suit, and under its terms the purchasers of the interests of the children of Dolly Deas did not occupy such a position in relation to the contract as would authorize them to recover on the ground that its terms had not been kept by the defendant. *Gunter v. Mooney*, 72 Ga. 205. If the plaintiff had been entitled to proceed to recover the land on account of an alleged violation of the lease by one of the transferees thereof, it would have been necessary to proceed against all.

4. A life tenant has no estate in the land which passes by inheritance to her heirs. Therefore persons claiming as her heirs do not show any right to recover from a person in possession on the ground that he obtained possession under a lease from her.

5. A mere general allegation that the defendant knew the property was to be sold by the guardian of the children, and "that he was at or near enough the sale at the time of the purchase by petitioners at the guardian's sale to hear the auctioneer crying the sale, and made no objection to the same or claim any interest or right to the same or any part," is only a statement of a conclusion in the alternative, and a special demurrer to it should have been sustained. So, also, of the allegation that the defendant "had so acted, claimed, and held himself out as the tenant aforesaid, and of having no interest, claim, or right to the property sued for, that these petitioners were induced to believe that the defendant had no claim or interest in the same, and they purchased the property aforesaid as bona fide purchasers, and paid for the same all the property was worth, without notice of any claim by the defendant." A special demurrer to this should have also been sustained.

Judgment reversed. All the Justices concur.

(124 Ga. 679)

SOUTHERN RY. CO. v. HOLBROOK.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. TRIAL—IRRELEVANT INSTRUCTIONS—CURING ERROR.

A charge inapplicable to the issues involved will not be cause for a new trial, where, in immediate connection therewith, the judge cures the error by instructing the jury, in effect, that the law which he has announced has no application to the case on trial.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 705, 718.]

2. MASTER AND SERVANT—INJURIES IN OPERATING RAILROAD.

Where, while a trainman is endeavoring to fasten with chains two detached portions of a train which has become separated by reason of the pulling out of a drawhead of one of the cars, the front part of the train is moved back upon him and he is injured, the injury is caused by the "running of the train," within the meaning of Civ. Code 1895, § 2321.]

3. SAME—RULES—INTERPRETATION.

The rules of the defendant company, which the plaintiff contracted in writing to obey, provided that "if anything connected with the coupling apparatus, cars, or track be defective or out of order, making the coupling or uncoupling more difficult or dangerous than ordinary, * * * the rules prohibit employees from attempting to make the coupling or uncoupling, or from remedying the defect or difficulty, but [they] must immediately upon discovery report the same to the conductor or other superior officer in charge of the train." Held that, under a fair construction, this rule contemplates that after the employee has reported the defect to the conductor he shall be subject to the conductor's orders in taking the necessary steps to remedy it.

4. NEW TRIAL—FAILURE TO INSTRUCT—NECESSITY OF REQUEST.

In the absence of a written request to charge in the present case, there is no merit in a ground of a motion for a new trial which complains that "the court erred in the entire charge to the jury, in failing, as movant contends, to charge them with the doctrine that an employee takes the ordinary risk incident to his employment."

5. APPEAL—CONCLUSIVENESS OF VERDICT—CONFLICTING EVIDENCE.

The evidence was conflicting, but the jury were fully authorized, under that offered for the plaintiff, to find the verdict rendered in his favor.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by J. N. Holbrook against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

S. J. Winn, D. K. Johnson, and Jno. S. Strickland, for plaintiff in error. Arnold & Arnold, for defendant in error.

CANDLER, J. Holbrook, the plaintiff in the court below, was a train hand in the employment of the Southern Railway Company. His petition alleges that while he was on a freight train of that company, in the discharge of his duties, at about half past 1 o'clock in the morning on a day named, the drawhead of one of the cars pulled out and the train parted; that in this emergency it became necessary to chain together the cars

at the point where the train separated; that the conductor, who had entire charge of plaintiff, directed him to assist in this work, which it was his duty to do; that by the conductor's orders the detached portions of the train were placed in such a position that the car from which the drawhead had been pulled (which was in the front portion of the train, or that attached to the engine) was situated at a distance of six or eight inches from the drawhead of the end car of the detached portion of the train, the entire train being brought to a complete stop; that, while the cars were in this position, plaintiff, under orders from the conductor, proceeded to the work of chaining the two cars together, when the engineer, fireman, or other employé in charge of the engine, negligently caused the front portion of the train to come back against the rear section, plaintiff's hand being caught between the two cars and injured in a manner set out. It was alleged that the engineer personally observed the situation of the train while plaintiff was at the work described, and knew of his position and the importance to his safety that the train be kept stationary. He sued for \$2,000 damages. The defendant filed an answer, in which it denied liability, and claimed that the plaintiff, under the rules of the company, which he was under written contract to observe, had no right to be in the position in which he was at the time of his injury. The jury found for the plaintiff the full amount sued for; the defendant moved for a new trial, which was denied, and it excepted.

1. The motion complains of a charge of the court, which, taken by itself, was undoubtedly erroneous as stating a principle of law inapplicable to the case on trial. This was cured, however, by another charge, in immediate connection with the one complained of, to the effect that the principles of law at first announced had no application in an action against a railroad company by an employé. It is always unfortunate for the trial judge to give to the jury instructions not germane to the case on trial, as it has a tendency to confuse and to lead the minds of the jury away from the real issues involved; but, where, as in the present case, an explicit instruction is given, the effect of which is to remove the confusion created by the first charge, we cannot say that the ends of justice demand that a new trial be granted.

2. Error is also assigned upon a charge to the effect that the burden would be shifted from the plaintiff to the defendant, upon a showing by the former either that he was without fault or that the company was at fault; the contention urged in the brief of counsel for the plaintiff in error being that such a charge is applicable only in cases where the injury was caused by the running and operation of the defendant's train, it being claimed that "the plaintiff was not injured in the running of the train, but was injured in endeavoring to make a coupling."

The distinction sought to be drawn is not well taken. If, while a trainman is endeavoring to make a coupling, a portion of the train is run against him and he is injured, we cannot escape the conclusion that in some way the "running of the train" was concerned in the injury. The argument that the injury was caused by the effort to make the coupling, rather than the running of the train, is a refinement of reasoning to which we cannot bring ourselves to agree. We therefore hold that the charge under consideration was not error. *Georgia Ry. & Electric Co. v. Reeves*, 123 Ga. 697, 51 S. E. 610.

3. There was introduced in evidence a contract, signed by the plaintiff, of which the following is a copy: "I, J. N. Holbrook, fully understand that the rules of the Southern Railway Company positively prohibit all employes, in coupling or uncoupling cars or air hose, from going between the cars while either car is in motion. Employes are also prohibited from going between the cars while an engine is attached to either, for any other purpose than to adjust for a coupling the knuckle on the car farthest away from the engine, or to couple the air hose, and then only when the cars are stationary and the knuckle can be adjusted in the ordinary way by raising the lever with one hand and opening or closing the knuckle with the other. If anything connected with the coupling apparatus, cars, or track be defective or out of order, making the coupling or uncoupling more difficult or dangerous than ordinary, I fully understand that the rules prohibit employes from attempting to make the coupling or uncoupling, or from remedying the defect or difficulty, but must immediately upon discovery report the same to the conductor or other superior officer in charge of the train. In consideration of being employed by said company, I hereby agree to be bound by said rules, and waive all or any liability of said company to me for any results of disobedience or infraction thereof. I further understand that many foreign cars, which this line must necessarily handle and transport, have no bumpers attached to them, and that thereby the danger of going between the cars to couple or uncouple or adjust pins is greatly increased. I further and plainly and explicitly understand and take notice as a part of this contract and regulation, that no conductor of any train, freight or passenger, or engineman or fireman, or any other agent of the Southern Railway Company, has the right to waive or dispense with or suspend, or in any way alter or amend any of the provisions, conditions, contracts, stipulations, or regulations contained in this paper writing. I am also hereby informed and take notice of the fact, and fully understand, that no conductor of a train, passenger or freight, or any engineman or fireman, or any other agent in and about such trains, has the authority to discharge, dismiss, or otherwise punish or injure me for adhering

strictly to the conditions, stipulations, and regulations contained in this paper, or the failure to obey any order to violate said conditions, stipulations, and regulations contained in this paper writing. * * * I have read the above carefully and fully understand it, and have received a duplicate thereof." It is contended by counsel for the railroad company that, by reason of this contract and its alleged violation by the plaintiff, no verdict could legally be found in his favor, and that certain charges of the court below were erroneous, as placing upon the contract an unwarranted construction.

It was in evidence that, when the train separated and the plaintiff discovered the cause of the trouble, he took no steps on his own initiative to remedy the defect, but at once reported to the conductor what had happened, and from that time acted only under the orders of the conductor. In reporting to the conductor he was acting literally in accordance with the rule laid down in his contract directing what he should do in case of emergency. The contract is silent as to what further steps should be taken in cases of emergency after the report had been made to the conductor; but it is safe to assume that it was not intended that the trainmen should refuse to obey the orders of their superior in taking measures to relieve the situation, leaving the conductor alone and unaided to do whatever work was necessary by himself. A reasonable construction would seem to be that trainmen were given no discretion in deciding what steps were necessary to remedy a defect caused by an emergency, and were not permitted to do anything on their own account under such circumstances. The responsibility for the safety of the train was on the conductor, and therefore, when an emergency occurred, the first thing for the trainman to do was, not to attempt to exercise his own judgment in remedying the defect, but to report immediately to the conductor, and thereafter obey his orders. The contract is very sweeping and drastic in its terms, and seems to have been designed primarily to defeat a recovery by its employe for an injury growing out of any conceivable combination of circumstances; but such instruments will always be construed most strongly against the company, by which they were prepared. *Western & Atlantic R. Co. v. Bussey*, 95 Ga. 585, 23 S. E. 207; *Richmond & Danville R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *Georgia R. Co. v. Clarke*, 97 Ga. 706, 25 S. E. 368. In the present case it requires no forced construction to decide that, under the terms of the contract, after the plaintiff had reported to the conductor the existence of the defect in the train which gave rise to an emergency, it was his duty then to obey the conductor's instructions in the steps necessary to overcome the emergency.

4, 5. The fourth headnote needs no elaboration. The evidence was conflicting, but that

for the plaintiff was amply sufficient, if believed by the jury, to warrant the verdict returned. The trial judge, by overruling the motion for a new trial, expressed his approval of the verdict, and this court will not interfere.

Judgment affirmed. All the Justices concurring.

(124 Ga. 671)

WHITT et al. v. BLOUNT.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. PARTNERSHIP — NAME — ALLEGATIONS OF PLEADING.

Although the name "Artope & Whitt Company," standing alone, would import a corporation, where it is designated in a plea as "a business known as the Artope & Whitt Company and owned by" defendants, and is repeatedly referred to in the plea as the business of defendants, such name will be construed as a mere trade-name under which defendants are conducting their business.

2. CONTRACTS—DURESS.

"The free assent of the parties being essential to a valid contract, duress * * * by threats or other arts, by which the free will of the party is restrained and his consent induced, will void the contract." The plea in the present case was a good plea of duress.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 431-441.]

3. SAME — WANT OF FAILURE OF CONSIDERATION—PLEADING.

The pleas of want of consideration and failure of consideration in this case were improperly stricken.

4. PLEADING—RECOUNPMENT.

A plea of recoupment being a cross-action by the defendant against the plaintiff, its allegations as to damages must be as specific and certain as if made in a petition.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 292.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by A. S. Blount against D. S. Whitt and others. There was judgment for plaintiff, and defendants bring error. Reversed.

A. S. Blount sued D. S. Whitt and G. E. Artope on three promissory notes given by the defendants to the plaintiffs, dated October 10, 1903, aggregating \$500, and due, respectively, two, four, and six months after date. The defendants filed the following plea: In 1903 defendants entered into a contract with plaintiff "in which he agreed to work for a business known as the Artope & Whitt Company and owned by them." Under this contract he was given control and management of their marble yard at Rocky Mount, N. C., and all of the business connected with the same in the states of Virginia, North Carolina, and South Carolina. In 1904 plaintiff, "contrary to his duties to defendants, and contrary to the law and good morals, got the affairs of said business and said marble yard business [so] thoroughly in his control as that no one else understood the same, nor could manage the same. Thus he brought about such a state of affairs that de-

fendants could not do without him except at a great financial loss to themselves. Following out his plan, he refused to carry out his contract with defendants and threatened immediately to quit their employment unless they would submit to certain new and unjust demands," to wit, the giving of the note sued on and "the payment of a certain sum of money." Moreover, he threatened "to leave and take with him certain property, and to retain funds amounting to \$847.38," which he had collected for defendants. "In addition to this [plaintiff] held and controlled numerous writings, contracts, etc., for work to be erected, amounting to thousands of dollars, and had it in his power to collect large sums for work which he had done and controlled, and which he alone could collect with facility and without great loss to defendants." Plaintiff, "being insolvent and understanding the power he had to coerce defendants, forced them into signing said notes; he agreeing as a part of the consideration therefor to continue on in their service for the year, and especially to carry out the contracts which he had obtained, and to collect the outstanding debts due them, and to do all other things in his power usual in such circumstances to carry on the business of defendants. After coercing defendants to pay him the sum of money and give him the notes as above stated, upon the consideration of his agreement to serve them for the year and collect the moneys due them and save them the losses above referred to, [plaintiff] * * * in a week or two thereafter and before the said year was out, contrary to said contract, did quit the service of defendants, and by so doing caused them to lose large sums of money, aggregating \$1,000 or other large sum, an itemized list of same being hereto attached marked 'Exhibit A.' Wherefore, the premises considered, defendants plead that said notes were obtained by fraud and duress, and were without consideration, and that the consideration for same has failed. They also pray that they may be allowed to recoup the said damages in the sum of \$1,000 against said plaintiff, and that they may have judgment for same." No exhibit or itemized statement of damages suffered by defendants was annexed to the plea. The plaintiff demurred to this plea on the grounds (1) that the contract set out therein appears to have been made between the plaintiff and the Artope & Whitt Company, presumably a corporation and a third party, and the breach thereof cannot be pleaded in defense to the action against defendants as individuals; (2) that the allegations do not make a case of fraud or duress; (3) that no cause of action is set out against plaintiff to enable defendants to recoup against him, and no bill of particulars is attached to the plea; (4) that the terms of the contract which plaintiff is alleged to have broken are not stated; and (5) that the plea admits the execution

of the notes sued on and sets forth no valid defense to a suit on them. The court sustained the demurrer generally, struck the plea, and, there being no issuable defense filed under oath, rendered judgment against the defendants, who excepted to the ruling striking their plea.

Arthur L. Dasher, for plaintiffs in error.
B. J. Dasher, for defendant in error.

CANDLER, J. 1. The name "Artope & Whitt Company," without more, would import a corporation; but when designated in the plea as "a business known as the Artope & Whitt Company, and owned by" defendants, and when considered in connection with all the other allegations of the plea relating thereto, it clearly appears that it was not a corporation, but a mere trade-name under which defendants were conducting their business.

2. Civ. Code 1895, § 3536, declares: "Duress consists in an illegal imprisonment, or legal imprisonment used for illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." The language of section 3670 is: "The free assent of the parties being essential to a valid contract, duress, either of imprisonment or by threats, or other arts, by which the free will of the party is restrained, and his consent induced, will void the contract. Legal imprisonment, if not used for illegal purposes, is not duress." The provision of these sections essentially modify the strictly defined doctrine of duress at common law. Under that doctrine duress was divided into two classes, viz.: (1) By imprisonment; that is, when a person is actually imprisoned (a) for an improper purpose without just cause, (b) for a just cause without lawful authority, or (c) for a just cause and under proper authority, but for an improper purpose. (2) Per minas, when a person (a) is threatened with loss of life, (b) is threatened with loss of limb, (c) is threatened with mayhem, or (d) is threatened with imprisonment. Accordingly, the English decisions, as well as a number of cases in the United States, adhering to the common-law doctrine, hold that a threat to destroy, injure, or detain goods or chattels does not constitute such legal duress as to be ground for setting a contract made under its influence. 9 Cyc. 444 et seq. Duress consists, not merely in the act of imprisonment or other hardship to which the party is subjected, but the state of mind produced by those circumstances, and in which the act sought to be avoided was done. *Id.* 443. An essential element of a contract in the true sense—that is, as distinguished from quasi or constructive contracts—is an agreement or mutual assent of the parties, and, as stated in section 3670 of the Civil Code of 1895, this assent, in order to make the con-

tract valid, must be free; that section declaring that duress, not only of imprisonment or by threats, but by "other arts, by which the free will of the party is restrained, and his consent induced, will void the contract." The language of section 3536, defining duress, is equally broad, since it declares that duress consists not only in any illegal imprisonment, or legal imprisonment for an illegal purpose, or threats of bodily or other harm, but also of other means amounting to coercion or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will. According to the weight of modern authority, the unlawful detention of another's goods under oppressive circumstances, or their threatened detention, will avoid a contract on the ground of duress, for the reason that in such cases there is nothing but the form of agreement, without its substance. Clark, *Contracts*, 240; 9 Cyc. 451. "Where the parties are not at arms' length, but one of them is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to or withholding of property as made under duress, as, for example, where a common carrier refuses to deliver or transport freight already in his possession, unless the shipper will sign a separate contract; where illegal charges are exacted by a custom's officer as a condition of the delivery of property; where a banker refuses to honor a customer's check unless he accedes to a false and fraudulent claim; where one with the necessary power threatens to prevent the clearance of a vessel; where a gas or water company refuses to furnish gas until a promise which it has no right to exact is made; where a state institution refuses to admit a student unless a payment of an illegal fee is made by him." 9 Cyc. 452, and cases cited. See, also, Clark, *Contracts*, 243, and cases cited in note 206.

As we have seen, the plea in the present case alleges, in substance, that the defendants, the year before the notes were given, had placed plaintiff in control of their business in North Carolina, which extended also into the states of South Carolina and Virginia; that he had a thorough knowledge and control of such business; that he had entered into numerous contracts, involving large sums of money, for the execution of work pertaining to the business; that he had collected and had in his possession nearly \$850 in money belonging to the defendants; that he also had control of numerous writings, contracts, and other property relating to the business; that under the circumstances no one but plaintiff could carry on the business except at a great financial loss to defendants; that plaintiff had brought about this state of affairs in pursuance of a preconceived plan to coerce defendants into giving him the notes; that he was insolvent; that he threatened to leave the employ of defendants, and take with him their money, contracts, and other property, unless they gave him the

notes and paid him a certain sum of money; and that, fearing plaintiff would carry out such threats, to the great financial loss of defendants, they gave him the notes. We are of the opinion that the plea, while not coming up to the requirements of technical accuracy, was in substance a good plea of duress, and that the court erred in striking it.

3. If the notes were given under duress, they were void. And if plaintiff agreed to continue in the employ of defendants for the balance of the year in which the notes were executed and to do for the defendants the things set out in the plea, and he, without fault on defendants' part, failed to comply with his agreement, there was, to that extent, a failure of consideration.

4. The plea failed to set out in the body thereof, or in an exhibit attached thereto, any specific damages which defendants suffered by reason of plaintiff's alleged breach of his agreements; and it was therefore not a good plea of recoupment, and was subject to the special demurrer made thereto. *Atlanta Glass Co. v. Noizet*, 88 Ga. 44, 13 S. E. 833.

Judgment reversed. All the Justices concurring.

(124 Ga. 630)

CENTRAL OF GEORGIA RY. CO. v. WRIGHT, Comptroller General, et al.

(Supreme Court of Georgia. Jan. 9, 1906.)

1. TAXATION—PROPERTY SUBJECT.

Stock in an Alabama railroad company, whose lines lay outside of Georgia, was owned by the Central Railroad & Banking Company of Georgia, a domestic corporation. To secure an issue of bonds that company conveyed the stock by deed of trust to a New York trust company, and an entry of transfer of the stock to the trust company was made on the books of the Alabama corporation. The Central Railroad & Banking Company of Georgia went into the hands of a receiver, its assets were disposed of at a judicial sale, and the Central of Georgia Railway Company, a new corporation chartered under the laws of Georgia, became the owner of its properties, including the equitable interest in the Alabama stock. The New York trust company has the physical possession of the stock certificates, as well as the legal title thereto; but every beneficial interest, including the right to receive dividends and to vote the stock, as well as the equity of redemption, is owned by the Central of Georgia Railway Company, subject only to its compliance with the terms of the bonds to secure which the deed of trust was given. *Held* that, the substantial beneficial ownership of the stock being in the Central of Georgia Railway Company, that company is liable to be taxed thereon in Georgia.

2. SAME.

On all other points presented by the record, this case is controlled by the decision in *Georgia R. Co. v. Wright*, 53 S. E. 251, 124 Ga. 596, this day decided.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between the Central of Georgia Railway Company and W. A. Wright, Comptroller General, and others. From the judgment, the railway company brings error. Affirmed.

Lawton & Cunningham and Alex. C. King, for plaintiff in error. Jno. C. Hart, Atty. Gen., and J. D. Kilpatrick, for defendants in error.

CANDLER, J. This case differs but slightly from the case of *Georgia R. Co. v. Wright*, 124 Ga. 596, 53 S. E. 251, this day decided. No question of *res adjudicata* or of the statutes of limitation is involved in the present case, but otherwise the two cases are identical in principle, save as to the one question now for determination. That question grows out of the peculiar character of the ownership by the Central of Georgia Railway Company of its half of the capital stock of the Western Railway of Alabama. It appears that this stock was originally owned by the Central Railroad & Banking Company of Georgia, which company, in 1887, conveyed it by a deed of trust to the Central Trust Company of New York, to secure an issue of bonds amounting to \$5,000,000. In 1892 the property of the Central Railroad & Banking Company was placed in the hands of a receiver in the Circuit Court of the United States; the equitable interest in this stock being part of the property turned over to the receiver. Subsequently, pursuant to orders granted by the United States court, the receiver pledged this equitable interest to secure a loan of money, and the Mercantile Trust Company of New York eventually became the owner of the equity by purchase at public sale. The property of the Central Railroad & Banking Company was sold under an order of court, and subsequently the Central of Georgia Railway Company, the present plaintiff in error, was incorporated, and became the owner, by successive transfer, of the equitable interest in this stock. Under the terms of the trust deed from the Central Railroad & Banking Company to the Central Trust Company the stock was transferred on the books of the Western Railway of Alabama, and stands in the name of the Central Trust Company. The physical possession of the stock certificate is also in the latter company. The grantor in the deed, however, is allowed to receive the dividends earned by the stock, contingent only upon the payment of interest on the bonds to secure the payment of which the deed of trust was given, and has the trustee's proxy to vote the stock in all elections of the Western Railway of Alabama. In short, the property which the stock represents is situated in Alabama; the stock itself and the legal title to it under the deed of trust are in New York; the beneficial ownership of the stock, the right to vote it, to receive its dividends, and to acquire the legal title to it upon the payment of the bonds, is in the Georgia company. The question is where is the situs of the stock for purposes of taxation.

We have seen, in the case of *Georgia R. Co. v. Wright*, supra, that the situs of stock in a foreign corporation, for the purposes of

taxation, is at the domicile of the owner of the stock. Now, the ownership of the stock involved in the present case is, as it were, split. The Central Trust Company, of New York, is the owner of the legal title, and the plaintiff in error owns the equity of redemption and the right, on compliance with the terms of the deed of trust executed by its predecessors in title, to enjoy every substantial benefit flowing from the stock. We agree with counsel for the railroad company that the deed of trust comes squarely within the terms of the Civil Code of 1895, § 2771, and that it conveyed to the trust the full legal title to the stock during the life of the bonds which were given to secure, subject to be defeated by the payment of the principal of the bonds at maturity, together with interest as it accrued. That, however, does not settle the question of taxable ownership in favor of the contentions of the plaintiff in error; for we find that in Georgia the law looks, in matters of taxation, rather to the substantial, beneficial ownership of property conveyed under the Civil Code of 1895, § 2771, than to the shadowy, technical ownership of the legal title. Thus, in the Political Code of 1895, § 778, it is provided that "while the public may treat the property as belonging either to the maker or the holder of a bond for titles, when the latter is in possession, yet as between the parties the one receiving the rents or enjoying the use is liable for the tax." And in *Wells v. Savannah*, 87 Ga. 399, 13 S. E. 442, Mr. Chief Justice Bleckley, delivering the opinion, used the following apt and pointed language, the application of which to the case now in hand seems irresistible: "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. * * * Where taxation is ad valorem, values are the ultimate objects of taxation,

and they to whom the values belong should pay the taxes." To the same effect see *National Bank v. Danforth*, 80 Ga. 55, 7 S. E. 546. We are not unmindful of the fact that many eminent authorities, cited in the brief of counsel for the plaintiff in error, sustain the contention that the situs for taxation of property conveyed by a deed of trust is at the domicile of the trustee who holds the legal title; but the case cited seems to rest mainly on statutory grounds. As was said in *Dorr v. Boston*, 6 Gray (Mass.) 132, relied on by counsel for the plaintiff in error: "The rules of taxation are wholly of statute provision." Our own statutes, and the decisions of our court of last resort, lay down a different principle, and by that we are bound.

The Central of Georgia Railroad Company receives the dividends, votes the stock, and has every beneficial interest in the property, except the doubtful one of physical possession. In accordance with the Georgia authorities which we have cited, we therefore hold that it is liable to pay the tax. It does not matter that it never owned the legal title at any time, and is not a party to the deed of trust by which it was conveyed to the Central Trust Company nor to the bonds the redemption of which by it is necessary to its ownership of the legal title. The important fact is that it now has the substantial, equitable, taxable ownership of the property. As has been indicated, on all points presented by the present record which are not dealt with in the foregoing discussion the case of *Georgia R. Co. v. Wright*, 124 Ga. 596, 53 S. E. 251, is controlling. As the only tax sought to be enjoined in the present case is that for the year 1900, the directions given in the former case are not pertinent to this.

Judgment affirmed. All the Justices concurring.

(59 W. Va. 225)

DUNFEE et al. v. CHILDS et al.(Supreme Court of Appeals of West Virginia.
March 6, 1906.)**1. EQUITY—BILL OF REVIEW—DEPOSITIONS.**

Upon a bill of review for error of law, depositions cannot be considered.

2. SAME—PENDENCY OF APPEAL.

A bill of review for error of law cannot be maintained while an appeal is pending in the Supreme Court of Appeals.

3. APPEAL—DISMISSAL—TIME OF EFFECT.

When an appeal is dismissed by an order of the Supreme Court of Appeals, it stands dismissed and ended on the actual date of such order, and does not continue to exist as an appeal to the end of the term of the Supreme Court of Appeals.

4. COURTS—PENDENCY OF OTHER SUIT—STAYING PROCEEDINGS.

A stay of proceedings in a suit provided for by section 6, c. 136, Code 1899, rests in the sound discretion of the court. To warrant the stay, it must be essential to justice, and it must be that the judgment of decree by the other court will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy in it.

5. EQUITY—BILL OF REVIEW—GROUNDS.

A decree of the Supreme Court reversing, for error of law, a decree under which land is sold, is not newly discovered evidence for a bill of review to reverse a later decree of a circuit court dismissing a bill filed to set aside a deed made to the purchaser under such decree of sale by the former owner of the land after the sale and its confirmation.

6. SAME.

The reversal by the Supreme Court is not newly discovered evidence or matter for a bill of review to reverse a decree of a circuit court made before such reversal.

7. DEEDS—CANCELLATION.

Will a decree of the Supreme Court of Appeals reversing a decree of sale of land be alone ground for a bill to cancel a deed made to the purchaser under the decree by the debtor and owner of the land before reversal, when there is no other consideration for such deed than such decree of sale and purchase under it?

8. VENDOR AND PURCHASER — BONA FIDE PURCHASERS—JUDICIAL SALE.

Where a party to a suit interested in a decree for sale of a debtor's land by having a debt decreed him against the land is the purchaser under the decree of sale, and he then conveys the land, after confirmation of the sale and before a bill of review or appeal to reverse the decree of sale, to a bona fide purchaser, for valuable consideration, without actual notice of error in the decree, such purchaser's title is not affected by a reversal of the decree of sale on bill of review or appeal.

9. LIS PENDENS—EFFECT OF SUIT—BILL OF REVIEW.

A suit as a lis pendens ends with final decree. A bill of review or appeal to reverse such decree is a new lis pendens, as regards purchasers claiming title under the decree, and is not a mere continuation of the original suit.

10. CANCELLATION OF INSTRUMENTS — PURCHASER FOR VALUE.

A decree of cancellation of a deed for land for fraud, or duress, or want of consideration, cannot be made against a purchaser, for valuable consideration, without notice of the facts tainting the deed with fraud, duress, or want of consideration.

11. DEEDS—GROUNDS OF INVALIDITY—FRAUD—DURESS.

A threat by one having good title to land and entitled to possession as purchaser under a decree of sale, as against the debtor occupying

the land, to eject such occupant by process under the decree of confirmation of sale, does not constitute fraud or duress to set aside a deed made by such occupant to said owner.

12. VENDOR AND PURCHASER — BONA FIDE PURCHASERS.

One claiming land under either a quitclaim deed or a deed with covenant of special warranty may make the defense of a purchaser for valuable consideration without notice.

13. DEEDS—FORM—INTEREST CONVEYED.

A deed of the form prescribed by section 1, c. 72, Code 1899, containing the words "do grant," though it contains a covenant of only special warranty, will pass the very land itself, and all estate, right, title, and interest of the grantor therein.

14. DEEDS—SETTING ASIDE—LACHES.

To set aside a deed for fraud, suit must be brought in a reasonable time, a time reasonable under circumstances of the particular case. Delay, especially where it affects third persons, will bar relief.

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County.

Suit by James R. Dunfee and others against H. Childs, Jr., and others. From a judgment for defendants, plaintiffs appeal affirmed.

Van Winkle & Ambler and Dave D. Johnson, for appellants. T. P. Jacobs, Pugh & Pugh, Roberts & Carter, M. F. Elliott, Erskine & Allison, and S. Bruce Hall, for appellees.

BRANNON, J. H. Childs & Co. brought a suit in equity in Tyler county to enforce judgment liens on land of Dunfee, and in it a decree was entered in August, 1891, to sell a tract of 85 acres of land of Dunfee for various debts, one of them to Hardman. Under this decree sale was made of said tract to Hardman, and the sale was confirmed in December, 1891. The decrees of sale and confirmation were by default. Dunfee filed a bill of review, in April, 1894, but it was dismissed. On appeal to this court the decree dismissing the bill of review was reversed for error of law, and the case was remanded to the circuit court. 45 W. Va. 155, 80 S. E. 102. The decree of reversal dates May 6, 1898. In April, 1894, Dunfee and wife filed what is called a "supplemental bill," in the nature of a bill of review. In it the charge was made that Hardman chilled the bidding at the sale, pretending to be buying the land with intent to let Dunfee redeem, and also that after his purchase Hardman, with knowledge that his title under the judicial sale was bad, went in company with a deputy sheriff, Hardman, being at the time sheriff, to the residence of Dunfee on the land, and represented that Dunfee's wife had no contingent dower in the land, and that under his purchase he could at once turn them out of possession, and would do so, unless they would execute to him a special warranty deed to the land, but that, if they would do so, he would let them remain on the land for the balance of the year 1892 from March, and that under this representation, and supposing that their legal rights

had been entirely taken away by the sale, and that Hardman knew what he stated to be true, in order to keep from being turned out of doors, they executed such deed to Hardman, dated March 28, 1892. The deed recites a consideration of \$100 paid and other valuable consideration; but it seems that said \$100 was not, in fact, paid. The bill alleges that there was no consideration but the promise not to execute the writ of possession and allow Dunfee to remain in possession. A writ of possession had been awarded to Hardman by the court. On the date of the deed Dunfee took a lease of the land from Hardman. This bill alleged numerous errors of law in the decree of sale, and in this respect it was a bill of review, and in the other respect an original bill to cancel said deed for fraud, duress, and want of consideration. For these causes this bill sought to reverse the decrees of sale and confirmation for error of law, and to set aside the sale, and also annul the deed from Dunfee and wife to Hardman. The bill states that Hardman had conveyed the land to McCoach, and McCoach had conveyed an interest therein to West, and they had leased the land for oil to Ludwig & Mooney, and they had assigned the lease to the Carter Oil company. Under said lease large quantities of oil were produced. This bill of April, 1894, sought to charge those liable therefor with the oil royalty in favor of Dunfee. This bill set up the fact that there had been a bill of review, as above stated, to reverse the decree of sale for error of law, and that said bill of review had been dismissed by the circuit court, and that an appeal to this court had been applied for, but did not say that such appeal had been granted or was pending. The bill also averred that Dunfee and wife had then pending another bill of review in the circuit court to reverse the decree of sale, and asked that said bill of review be read with said supplemental bill. When the cause was called for hearing on said bill of April, 1894, Dunfee and wife moved the court to stay the hearing until an appeal, alleged in the motion to be pending in the Supreme Court, from a decree dismissing said bill of review filed to review the decree of sale should be determined; but the court refused to stay the case, and dismissed said supplemental bill, in the nature of a bill of review. This decree was made in December, 1896. In May, 1899, Dunfee and others filed another bill, a bill of review, to reverse the decree of December, 1896, which dismissed said supplemental bill, and to set aside said deed to Hardman for fraud, duress, and want of consideration. We may say this was for error of law. This bill also set up the fact that the Supreme Court had reversed the decree of the circuit court dismissing the bill of review which had been filed to reverse the decree of sale and the sale under it. This was set up to have the effect of newly

discovered matter to reverse the decree of December, 1896, dismissing said supplemental bill. Dunfee had died, and this last bill of review was filed by his heirs. On full defense this last bill of review was dismissed by decree dating 10th of October, 1900. From this decree the plaintiffs have appealed.

The printed record contains 410 pages besides the record on the former appeal, and the briefs 381 pages, and the case has been complicated by numerous elaborate pleadings. It is to be noted that this appeal is only from the decree of October 10, 1900, dismissing the last bill of review. The question is, should that decree be reversed? Instead of dismissing the bill of review of May, 1899, should the decree have been one reversing the decree of December, 1896, and canceling the deed from Dunfee and wife to Hardman? At once I remark that we cannot consider whether the court upon the bill of April, 1894, ought to have set aside the deed from Dunfee and wife to Hardman, for the reason that that matter turned on depositions, which cannot be considered upon a bill of review. To reverse the decree of December, 1896, for that matter, there must have been an appeal from it, bringing the evidence under review. By the decree the court found that the evidence did not sustain the attack on the deed, and it could not reach this conclusion except by considering the evidence. The depositions were voluminous and conflicting upon the questions of duress, want of consideration, misrepresentation, and improper procurement of the deed. Error of a court upon questions of fact under evidence is not reviewable on bill of review. *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209; *Dunn's Ex'rs v. Renick*, 40 W. Va. 349, 22 S. E. 66. The last bill of review, that of May, 1899, assigns only two errors in the decree of December, 1896—one the failure to stay the case until decision of the Supreme Court; the other, "in dismissing the bill, because, upon the face of the decree as shown by the pleadings, the plaintiffs were entitled to the full relief prayed for." This is very indefinite and general. What is its meaning? The law requires definite assignment. This is hardly an assignment of error. If it means, as I suppose it was intended, that the court erred in not setting aside the deed for fraud, we cannot consider it, as that hinges on the evidence. Of course, the decrees of 1891 are not involved, as they have been reversed, or we will say so. The only question presented by the last bill as error of law in the decree of December, 1896, to be considered by us, is whether there is error in refusing to stay the hearing of the bill of April, 1894. We cannot look into the affidavits as to the mere matter of continuance not touching the stay.

It is claimed that there is error in the decree of December, 1896, dismissing the bill of April, 1894, because the circuit court failed to stay the proceedings until the deci-

sion of the Supreme Court on appeal from the decree of sale of August, 1891. But there was nothing to show that in fact such an appeal was pending. It is enough to close this question, the only question of law involved, that the record does not present this error, as a bill of review for error of law can only be sustained by error on the face of the decree. The motion to stay the suit, it is true, did aver that there was pending in the Supreme Court an appeal; but no showing of that kind was made by affidavit, record, or otherwise. And, as against the adverse party, this averment amounted to nothing. The answers of Childs & Co. and the Carter Oil Company denied the pendency of such appeal, and the bill does not allege its pendency, and no showing of it was made by the record, and the mere statement of the plaintiffs in their motion would not show the existence of an appeal, as it would not establish the fact of the appeal as against the other parties. So there is no error in the refusal of a stay. On the contrary, instead of there being ground to stay the case, there was ground under this head to justify the dismissal of the bill, because by their motion to stay the plaintiffs admitted the pendency of an appeal in the Supreme Court for the same matter for which they had filed their bill of April, 1894, and thus admitted that they had already an appeal pending to reverse the decree of sale for error of law, and therefore could not have a bill of review in the circuit court for the same error of law. Instead of that being matter to stay the case, it was matter calling for the dismissal of their bill, so far as it is to be viewed as a bill of review, so far as the error of law was concerned. There cannot be a bill of review for error of law while an appeal is pending from the same decree. *Maxwell v. Martin*, 35 W. Va. 384, 14 S. E. 7; *Kimberly v. Arms* (C. C.) 40 Fed. 548; *Enslinger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732.

The record of the appeal on the old bill of review shows that the appeal was not granted until months after the decree of December, 1896, namely, April 30, 1897. A former appeal there was, but it was dismissed four days before that decree, and in fact there was no appeal pending when that decree was rendered. Orders appended to a brief of Dunfee's counsel so show as to the first appeal; but legally we cannot look into them, as they are not part of the record. Therefore the fact remains that it does not appear that any appeal actually existed at the date of the decree of December, 1896. This is enough to justify action on, and dismissal of, the bill of April, 1894, so far as the matter of stay is concerned—that is, so far as the action of the court refusing such stay is imputed as error—and that is the only matter of error of law involved in the decree of December, 1896, dismissing the bill of April, 1894, since the old decrees of 1891 are out of the way.

As there was no appearance of record to show the actual pendency of an appeal it is unnecessary, except in deference to the point made by counsel, to advert to the point that, though the first appeal was dismissed on the 12th day of December, 1896, by the Supreme Court, yet this court did not close its term until December 31, 1896, and that the order dismissing the first appeal did not thus become final until December 31st, and was not in force on the 16th of December. This point is not tenable. For some purposes judgments relate to the first day of a term, for instance, as a lien; but hardly ever to the last day for any purpose. It is true that during a term the record is in the breast of the court, and may be set aside; but generally the date of actual rendition is the date by which the judgment is to be tested as to its force and operation. *Long v. Perine*, 44 W. Va. 243, 28 S. E. 701. On December 12, 1896, the order dismissing the first appeal took effect. On that date that order put that appeal out of court. Its life was gone for all purposes, and it had no existence on the 16th of December. Even if the 31st of December, the close of the term, had anything in the world to do with the question when the term closed on that date, it would retroact and make the order dismissing the appeal have full effect, in a legal point of view, on the date when it was actually made, the 12th day of December, and enable us to assert that on the 16th of December there was no appeal pending. We decided in *Cresap v. Cresap*, 54 W. Va. 581, 46 S. E. 582, that the date of a judgment or decree, as shown by the record, marks the point of time from which the limitation of a writ of error or appeal runs; that is, the actual day of the term on which it was made. Let us suppose, however, that there was pending on the 16th of December, 1896, an appeal. The stay of proceedings was not material as to the matters of law involved in that appeal, the matters affecting the decree of sale. The question whether that decree should be set aside was fixed by the record of the appeal. In case of reversal, such reversal would remove the decree of sale without any aid from the decree on the bill of April, 1894, reversing the decree of sale.

Can we regard such stay of proceedings material as to that matter of the bill of April, 1894, which sought the vacation of the deed from Dunfee and wife to Hardman, dating March 28, 1892? I think not. If we should say that a stay had been granted, and that the Supreme Court had reversed the decree of sale, and that this fact had been brought into the case by amendment of the bill of April, 1894, would it demand a decree reversing the decree of sale (supposedly already reversed by the Supreme Court) and annulling the deed from Dunfee and wife to Hardman. If we concede that such reversal would alone constitute ground for the annulment of that deed, if Hardman still owned the land, yet could it be annulled as against McCoach and

West and Ludwig & Mooney and the Carter Oil Company? Could a reversal of that decree by the Supreme Court upon the appeal, or by the circuit court under the bill of April, 1894, treated as a bill of review, affect those purchasers for valuable consideration, though it would affect Hardman? Could a decree upon that bill of April, 1894, treated as an original bill, setting aside that deed, affect the said purchasers, though they held title derivatively from Hardman? I hold that they could not be affected in either aspect, for the reason that they are purchasers for valuable consideration without notice. Further on I will seek to give reasons based on authority for this position. In connection with the subject of stay, I will add since that stay constitutes the shibboleth of the appellants to sustain the claim of error of law in the decree of December 16, 1896, which they would reverse by their last bill of review, that counsel cites section 6, c. 136, Code 1899, saying that "whenever it shall be made to appear to a circuit court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had, until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein upon such terms as may be prescribed by the order." This language vests a wide discretion in the court, and though it is not an arbitrary discretion, yet it requires a strong showing of prejudice to a party to reverse the action of a court for a refusal to make such stay. Some courts have held that such refusal is not reviewable. *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98. We do not see that such discretion was abused in this instance, even if we could see that there was any materiality, for the purposes of the case, under the bill of 1894, in the pendency of the appeal, as there could not be, because that appeal itself, if effectual, would operate on the decree of sale independently of any action under the bill of April, 1894. The statute itself requires that it be made to appear that a stay ought to be granted. It must appear that the stay was necessary to the ends of justice. It was not necessary in this case, for the reason that the appeal would decide on the error of law in the decree of sale, and for the further reason stated above that the rights of such purchasers could not be affected by a reversal of the decree of sale, or by annulment of the deed from Dunfee and wife to Hardman. Thus the stay would have been useless in a legal point of view. The stay must be on the ground that the action in the other case is material in the decision of the case stayed. We find it stated in 1 Ency. Pl. & Prac. 768 that, "in order to authorize any court to stay proceedings on account of a suit pending in another court, the two proceedings must be practically identical." The statute has not been construed by this court, so far as I know; but it must be very evident that it

means to, first, vest a discretion in the court, and, second, that it must appear that the decision of the case in another court will have a material or controlling effect, in actual legal operation, upon the suit in which the stay is asked. The statute does not prescribe the conditions calling for a stay, but any action under it must be governed by the common-law principles relating to the subject. A suitor's suit cannot be suspended merely because a legal question may be common to the two suits. He has a right to demand that the court shall decide such question, and not wait for its decision by another court. The decision in the other suit must have legal effect in the suit in which the stay is asked, and close its litigation. If it operate on only one of two litigated matters, it ought not to be granted, because it does not cover the whole case.

Refusal of the stay is the only error of law imputed in the dismissal of the bill of 1894, specified in the bill of review of May, 1899, and we have seen that this does not constitute a reason for reversing the decree of December 16, 1896, dismissing the bill of April, 1894. I will add another reason why there is no error of law in such dismissal. The bill of April, 1894, states that Dunfee had then pending a bill of review to reverse the same decree of sale for the same error of law, and that it was yet pending. There could not be two bills of review for the same cause. This matter was pleaded in bar of the bill of April, 1894, and was cognizable on final hearing. Thus we conclude that there is no error in the decree of October 10, 1900, upon the bill of May, 1899, based on error of law; first, because, if there was pending an appeal from the decree of sale, that would prevent the court from reversing that decree under the bill of April, 1894; second, there was a bill of review yet pending in the circuit court to reverse the decree of sale; third, there was no evidence that an appeal was pending so as to show error in refusal of a stay before hearing the bill of April, 1894; fourth, because no reversal of the decree of sale or annulment of the deed of Dunfee and wife to Hardman could affect McCoach and other purchasers; fifth, if it had been assigned as error in refusing to reverse the decree of sale under the bill of May, 1899, the answer is that the Supreme Court had already done this. Though matter of error in the decree of sale is incorporated in the bill of review of May, 1899, yet it is not assigned as error therein. So much for matter of law apparent.

But the bill of May, 1899, states that the Supreme Court had reversed the decree of sale made in 1891, and claims that this should have induced the court to set aside the decree of December 16, 1896, on the ground of newly discovered evidence. The first reply to this is that this is not such new matter as calls for reversal on the last bill of review. All definitions of newly dis-

covered evidence as a basis for a bill of review require that it shall relate to matters of fact existing at the date of the decree sought to be reversed by reason of such newly discovered evidence. But the decree of the Supreme Court reversing the decree of sale did not occur until long after the decree of December 16, 1896. No case is cited to sustain the proposition that this decree of reversal can be summoned as new matter to reverse a decree made before that reversal. A decision of the Circuit Court of the United States in New York (*Vetterlain v. Barker* [C. C.] 45 Fed. 741) is the only case cited on the point. A decree in a collateral suit had been used in another suit as *res judicata*. That decree was later set aside as void for want of jurisdiction by the court which rendered it. This setting aside was presented as new matter in a bill of review. The court held that it could not be so used, because the decree had been set aside as void; but expressed the opinion that, but for its being void, it would be new matter for a bill of review. Likely so, because as *res judicata* it had been controlling and decisive; but in this case it is not so. I have already sought to show that a reversal of the decree of sale could not operate to call for a decree under the bill of April, 1894, reversing the decree of sale or annulling the deed of Dunfee and wife to Hardman, so as to affect said McCoach and other purchasers. Therefore it is not such matter as would call for a different decree than that of the 16th of December, 1896, or of October 10, 1900. Under neither the bill of April, 1894, nor of May, 1899, could any decree be rendered to the prejudice of McCoach and other purchasers. New matter, to be good for a bill of review, must be effectual to call for a different decree. *Machine Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237; *Brown v. Nutter*, 54 W. Va. 82, 46 S. E. 375. This is a second reason why that new matter is not effective to have called for a reversal of the decree of December 16, 1896, upon the bill of May, 1899. As to the claim that the decree of reversal of the sale decree is new matter good for a bill of review, I will add that it would be needless to affect the decree of sale under the bill of May, 1899, because the reversal did that; and, as to the refusal to vacate the deed from Dunfee and wife to Hardman, it could not reverse the decree of December, 1896, because the reversal occurred after that date. *Bledsoe v. Carr*, 10 Yerg. (Tenn.) 55, holds that "the rendition of a decree in another court is not new matter within the meaning of the rule" that newly discovered matter is ground for a bill of review.

So, treating the bill of May, 1899, as a bill of review, we see no error in the decree of October 10, 1900, dismissing that bill. It is hardly necessary to say that we cannot look into the evidence bearing on the question whether the deed from Dunfee and wife to Hardman was procured by fraud or co-

ercion, because upon a bill of review we cannot look into such evidence, as that can only be done upon an appeal. But suppose we treat the last bill, that of May, 1899, as an original bill to set aside the deed from Dunfee and wife to Hardman on the strength alone of the reversal by the decree of the Supreme Court of the decree of sale. There is, or might be, an objection to so treating this bill, on the ground that it unites matter for a bill of review and matter for an original bill. In other words, it asks to set aside the decree of December 16, 1896, for error of law and new matter, and to treat it as an original bill would make it operate as an original bill to affect said deed on the strength of the reversal of the sale decree. "A bill cannot be maintained which seeks in the alternative to review a decree for error apparent, or to impeach and set it aside on the ground of fraud." *Gordon's Adm'r v. Ross*, 63 Ala. 363. The opinion in *Kimberly v. Arms* (C. C.) 40 Fed. 559, takes the same view. But as there was no demurrer to the bill of May, 1899, for multifariousness, let us waive this defect, though this court might *sua sponte* raise that question itself, without demurrer, and dismiss the bill. *Dunn v. Dunn*, 26 Grat. (Va.) 296; *Hogg's Eq. Proceed.* § 37; *Oliver v. Platt*, 3 How. 411, 11 L. Ed. 622; 14 Ency. Pl. & Prac. 211. Then, treating this bill as an original bill setting up the fact of the reversal of the decree of sale, did it call for a decree annulling the deed from Dunfee and wife to Hardman? If that deed rested alone upon the decree of sale, it would seem to do so. If, however, other consideration in fact enter into that deed, as for instance, if Hardman had in fact paid the \$100 money consideration stated in the deed, the reversal of the sale decree plainly would not affect that deed, for the simple reason of that additional new consideration; but that \$100 was not in fact paid.

There is another element of consideration stated in the brief as a support for said deed, namely, that Hardman allowed Dunfee and wife to remain on the land and retain their home upon it from March 28, 1892, to the close of the year. It is said that at that time there was no appeal pending from the decree of sale, and no step had been taken against it, and that Hardman's purchase was in full force. That decree of sale was not void, but merely voidable, and while standing unreversed gave Hardman perfect title and right of possession, and his permitting Dunfee and wife to retain possession under a lease made by Hardman to them constituted good consideration. It constituted a valid consideration for the deed when it was made. As things then stood, this lease was valuable consideration, and thus, in technical law, made the deed unimpeachable. But afterwards the sale decree is reversed, and that avoided it *ab initio*, and it goes to show that Dunfee only remained on his own land, and

this would seem to do away with the retention of possession by Dunfee under the lease from Hardman as a basis of consideration for the deed. There was thus no money consideration, and this lease came to be no consideration by the retroaction of the decree of reversal in the Supreme Court, and so there was no consideration in fact for that deed. The consideration upon which it once rested fell from under it. Though it is not necessary to explicitly so decide, I incline to think that this decree of reversal would annul the deed from Dunfee and wife to Hardman, if Hardman still owned the land. I have forgotten to say that it is argued with great force that there is other consideration of value to defend the deed against the effect of that reversal, and that is that the money paid by Hardman under his purchase under the decree went to pay Dunfee's debts, and is the same as if paid to Dunfee; but the answer to this may be that upon reversal Hardman would be entitled to be repaid that money and to charge it on the land, and thus lose nothing.

But for argument let us say that the reversal of the decree of sale would of its own force, as a new fact, an independent fact, call for the cancellation of the deed from the Dunfees to Hardman. We do not feel called upon to say decisively whether or no such would be the case, treating the last bill as an original bill, as we would have to say if Hardman yet owned the land, or a royalty issuing from it, because he conveyed the land outright to McCoach by deed dated February 2, 1893, under an executory contract of sale dating April 2, 1892, and McCoach conveyed an interest to West, and McCoach and West on April 18, 1892, leased the land for oil purposes to Ludwig and Mooney, and they entered and developed oil upon it. These transfers were made after the decrees of sale and confirmation and after the conveyance of the land to Hardman under his purchase under the decree of sale, and before any bill of review had been filed or any move made against the decree of sale. Could a reversal of these decrees by the Supreme Court under the appeal from a decree made upon the bill of review dismissing it, or by a reversal of said decrees as asked by the bill of review of April, 1894, affect McCoach or those claiming under him? Such reversal could not do so, because McCoach was a complete purchaser for valuable consideration without notice. Did McCoach have notice? Notice of what? When he purchased, there was a final decree and no bill of review. Surely he was not bound to notice the single technical error which alone caused the reversal later of the decree of sale; that is, the failure of the record to show that the land would not by rents in five years pay the debts. This defect did not render the decree void, but only erroneous and voidable. *Waldron v. Harvey*, 54 W. Va. 610, 46 S. E. 608, 102 Am. St. Rep. 959. This fact is material, for, if the decree were void, it would

be different as if there were no jurisdiction of the subject-matter or parties. If void, the decree would be null and would confer no title on the purchaser. *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014. And the purchaser, having no title, could not confer it; but Hardman had title perfectly valid while the decree stood unreversed, and McCoach had right to think that, as the court had decreed a sale, that sale would confer good title. The argument is made that McCoach was a pendente lite purchaser. How can this be so? The case in which the sale was made had been ended by final decree. A man cannot be such a purchaser after final decree. "During the interval between final judgment and commencement of proceedings in error, there is no suit pending, and a purchaser in good faith does not take title pendente lite, and is not affected by subsequent reversal of the judgment." *Cheever v. Min-ton (Colo.)* 21 Pac. 710, 13 Am. St. Rep. 258. In that case the court held the writ of error a new suit. We cannot say that the original suit in which the decree of sale was made and the bill of review and the appeal upon it make one and the same continuous suit, and thus find that, though McCoach purchased from Hardman after final decree and before bill of review or appeal, he was a pendente lite purchaser; for such bill of review and appeal are new suits, not a continuation of the same suit for the present purpose. A bill of review or appeal is a second lis pendens, and must have its own notice. It does not relate back to the rendition of the judgment or decree. 2 Cyc. 510; *Bennett v. Lis Pendens*, §§ 40, 70; *Wooldridge v. Boyd*, 13 Lea (Tenn.) 151; 21 Am. & Eng. Ency. L. (2d Ed.) 618; *Scudder v. Sargent (Neb.)* 17 N. W. 369; *Hollister v. Maun (Neb.)* 58 N. W. 1128; *Taylor's Lessee v. Boyd*, 3 Ohio, 337, 17 Am. Dec. 603; *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed. 162; *Warren County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Ludlow's Heirs v. Kidd*, 3 Ohio, 541; *Barton's Chancery Prac.* 331; *Bank v. Jenkins*, 104 Ill. 143; *Macklin v. Allenberg*, 100 Mo. 343, 13 S. W. 350; *Cole v. Miller*, 32 Miss. 89. In *Rector v. Fitzgerald*, 59 Fed. 808, 8 C. C. A. 277, the Circuit Court of Appeals held that where a final decree dismissed a suit filed by Rector, which dismissal was in 1881, and in 1884 Fitzgerald took a mortgage on the land involved from the grantee of the defendant who had prevailed in the suit, and afterwards Rector filed a bill of review against Fitzgerald and his grantor to reverse the decree dismissing the bill for error appearing on the record, Fitzgerald was a purchaser in good faith, and that after the term at which a final decree in favor of his grantor had been rendered his title could not be affected by a decree subsequently rendered on a bill of review subsequently filed. It also held "that a bill of review will not be regarded as a continuation of the original suit so as to affect with notice a person purchasing the

property in controversy in good faith from the successful party after a final decree and without notice that a bill of review is to be filed." We can safely say with Judges Lee and English in *Claytor v. Anthony*, 15 Grat. (Va.) 526, and *Keck v. Allender*, 37 W. Va. 210, 16 S. E. 520, that "a bill of review forms no part of the proceedings in the original cause." "It is a new suit," said Judge Cabell in *Laidley v. Merrifield*, 7 Leigh (Va.) 353. This is because the old suit has ended by final decree. The Virginia Court of Appeals in a very late case held good the title of a purchaser from a party to the suit made between the decree and filing of a bill of review or petition for rehearing. *Va. Iron Co. v. Roberts*, 103 Va. 661, 49 S. E. 984. In *Rector v. Fitzgerald*, 59 Fed. 808, 8 C. C. A. 277, the Circuit Court of Appeals reviewed the cases, and from them concluded: "We are of opinion, on principle and authority, that a bill of review ought not to be regarded as a continuation of the original suit, merely for the purpose of affecting a purchaser in good faith after final decree with notice. In our judgment one who purchases after the term at which a final decree is rendered, without notice that a bill of review is contemplated or will be exhibited, should be protected from the effect of a decree on such a bill, if subsequently filed." I ask if it can possibly be law that one who buys or recovers land under decree must wait three years for a bill of review, or two years for an appeal, or five years for a motion to reverse, before he can sell to a bona fide purchaser and give him good title? Is it the policy of the law to thus tie up land? The decree is presumed to be right until reversed. May not the victor in the suit or the purchaser act upon this presumption? "The successful party ought not to have his title clouded and the value of his property correspondingly diminished for three years by two doubtful contingencies: (1) That a writ of error will be sued out; and (2) that a reversal will take place." *Cheever v. Minton* (Colo.) 21 Pac. 710, 13 Am. St. Rep. 258. So says *Bank v. Bank*, 6 Pet. 8, 8 L. Ed. 299.

The case of *Lynch v. Andrews*, 25 W. Va. 751, cannot be used to show that the purchasers were pendente lite from Hardman. It is not authority in this case, because the decrees were not final, I mean the decrees of sale and confirmation, as there was a reservation of right to make final adjudication. From the case of *Camden v. Haymond*, 9 W. Va. 680, and *Haymond v. Camden*, 22 W. Va. 184, 188, it will appear that the decrees involved in *Lynch v. Andrews* were pointedly held to be interlocutory. That matter was res judicata when the case of *Lynch v. Andrews* was decided, and was so treated in its decision. The decrees being interlocutory, not final, the purchaser was regarded as a purchaser pendente lite; but in this case there was no reservation as there was in those decrees. The decrees in this case were

final in every sense, and the purchasers from Hardman were not pendente lite purchasers. Again, the decrees against Andrews were void for want of service or appearance. In volume 9, p. 1, of that excellent equity work (*American & English Decisions in Equity*), will be found valuable authority to support this holding. It reports the West Virginia case of *Ohio River Co. v. Fisher*, 115 Fed. 929, 53 C. C. A. 411. This case protected bona fide purchasers purchasing between the decree and the filing of a bill of review. The Circuit Court of Appeals affirms the rule put in the case of *Rector v. Fitzgerald*, holding that a bill of review is not a continuance of the old suit, but a new one, and that a third person bona fide purchasing under a decree afterwards reversed is not affected by the reversal. "Subsequent reversal of a decree of chancery does not affect the title of a bona fide purchaser who has acquired under such decree before suit in error to reverse it was commenced." *McCormick v. McClure* (Ind.) 39 Am. Dec. 441. This case says that one may purchase before appeal with safety. The opinion says that the appeal is a new suit. *Pomeroy*, Eq. § 632 (3d Ed.) says that, if the unsuccessful party is entitled to appeal, he must do so in a reasonable time to keep the lis pendens alive. Even under this rule the lis pendens had ceased, as the bill of review was not filed for 32 months after the decree. So there was no proceeding pending when McCoach got his deed to make him a pendente lite purchaser.

The bill of April, 1894, alleges that Hardman was guilty of wrongful conduct in chilling the bidding at the court sale, so as to keep down the price, and that he purchased with intent that Dunfee should redeem. If we had before us an appeal from the decree on that bill, we could examine the evidence to see whether this charge is true, and whether McCoach knew of it, for, if he did not, of what avail is it, though true? If that evidence were before us, and would show the charge to be true as to both, then we could determine whether in fact Hardman bought in a trust which would be based on sufficient consideration and would be valid and enforceable in equity, though only oral. But we have before us an appeal from a decree of October 10, 1900, dismissing the bill of April, 1894, to see whether there is error of law in such dismissal. In other words, we have before us a bill of review, and we cannot look into the evidence to prove notice on McCoach or that Hardman was guilty of any such conduct at the sale. We cannot look into the depositional evidence to convict Hardman of fraud upon a bill of review. *Dunn's Ex'rs v. Renick*, 40 W. Va. 349, 22 S. E. 66; *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209. So we must regard McCoach and those claiming under him in the light of purchasers for valuable consideration without notice, and then inquire whether by law they can be

affected by a reversal of the decree of sale. We do not deny the rule given in *Bank v. Bank*, 6 Pet. 8, 8 L. Ed. 299, and stated in the books passim, namely: "On the reversal of the judgment, the law raises an obligation in the party to the record who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost." *Fleming v. Riddick*, 5 Grat. (Va.) 272; *Keck v. Allender*, 42 W. Va. 420, 28 S. E. 437. But that does not apply to this case. In the case just mentioned, *Bank v. Bank*, after saying that on reversal the losing party must be restored to what he lost by the judgment, the court further said: "But, as it respects third persons, whatever has been done under the judgment whilst it remained in full force is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed? It would virtually, in many cases, amount to a stay of proceedings on the execution." *Lovett v. German Reformed Church*, 12 Barb. (N. Y.) 83. The general rule is well established that a reversal of a decree does not affect purchasers for value without notice. *Hogg's Eq. Princ.* § 293; 3 Cyc. 462, 467; *Zollman v. Moore*, 21 Grat. (Va.) 313; *Gould v. Sternberg* (Ill.) 21 N. E. 628, 15 Am. St. Rep. 138; *Reynolds v. Harris*, 76 Am. Dec. 459. The authorities are very numerous, and almost of one voice, to show that a stranger to a case purchasing land under a decree, though it be erroneous, is not affected by its reversal, nor is a purchaser from him. *Hughes v. Hamilton*, 19 W. Va. 366, point 15. This is now a statute. Code 1899, c. 132, § 8. See *Machlin v. Allenberg*, 100 Mo. 342, 13 S. W. 350. But the authorities, by great preponderance, hold that when the purchaser is a party to the cause in which the sale is made, and has a substantial interest in the debt or cause for which the land is sold, his title perishes with the reversal of the decree. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Klapneck & White v. Keltz*, 50 W. Va. 331, 40 S. E. 570; *Frederick v. Cox*, 47 W. Va. 14, 34 S. E. 958. In this case, however, the purchase was not by a stranger, but by *Hardman*, who filed a petition in the suit in which numerous debts, among them a considerable sum to him, were decreed against the land, and thus he was a party interested in the decree; but, he having conveyed to *McCoach*, we meet the question whether *McCoach* is to be regarded a purchaser for valuable consideration and protected from loss of title by reversal of the decree of sale. Authorities above cited answer that he is protected. As the title of a stranger to the cause purchasing under a decree does not fall with reversal, why should the title of one purchasing from a party not

be likewise protected? Both are strangers to the cause, both alike innocent, and it would seem that like principles would apply to both. I think the statement of law made in *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102, after stating that the title of a party falls with reversal, that "there is an exception where the sale is to a stranger bona fide, or where a third person has bona fide acquired some collateral right before reversal," is borne out by the authorities there cited and many others. In denial of this position reliance in some cases has been placed on the maxim "Nemo potest plus juris in alienum transferre quam ipse habet" (No one can transfer to another more right than he himself has); but this does not apply to such purchaser. "The purchaser must be regarded as a purchaser without notice, since he buys from a party who derives title from a judgment and execution valid at the time, and really occupies the same position as if he had himself bought at the sheriff's sale. Whilst, therefore, the title of the plaintiff would be annulled by the reversal of the judgment, the sale or conveyance to a third person before reversal of the judgment would be valid, and the purchaser, supposing the purchase to be in good faith, would be protected from the risks which his vendor would be subject to." *Vogler v. Montgomery*, 34 Mo. 577; *Wadhams v. Gray*, 73 Ill. 415. Where title is vested in one by decree, and he conveys to another bona fide, title in him is not affected by the reversal. *Hannas v. Hannas*, 110 Ill. 53. Many cases held that a stranger purchasing of a party who purchased under a decree is not affected by reversal. Notes to *McJilton v. Love*, 54 Am. Dec. 455, and *Little v. Bunce*, 28 Am. Dec. 371; *Lovett v. German Church*, 12 Barb. (N. Y.) 67, 28 Am. Dec. 371, note; *Rorer on Judicial Sales* (2d Ed.) § 1142; *Dater v. Troy Co.*, 2 Hill (N. Y.) 629; *Davis v. Watson*, 54 Miss. 679; *Evans v. Kahr*, 60 Kan. 719, 57 Pac. 950, 58 Pac. 467; *Guiteau v. Wisely*, 47 Ill. 433. "When, after entry of a decree quieting title to real estate in a party to the suit, he conveys to a bona fide purchaser, no appeal bond having been filed, a subsequent reversal of such decree upon appeal will not affect the purchaser." *Parker v. Courtney* (Neb.) 44 N. W. 863, 26 Am. St. Rep. 360. "The party thus invested [by decree] with title and possession sold and conveyed to a third person, who stands before the court as an innocent purchaser, for valuable consideration without notice. Can his rights be divested by a reversal of the decree on which his title was originally founded? We are of opinion that he cannot be so divested." So says the opinion in *Taylor's Lessee v. Boyd*, 3 Ohio, 337, 17 Am. Dec. 603, a well-considered case. In that case the syllabus reads thus: "Reversal of a decree under which a purchaser in good faith, before service of citation in error, acquired title, does not divest the title of such purchaser." In that case *Boyd* sued *Taylor* to get a deed for land, and obtained a decree for a deed.

Taylor brought a writ of error. Later Boyd conveyed to another Boyd, after writ of error, but before citation in it. Boyd's title was held good against reversal. It was contended that the purchaser Boyd was a purchaser pendente lite; but it was held that the writ of error was a new suit, and that he was not a pendente lite purchaser. In *McCormick v. McClure*, 6 Blackf. (Ind.) 474, 39 Am. Dec. 441, McCormick filed a bill to recover land and obtained a decree and took possession. The decree was reversed. On motion for a writ of restitution, it appeared that McCormick had conveyed to Justice after decree and before appeal, and it was held that the suit was not pending, and that the bona fide purchaser took valid title. In *McAusland v. Pundt*, 93 Am. Dec. 358, it is held that "grantee of a judgment creditor, who purchases the debtor's land at a sale under a judgment, acquires good title, notwithstanding the judgment is afterwards reversed." It is there held that the maxim, "No man can transfer a greater right than he himself possesses," is subject to many exceptions. The court said that it was not denied that, if a third party had purchased, his title would be good; thus saying that one purchasing from a party who had purchased was governed by the same principles. There are some contrary decisions. See *Freeman on Executions*, § 347; *Singly v. Warren* (Wash.) 51 Pac. 1066, 68 Am. St. Rep. 896. But which is the more sound rule, which the more conforms to sound public policy; that is, the policy that judgments and decrees rendered by the courts of the country in cases of lawful jurisdiction shall have some efficacy, and inspire some confidence, so that persons not parties to the suit may buy upon the faith of those judgments and decrees with some reliance and confidence? The constitution and statutes make the courts the arbiters of men's property controversies, and, when those courts have decided a property controversy and subjected property to sale and transfer, why should not the business world act under them with reliance and safety?

Great importance is attached by the appellants to the Kentucky case of *Clarke v. Farrow*, 52 Am. Dec. 552, containing the syllabus reading thus: "Purchaser of property in litigation after final decree is a purchaser pendente lite. He is not a necessary party to a bill of review, but is bound by the decision upon any bill of review or writ of error. Purchaser at a sale under final decree generally takes a good title, though the decree be afterwards reversed." This syllabus in holding a purchaser after final decree, if it means either before or after a bill of review or appeal, or, rather, if it means a purchaser after final decree and before bill of review or appeal, is surely too broad. Authorities cited above show this. That case, however, differs widely from the case we have in hand. In that case *Farrow* sued for the specific performance by Clark's heirs of a

contract for the sale of a lot, and obtained a decree and a conveyance of the lot to him, and afterwards conveyed the lot to Wright. Still later the decree was reversed and the contract was rescinded. As applied to the case of specific performance or a suit to get title, the doctrine of that Kentucky case may be right. We are not called upon to say as to this; but I call attention to the fact that it is in direct antagonism to *Taylor v. Boyd* and *McCormick v. McClure*, above cited. But the Kentucky case sustains the proposition made by this opinion, that where the case is one not of specific performance, or one of like kind, but a case of sale for debt under decree, one buying from a purchaser under decree, though such purchaser be a party interested, takes good title, unaffected by reversal. In that case the court drew this distinction pointedly in the syllabus based on the following language of the opinion: "And we barely remark, in addition, that a title passed by a commissioner's deed under a decree for specific performance, and other similar cases, stands upon different ground from that of a title derived under a decree of sale, and an actual sale, because, in the former case, the conveyance of title rests wholly on the decree, and is the same as if it existed in the decree alone; there being no meritorious act done under the authority of the decree which might give additional efficacy to the conveyance. But in other cases, as of a sale under a decree, the purchase is of itself a meritorious act, authorized by the decree and creating an equity; and it is a matter of interest to all parties, and to the public, that such sales, if fairly made, should be sustained, and they are sustained, though such decree be afterwards reversed. They are sustained, too, though the purchaser be the successful party to the suit, because he does not get the land by the direct operation of the decree itself, but by proceedings which it authorizes; and for this reason he is not compelled, upon a reversal, to restore the land, but to restore the price or money which it brought, and which alone he gets by the direct operation of the decree. On these, and perhaps other, grounds may be placed the distinction which has been uniformly held between the effect of reversal of decrees for sale, or under which sales have properly taken place, and decrees for conveyance of title where that is the object of the suit, and the very thing decreed." That Kentucky case strongly supports the cause of the appellees in this case, and is strongly against the appellants. So we conclude that the reversal of the decree of sale cannot affect the title of *McCoach* and those claiming under him, though under our law it would affect *Hardman*, if he yet owned the land.

Next we consider the demand of the bill of April, 1894, to set aside the deed of March 28, 1892, from *Dunfee* and wife to *Hardman*. The court could not set aside that deed, to the prejudice of *McCoach*, because he was

purchaser for valuable consideration without notice of the misrepresentation, coercion, or want of failure of consideration on which the attack upon that deed was predicated. We find in 2 Story Eq. Juris. § 1503, the following basic principle applicable as well to the demand to set aside said deed as to the claim that the reversal of the decree of sale destroyed the title of McCoach and those claiming under him: "In short, courts of equity will not take the least step imaginable against an innocent purchaser in such a predicament, and will, on the other hand, allow him to take every advantage which the law gives him; for there is nothing which can attach itself upon his conscience in such a case in favor of an adverse claim." Remember we are in a court of equity, which never lifts its hand by affirmative action hurtful to a purchaser bona fide for valuable consideration. Reflect that McCoach, under judicial sale and under the deed from Dunfee and wife, obtained legal title, and would thus prevail in a court of law, and equity will not make his condition worse by depriving him of legal title which gives him advantage in a court of law, for, as Judge Moncure said in *Burwell's Adm'rs v. Fauber*, 21 Grat. (Va.) 463: "Certainly a bona fide purchaser for value, and without notice, is a great favorite of a court of equity, and that court will not disarm such a purchaser of a legal advantage." We find it stated in *National Valley Bank v. Harman*, 75 Va. 609, that Lord Rosslyn said what is approved by the Virginia court and held everywhere as equity law: "I think it has been decided that against a purchaser for valuable consideration without notice this court will not take the least step imaginable. You cannot even have a bill to perpetuate testimony against him. I am pretty sure it is determined that no advantage the law gives him will be taken from him by this court. The doctrine as to the jurisdiction of this court is this: You cannot attach upon the conscience of the party any demand whatever where he stands as a purchaser, having paid his money, and denies all notice of the circumstances set up in the bill." The Virginia court said that this doctrine had been repeatedly sanctioned by that court and the Supreme Court of the United States; citing *Boone v. Chiles*, 10 Pet. 177, 211, 9 L. Ed. 388; *Carter v. Allan*, 21 Grat. (Va.) 241, 247; *Tompkins v. Powell*, 6 Leigh (Va.) 576. Rescission of a deed for fraud cannot hurt a bona fide purchaser. See *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470; *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234; 14 Am. & Eng. Ency. L. (2d Ed.) 163. "The relief of cancellation will not be granted against a bona fide purchaser for value without notice of the fraud or other ground for cancellation." 6 Cyc. 319; *Carter v. Allan*, 21 Grat. (Va.) 241. In that case the court holds thus: "A purchaser for value without notice, actual or constructive, having obtained a conveyance, will not be

affected by a latent equity, whether by lien, or incumbrance, or trust, or fraud, or any other claim." "From a purchaser for value without notice this court takes nothing away which the purchaser has honestly acquired." 21 Am. & Eng. Dec. in Eq. pp. 249, 110.

There is another decisive view against the appellants. The bill of April, 1894, charges that Hardman knew of the error infecting the sale decree. He was not bound in law to notice it, and actual notice of it ought to be proven. The bill charges that Hardman at the sale bought under the pretense of of allowing a redemption by the Dunfees, and that he employed coercion by threatening to eject Dunfee from the land, unless he would make the deed of March 28, 1892, and that he represented that he had the right to do so, and that Mrs. Dunfee had no contingent right of dower, and that the \$100 stated as the consideration for the deed was not paid, and that McCoach and West had notice of all these things. Whether these charges are true or not depends wholly on evidence contained in depositions, and under authorities above cited, as we are deciding upon a bill of review, we cannot read those depositions to sustain these charges against Hardman and McCoach, as we could do upon an appeal from the decree of December 16, 1896. Therefore those charges are impotent in this case to fix fraud or misconduct on Hardman or knowledge or notice on McCoach. We have no readable evidence to sustain those charges. If Hardman made such statements, they constitute no fraud, no duress, or coercion. He owned the land under a confirmed sale, giving him, at that time, perfect title, and he was entitled to possession, and could lawfully have enforced it by the writ of possession which had been awarded by the court. And, as Mrs. Dunfee had joined in a deed of trust for one of the debts decreed against the land, she had no dower in the land itself; but as some persons had told her that she had, and as she set up such claim, which would frighten oil men from buying or leasing, Hardman naturally desired to close that trouble by her deed. As she had nothing in the land, he might fairly ask the deed, and as to her the lease would be a consideration, and by the deed he took nothing from her legally belonging to her. There was neither fraud nor duress nor coercion in this to affect the deed, as shown by cases cited in *Whittaker v. Southwest Improv. Co.*, 34 W. Va. 217, 226, 12 S. E. 507.

But it is contended that McCoach cannot occupy the position of a bona fide purchaser, because he holds the land under a special warranty deed. Seeing that a special warranty deed would give McCoach the cast and character of a bona fide purchaser, counsel frequently call this deed a quitclaim deed, and rely on some cases holding that a purchaser under a quitclaim deed cannot make the defense of a bona fide purchaser;

but that position is not sound law. "The receipt of a quitclaim deed does not of itself prevent a party from becoming a bona fide holder; and the doctrine expressed in many cases, that the grantee in such a deed cannot be treated as a bona fide purchaser, does not rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests, which may possibly affect the title, and therefore it is said that the grantee, in accepting a conveyance of that kind, cannot be a bona fide purchaser and entitled to protection as such, and that he is, in fact, thus notified by his grantor that there may be some defect in his title, and he must take it at his risk. This assumption we do not think justified by the language of such deeds or of the general opinion of conveyancers." *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. The same doctrine is held in *U. S. v. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354, and *Brown v. Jackson*, 3 Wheat. 451, 4 L. Ed. 432, as shown in the opinion filed by me in *Ellison v. Torpin*, 44 W. Va. 435, 30 S. E. 188. The Supreme Court of the United States, as there stated, has changed its ruling as to this, and has come to the conclusion that a purchaser under a quitclaim deed may be a bona fide purchaser. I refer to the authorities there cited for the proposition. But this is not a quitclaim deed. It is a statutory deed prescribed by chapter 72, § 1, of the Code of 1899, with a covenant of special warranty, and in its granting clause contains the words, "do grant unto the said party of the second part, with special warranty, all that certain lot, tract or parcel of land." By the very letter of section 2, "every such deed, conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest whatever, both at law and in equity, of the grantor in or to such lands." This surely passes the very land itself, under that statute, whether the deed be one of special or general warranty. *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234. The operative words, "do grant," are the same prescribed by the statute for both a special and general warranty deed, and plainly operate alike in their granting or transferring effect; the only difference being, not in the force of the instrument to pass title, but in the obligation and effect of the warranty. Hence the character of the deed does not deprive McCoach of the benefit of the position of a purchaser for valuable consideration.

I have said that we cannot read the depositions for decision, and therefore we need not state their contents; but, as bearing on the substantial justice of this case, I will

say that the depositions fall far short of sustaining the charges of fraud, coercion, and misrepresentation against Hardman, and proving notice thereof on the part of McCoach. Even if Hardman were culpable in the manner of his procurement of the deed, there is no evidence to show that McCoach and those claiming under him had notice of it. Therefore McCoach would be protected against this charge of fraud in the procurement of the deed. The law above given, touching the protection of an innocent purchaser against loss of title by the reversal of a decree, fully applies to protect McCoach against the demand for cancellation of the deed. Look at the reasonableness of his position. He saw the fact that Hardman had purchased at an open judicial sale, and he also saw the deed of Dunfee and wife to Hardman, and further that Dunfee had recognized Hardman's title by leasing the land March 28, 1892, from Hardman. Had not McCoach the right to act on this with honest confidence? And this confidence was inspired by the fact that the Dunfees had made the deed and taken the lease. Their plain acts thus led McCoach to buy, and, where one of two innocent parties must suffer loss, that loss must be borne by that one "who by his conduct, acts, or admissions has rendered the injury possible." *Norfolk & Western Railroad Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586; *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576; *Somes v. Brewer*, 18 Am. Dec. 406.

It is charged that Hardman, when he got the deed, knew there was error in the decree of sale that would invalidate the sale. Will the law say that he was bound to be a jurist, seer and prophet, and anticipate the effect of the single technical error affecting the deed, for the purpose of fixing actual fraud in his mind? I know that for some purposes a purchaser is bound to know defects in his chain of title. He is bound to know the contents of a record under which he claims for certain purposes and to a certain extent, as, for instance, if he buys under a decree, he must see that the court has jurisdiction of the subject-matter and the parties; but is it possible that he is bound to know in advance the effect of every error and irregularity for which the decree may be in the end reversed, when such error does not affect the authority and jurisdiction of the court? But, even say that Hardman and McCoach were bound to see this defect in the decree, say that you can use this for the purpose of fixing intentional fraud in the mind of Hardman—then I ask why did Dunfee allow Hardman to avail himself of that fraud by making a deed? Did not Dunfee have the same means to know of that defect in the decree as Hardman had? Was not the same avenue of information open to Dunfee as to Hardman? If Hardman took the deed with knowledge

of that error, so did Dunfee make the deed with like knowledge.

It is charged that negotiation was commenced by McCoach to purchase of Hardman before Hardman got the deed from the Dunfees, and that this is evidence of notice on the part of McCoach. The evidence is clear and preponderating that McCoach did not begin such negotiation before the execution of the deed. But what if he had done so? He had a right to do so. Hardman was vested with title by a confirmed judicial sale, and why had not McCoach a right to buy under that? How would that show either that he knew of any defect in the decree, or had any foreknowledge of the execution of that deed?

And another point is this: If there was anything wrong in the procurement of that deed, why did not Dunfee attack it sooner after March 28, 1892, than April, 1894? He having knowledge of every circumstance connected with the execution of his deed, the law demanded quick attack, especially when he and his wife, living on the land, saw the oil operators spending thousands of dollars in their uncertain enterprise of development. He waited too long to invoke the power of equity to overthrow rights in those people. The many cases cited in *Whittaker v. Southwest Improv. Co.*, 34 W. Va. 217, 12 S. E. 507, will establish this. "To set aside a sale for fraud and conspiracy, suit must be brought within a reasonable time after the discovery of such fraud." *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 900. As oil operations were going on before Dunfee's eyes, and as he knew that those engaged in them were resting on his deed, equity would require, in this particular case, prompt and speedy attack. And I will mention as pertinent here the fact that on the 2d of January, 1893, McCoach having before that purchased the land by executory contract of Hardman, Mrs. Dunfee leased the house on it from McCoach, and thus inspired confidence in the title of the operators.

The law of estoppel plays an active part in this case also. Dunfee and wife made that deed to Hardman, and they took those leases from Hardman and McCoach, thus admitting title in Hardman and McCoach, and they rested quiet and silent upon that land, seeing money expended in oil operations, knowing that Hardman relied upon the judicial purchase, the deed, and his lease to the Dunfees, and knowing that the oil operators relied upon them, and went on with their expenditures, and they made no protest. These facts not only call for speedy notice of dissatisfaction to those interested and speedy suit, but it operates as an estoppel and bar in equity against any relief. "If a person knowing his rights stands by and encourages or permits an innocent party to purchase his property or make valuable improvements upon it, without making known his rights,

he is estopped from making any claim to it." *Heavener v. Godfrey*, 3 W. Va. 426. See *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Norfolk & Western Railroad Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222.

I need hardly say that some evidence was given to show that after the delivery of the deed of the Dunfees to Hardman Hardman said that, if he could sell the land for oil for enough to pay his debt due from Dunfee, he would give Dunfee the surface. This is not in the bill. It was after delivery of the deed, and cannot affect that. If such agreement were made, it was voluntary, based on no consideration, merely oral and not enforceable. In no view does it play any part in this case.

Decree affirmed

(140 N. C. 619)

HOGGARD v. JORDAN et al.

(Supreme Court of North Carolina. Feb. 27, 1906.)

WILLS—ELECTION—ACTS CONSTITUTING.

Where a husband devised to the wife for life certain real estate of which the wife was a part owner, with remainder over to their children, and the widow took possession, after qualifying as executrix, and remained in possession nine years, until her death, and the children acquiesced in the will for eight years thereafter, there was an election, so that a petition to sell a portion of the lands as the property of the widow to make assets to pay her debts after her decease could not be maintained.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 2060.]

Appeal from Superior Court, Bertie County; Peebles, Judge.

Petition by J. W. Hoggard, as administrator of Mary C. Jordan, against C. E. Jordan and others, to sell lands for the payment of debts. From a judgment denying the petition, petitioner appeals. Affirmed.

This was a petition by the administrator of Mary C. Jordan, deceased, to sell land for the purpose of making assets with which to pay debts. The defendants are the devisees of Jesse N. Jordan and heirs at law of his widow Mary C. The petitioner alleged that his intestate Mary C. died seized of the lands described in the petition. This was denied by defendants. The cause was, upon issue thus joined, transferred to the Civil Issue Docket for trial. By consent his honor found the facts. On the 18th day of May, 1877, Mary C. Jordan, being the owner of a share of a tract of land, descended from her father, joined with her husband Jesse N. Jordan, in a conveyance of said share to her sister, Florence Hancock, and her husband R. E. Hancock. On the same day the said Florence and her husband joined in a conveyance of her interest in said land to the said Mary C. and her husband Jesse N. Jordan, who died during the month of October 1887, leaving a

last will and testament nominating the said Mary C. executrix thereto. Item 1 of his will is in the following words: "I leave to my beloved wife, Mary Catherine, during her natural life, my entire personal property of every kind and description, to use as she may think best, together with all of my real estate, consisting of the Hancock tract of land and the two stores and lots situated in Lewiston, to lease or rent as she may think best for the interest of herself and younger children." He gave the same property upon the death of his wife to his children, who were also the children of his wife, Mary C. The value of the personal estate of said Jesse N. was, at the time of his death, \$200. The said Mary C. proved the will and qualified as executrix thereto, taking into her possession the personal estate and occupying the land until her death during the month of March 1896. She left no will. Petitioner qualified as her administrator, January 4, 1904. She was indebted in the sum of \$75. His honor upon the foregoing facts being of the opinion that the said Mary C. took under the will but a life estate in the lands rendered judgment for defendants, to which they excepted and appealed.

Winston & Matthews, for appellant Day, Bell & Dunn and J. B. Martin, for appellees.

CONNOR, J. (after stating the case). We had occasion to consider the general principle involved in this record in the case of *Tripp v. Nobles*, 136 N. C. 99, 48 S. E. 675, 67 L. R. A. 449; and upon a rehearing in 138 N. C. 747, 51 S. E. 1038. The plaintiff insists that a distinction may be drawn between that case and the facts presented in this appeal; he also suggests that the very able dissenting opinion "is more in harmony with decisions and justice." It must be conceded that in some cases, there is an apparent hardship in the application of the well-settled doctrine of election, but a careful examination of the numerous cases to be found in our own and the English courts show a solicitude on the part of the judges to so administer the doctrine that the rights of all persons interested shall be protected; decrees are so molded, that, when possible, compensation is directed to be made and forfeitures of estates prevented. The doctrine of election between inconsistent dispositions of property in wills and other instruments is peculiarly of equitable origin and its administration in the jurisdiction of courts of equity "by reason of the inflexible, inelastic, and cramped procedure of the common-law courts." An examination of the will of Jesse N. Jordan made but a few months prior to his death discloses a wise plan for the disposition of his estate, by which his widow is enabled to use both her own and his property "for the best interest of herself and younger children." To this end he gives her a life estate in the Hancock land to which it is not improbable he thought he was entitled to one-half, "two

stores and lot in Lewiston, N. C." and his entire personal estate. It will be noted that, at the time of his death, four of his children were under 14 years of age and all were minors. At her death he gives to each child a share in the property. It was stated on the argument that, she, for some reason, did not get the stores. We are concluded in this respect by the record—the petition states that she died seised of the Hancock land and "two stores and lot situate in Lewiston, N. C." His personal estate was worth but \$200, to all of which she would have been entitled as her year's support. There is nothing in the record to show the value of the land or the stores, nor that the latter did not belong to the testator. We are of the opinion that upon the facts found, Mrs. Jordan was put to her election, either to claim under the will as a whole, or to claim against it, surrendering any other than her dower right in the stores, and her year's support in the personalty. She knew the contents of the will, proved it and qualified as executrix, remained in possession of the property until her death in 1896, and her children went into possession under the will. Thus for nine years she, by her conduct in proving the will and qualifying and by using the property, acquiesced in the disposition made by her husband. For eight years since her death the only persons who could have been benefited by electing to take as her heirs, and against the will, have likewise acquiesced in it. Certainly, after so long acquiescence in the provisions of the will, her administrator, against the consent of her real representatives, will not be permitted to make an election for her by simply filing a petition for the sale of the land. Her conduct brings the case clearly within the observation of Lord Hardwicke, in *Tomkins v. Ladbroke*, 2 Vesey, Chan. 593, that the courts will not "disturb things long acquiesced in by families upon the foot of rights, which those in whose place they stand, never called in question." The Vice Chancellor in *Dewar v. Maitland*, L. R. 2 Eq. 834, said: "Although the court compels persons to elect, yet election itself is a voluntary act. The doctrine has been established for the peace of families and of the public, that if property has been long enjoyed according to a certain mode and rights, this court will be very slow to disturb such enjoyment. The heir in this case chose to enjoy the property devised by his father—whether properly devised or not—upon the footing of his will." In *Worthington v. Wigginton*, 20 Beav. 67, the question was discussed by Sir John Romilly, M. R., saying: "Two things are essential to constitute a settled and concluded election by any person who takes an interest under a will, which disposes of property under that will. There must be, in the first place, clear proof that the person put to his election was aware of the nature and extent of his rights; and in the second place, it must be shown that, having that knowledge,

he intended to elect. In this case, I think that the widow was aware of what her rights were; she was fully aware of the contents of her husband's will, she was the sole executrix named in it and had proved it; and she had made use of her character of executrix to enforce payment of money due to her late husband and to arrange with the landlord for the surrender of the five leaseholds. She must, therefore, on the one hand, have known that her husband had by his will, specifically bequeathed the stock standing in their joint names, and that by it he gave her only a life interest in that stock * * *. She knew that the will disposed of her property, she knew that she could withdraw it from the operation of the will."

The discussion and review of the authorities are full and exhaustive. In *Adsit v. Adsit*, 2 Johns. Ch. 448, 7 Am. Dec. 539, Chancellor Kent said: "Taking possession of property under a will or other instrument and exercising unequivocal acts of ownership over it for a long time, will amount to a binding election." *Penn. v. Gugginheimer*, 76 Va. 839; *Pom. Eq. 513*; *Fetter, Eq. 56*. We have discussed the question upon the theory that the widow in her life time or her heirs at law at her death were seeking to claim her land devised by Jesse N. Jordan. It would seem that, if such were the case, they would, under the circumstances, be held to have elected to claim under the will after the unequivocal acts of ownership and long acquiescence in the disposition made by her husband. However this might be, we are unable to perceive how, in the light of the facts appearing in the record, where all of the parties interested, or who, if no disposition had been made of the land by the husband, would have been interested, are still acquiescing in and claiming under the will, the administrator of Mrs. Jordan can treat the election to claim against the will, as having been made, and subject the land to sale. It is conceded that the only purpose in seeking to sell the land is to pay a debt contracted by Mrs. Jordan after the death of her husband. She was certainly under no legal or moral obligation to the creditor to dissent from her husband's will or elect to take against it. The status of her property was a matter of record when the debt was contracted, and no question raised until eight years after her death. The children, it is to be presumed, upon the death of Mrs. Jordan, took possession of the land under their father's will. It is difficult to see how, against their consent, a court, in a statutory proceeding, having no equitable element in it, can proceed to sell the land. If sold for a price in excess of the debt to whom and in what right would the excess be paid? Certainly if the land is sold, as her property, the excess after paying the debt, should be paid to her heirs and not the devisees of her husband. There can be no partial election to claim against the will. It is well settled

that the election, when made, must be complete and final. Rights of property and family settlements made with the consent of husband and wife or, at least, acquiesced in by the survivor, would be insecure, if, after so many years, they could be disturbed in this summary method. To the suggestion that Mrs. Jordan made no will, it would seem an answer that she acquiesced in the disposition of her land made by her husband. As we have said in *Tripp v. Nobles*, supra, the creditor cannot reasonably complain; he extended credit with the condition of the title disclosed on the records. Whether Mrs. Jordan preferred to abide by the will of her husband and take the \$200 in personalty under the will by reason of an arrangement made between them, or out of respect to his wishes, or for any other reason, is not material. She, by her conduct, showed that she was content with the disposition of her property; and his will, approved by her, should not now be disturbed. To do so would not "be in harmony with decisions and justice."

We have given the case a careful consideration and re-examined the authorities and find no reason for disturbing the decisions heretofore made by us. It may be proper to say that all of the authorities disclose a purpose to give to the widow, claiming dower in land devised to her, the largest possible latitude both in regard to the construction of the will and the time within which she is required to elect. As said by Romilly, V. C., in *Worthington v. Wigginton*, supra, "the cases relative to dower have no application to the present."

The judgment of the court below must be affirmed.

WALKER, J. (concurring in result). This case is not like *Tripp v. Nobles*, 136 N. C. 99, 48 S. E. 675, 67 L. R. A. 449. Here there was a substantial benefit conferred by the will, which forced the plaintiff's intestate to choose between the acceptance of that benefit and the retention of the property, already her own, which is attempted to be disposed of by the same instrument. There was no such benefit received under the will construed in *Tripp v. Nobles*. It would seem but just to require that the benefit bestowed should be a substantial one, in order to put the donee to an election, and that it should not consist merely of property which he would have received under the law, if the will had not been made. Further investigation confirms me in the view entertained and stated in my dissenting opinion in that case. The principle was adopted and applied in *Tyler v. Wheeler*, 160 Mass. 206, 35 N. E. 666, where it was held that an executor is not estopped by qualifying under the will of his wife to claim his legal interest in her estate, and in *Register v. Hensley*, 70 Mo. 189, the court decided that a widow's renunciation of the provisions of her husband's will, made in lieu of dower, was not invalidated by her

not surrendering personal property, which she had previously received under the will, where the amount was the same as that which she would receive under the administration law. The case of *Loring v. Craft*, 16 Ind. 110, also sustains the same view, as the court held that a surviving wife is entitled to the statutory provision of \$300 "notwithstanding she may have accepted the provisions made for her by the will of her husband." *Corriell v. Ham*, 2 Iowa, 552; *Wilber v. Wilber*, 52 Wis. 298, 9 N. W. 163. The language used in *Flitts v. Cook*, 59 Mass. (5 Cush.) 601, seems to fit the case: "In looking at the provisions of this will," the court said, "it will be seen that they are so little a departure from what would have been the legal rights of Joanna Cook without the will, that little can be inferred from the subsequent use of the property in the manner set forth in the agreed statement." The court then held that there was no binding election or estoppel. The law is thus stated in *Bigelow on Estoppel*, 676: "This doctrine of election is never applied in the law of wills when, if an election is made contrary to the will, the interest which would pass from the testator by the will cannot be laid hold of in equity to compensate the disappointed donee. Some free disposable property must be given to the electing donee which can become compensation for what the testator sought to take away."

It was held in *Re Gwin's Estate*, 77 Cal. 313, 19 Pac. 527, that "a widow is not estopped to make an election to take under the law by causing the will of her husband to be probated and by becoming executrix thereof." To the same effect is *Estate of Frey*, 52 Cal. 658. The court decided in *Collier v. Collier's Ex'rs*, 3 Ohio St. 369, that "a widow electing to take under a will, containing provisions for her, expressed to be in lieu of dower and all other claims on the estate of the testator, is not barred of her right to the year's support, provided by law, from the estate of the debtor." So it was held in *Taylor v. Browne*, 2 Leigh (Va.) 454, that by taking administration with the will annexed, the widow will not be held to have elected to claim under the will instead of under a deed of settlement, formerly made by her husband for her use and benefit, and which contained a disposition of the property different from and more beneficial to her than the provisions of the will. Taking under the will, says the court in *Hubbard v. Russell*, 73 Ala. 578, will not deprive the widow of her exemption of \$1,000 allowed her by the law, for she substantially and practically takes what already belongs to her. Election being a matter of equitable cognizance, the ordinary principles of equity must apply, one of which is that the court will never decree anything to be done which is plainly unfair, oppressive or unconscientious especially when the rights of others will not be materially affected by a refusal to do so. It also re-

gards more the substance than the mere form of things. The authorities, it seems to me, clearly establish that the widow's year's provision, or any other interest created by the law and independent of the disposition of the husband, cannot be considered as a bounty conferred, and therefore no election can arise in such a case. It would appear to be against equity so to hold. The proving of her husband's will by her as executrix, under such circumstances, should not therefore put her to an election. There is not in such a case a single equitable element to support an estoppel and it is so held in the other states, and I think in decisions of this court, as I have shown in my former opinion. The cases in our reports, which are relied on in *Tripp v. Nobles* to show the contrary, are clearly distinguishable from that case. In *Tripp v. Nobles* it appeared that the intestate could take nothing under the will which was not already hers by force of the law. The testator therefore had no free, disposable property to give her, and whether he has or not is the test by which to determine whether a case of election is presented.

Upon the doctrine of compensation, I will add to the authorities cited in my dissenting opinion in *Tripp v. Nobles*, the following: In *Bell v. Culpepper*, 19 N. C. 20, this court, by Gaston, J. said: "The rule of election, in the sense in which it is insisted on by the defendant, is confined exclusively to courts exercising equitable jurisdiction, which have it in their power to restrain men from the unconscientious assertion of acknowledged legal rights. They hold that it is against conscience for a man to take a benefit under a will or other instrument, and at the same time disappoint other plain provisions of that will, made in favor of third persons. Of course he may keep, if he pleases, what was before his own; for the mistake of the donor cannot take away his property. But, if he will insist on enjoying the interest given him by the instrument, they will by proper decree provide that so enjoying it he shall give effect as far as he can to the other provisions of the instrument." And in *Alston v. Hamlin*, 19 N. C. 124, this court by the same judge said: "If the defendant can avail himself of the implied election which was insisted on at the trial, it must be before a tribunal competent to decide upon the equity of such election. The principle of election, as here asserted, is a principle of equity, proceeding on the doctrine of an implied condition, of which a court of equity in a proper case will enforce the performance by compelling the legatee if he elects to take the bequest, to make compensation out of his own property to the disappointed legatees."

It does not appear in the case at bar what is the value of the land, nor what is the value of the "Lewiston lots," so that the principle of compensation could not be applied, even if there had not been a binding

election to take under the will, but an election had been so made as to call for the application of that principle, and even if equitable relief can be administered in this statutory proceeding and by the court where it originated. *Vance v. Vance*, 118 N. C. 864, 24 S. E. 768.

While I differed from the majority of the court in the case of *Tripp v. Nobles* as to the questions of estoppel and election involved, yet having fully stated what, in my opinion, is the correct principle of law, as it should have been declared and applied to the facts, henceforth that decision shall be the law with me, for it may be right, though the conclusion reached by the court, I must think, and this is said with the utmost deference, is not supported by the best precedents or by the weight of authority.

(140 N. C. 412)

PATTERSON v. OLD DOMINION S. S. CO.
(Supreme Court of North Carolina. Feb. 27, 1906.)

1. BERTHS—FAILURE TO SUPPLY—LIABILITY TO PASSENGER.

A steamship company is liable to a passenger for failure to furnish the latter with a berth on a steamer running at night, where it fails to notify the passenger of its inability to supply such berth on his application therefor at the time of purchasing his ticket.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 533.]

2. SAME—ACCOMMODATIONS FOR PASSENGERS—ORDER OF APPLICATION.

A common carrier must serve the public without discrimination, and sell its tickets and accommodations in the order of application.

3. SAME—BREACH OF DUTY—RIGHT OF ACTION—DAMAGES.

A common carrier discriminating in the sale of its tickets and accommodations in the order of application therefor is liable for such breach of duty, and also for the indignity, vexation, and disgrace, if any, resulting therefrom to a passenger.

4. APPEAL—QUESTIONS REVIEWABLE.

Defenses set up in an answer and unsupported by evidence will not be considered on appeal.

5. CARRIERS—STEAMSHIP COMPANIES—FAILURE TO FURNISH BERTHS—ACTIONS—SUFFICIENCY OF EVIDENCE.

Where there was evidence that subsequent to plaintiff's purchase of his ticket and application for a berth on defendant's steamer, and defendant's refusal to furnish the berth, other parties were given berths, and that by reason of defendant's refusal plaintiff was compelled to sit up all night, the granting of a nonsuit was error.

Appeal from Superior Court, Craven County; Bryan, Judge.

Action by J. F. Patterson against the Old Dominion Steamship Company. From a judgment of nonsuit, plaintiff appeals. Error.

D. L. Ward and W. D. McIver, for appellant.

OLARK, C. J. The plaintiff's evidence is that he purchased his ticket, and with three friends was first to apply at the purser's

office for berths and requested a stateroom for the four, containing four berths. Two of his friends were given berths in this room, together with two strangers who applied after the plaintiff. The plaintiff and one of his friends were refused a stateroom and berths altogether, and they were compelled to sit up all night. The defendant was applied to by the plaintiff for a berth when he bought his ticket, but the defendant refused to supply staterooms or berths until after the ship had left the dock and was in midstream. If, as is presumably the case on a steamer running at night, a berth is a reasonable and proper accommodation, the defendant is liable for failure to furnish it, unless the fact that none can be had is made known to the passenger who chooses to ask for a berth when he buys his ticket. The defendant should have had its office for berths open when it sold its tickets. It was its duty to sell tickets to applicants in the order in which they were applied for, without discrimination, till the full number was sold to the passengers whom it could carry comfortably, and the same is true as to the sale of its berths. If its berth and stateroom accommodations are exhausted when a ticket is asked for, the intending passenger, on learning that fact, may defer his trip till another time, or may go by another route, rather than sit up all night. It is an imposition upon the traveling public to withhold information as to the lack of a sufficient number of berths till after the passage ticket is paid for, and the passenger has embarked, and the vessel is in midstream, so that he cannot help himself. Still worse, if possible, is the refusal then to furnish berths in the order in which they are applied for. A common carrier must serve the public without discrimination, and sell its tickets and accommodations in the order of application. 6 Cyc. 535. It is liable for an action of damages for a wrongful refusal, and, in addition, for the indignity, vexation, and disgrace, if there is any evidence of such. *Railroad v. Rinard*, 48 Ind. 298; *State v. Railroad*, 48 N. J. Law, 55, 2 Atl. 803, 57 Am. Rep. 548; *Wallen v. McHenry* (Tenn.) 8 Humph. 245.

Nothing is here said that would militate against the bona fide engagement of tickets and berths beforehand, nor against the refusal to sell a ticket or berth to any person who for a good reason may be objectionable to other passengers; but the passenger, if not thus objectionable, should be informed that no berths can be had, all being already sold, when he purchases his ticket, if he then asks for a berth. And if he does not then apply, when applications for berths are made at the purser's window, in regular course after the vessel starts, the berths not already sold or engaged must be disposed of in the order of application. If this were not so, berths could be furnished to the friends of the purser or for a private consideration to him (a tip), as is here testified was the case, to the exclusion of those prior in time, who did not

pay the purser, as well as the regular fare. If the supply of berths is exhausted before an applicant is reached, it will be his own fault that he did not apply for his berth and learn whether or not one could be had at the time he bought his ticket. The plaintiff here testified that he made no objection to the ladies on board being first supplied with berths, but to other men being furnished who applied for berths after he did, one of whom "tipped" the purser.

The answer sets up defenses which we cannot consider, as no evidence was offered in their support. Upon the evidence offered, the granting a nonsuit was error.

(140 N. C. 407)

SIMMONS & WARD v. DAVENPORT.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. ATTORNEY AND CLIENT—COMPENSATION—ACCEPTANCE OF SERVICES.

Where plaintiffs were employed by defendant as attorneys, and rendered services under the contract, they were, in the absence of any stipulation as to compensation, entitled to what the services were reasonably worth, whether defendant knowingly accepted the benefit of the services or not.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 292, 308, 336.]

2. TRIAL—INCOMPLETE INSTRUCTIONS—FAILURE TO ASK FOR DEFINITE CHARGE.

Where, in an action for attorney's fees, the court submitted the first and second issues, with proper instructions as to the burden and amount of proof required, and merely read the third issue to the jury without any specific instructions as to it, the generality of the charge was not reversible error, in the absence of any request for more specific instructions, especially in view of the fact that the case was very simple.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 628.]

Appeal from Superior Court, Craven County; Webb, Judge.

Action by Simmons & Ward against B. B. Davenport. From a judgment for plaintiffs, defendant appeals. Affirmed.

Plaintiffs sued the defendant to recover an amount alleged to be due for professional services rendered by them at his request in collecting a debt held by him against an insolvent bank. Defendant denied that he was indebted to the plaintiffs. There was evidence tending to show that plaintiffs had rendered the services at the request of the defendant, and that the latter had received the benefit of them and had refused to pay what they were reasonably worth, and there was some evidence, on the part of defendant, tending to show that, while the plaintiffs were the attorneys of the other creditors of the bank, they had not been retained by the defendant. There was also evidence that defendant had frequently consulted with one of the plaintiffs about the collection of his claim, going to his office for that purpose, where defendant was seen in consultation

with him. A clerk of the plaintiffs copied a release which defendant was to give to Mr. Blades, trustee of the bank, and about which he had received advice from the plaintiffs. There was much other evidence to sustain the plaintiffs' contention that they had been employed by defendant and rendered the services with the understanding that they should be compensated for them. In the view we take of the case, it is not necessary to set out the evidence more in detail. The following are the issues, with the answers thereto: "(1) Did the defendant employ Simmons & Ward as attorneys in the matter in dispute? Yes. (2) Did plaintiffs render for defendant the services alleged to have been performed? Yes. (3) Did defendant knowingly accept the benefit of such services? Yes. (4) What was the value of plaintiffs' services? Seventy-five dollars." The only exceptions taken were to the charge. The court instructed the jury, in substance, that the burden upon all the issues was upon the plaintiffs, and that they must satisfy the jury by a preponderance of the evidence as to them. The court then referred to each issue separately, and gave the same instruction as to the first and also as to the second issue which it had given as to all of the issues, and stated, further, that if the plaintiff had satisfied them by the greater weight of the evidence that defendant had employed the plaintiffs to represent him, and consulted with them, they should answer the first issue "Yes," but if they were not so satisfied they should answer it "No"; and the same was said, with the necessary changes, as to the second issue. The court merely read the third issue to the jury, without making any separate comment thereon, or giving any instruction in regard to it, other than contained in the general charge upon all the issues. Upon the fourth issue the court charged that it was for the jury to say how much, if anything, the plaintiffs are entitled to recover, and whether the amount stated by the witnesses was a reasonable compensation for the services rendered; that the jury must consider the evidence upon this question, and say what amount the plaintiffs should receive for their services. The defendant excepted to the instructions upon the first, second, third, and fourth issues. There was a judgment upon the verdict, and defendant appealed.

W. D. McIver, for appellant. O. H. Gulon and E. M. Green, for appellees.

WALKER, J. (after stating the case). We do not see upon what ground the defendant can complain of the instructions of the court. If the plaintiffs were employed by the defendant as attorneys to represent him and take care of his interests, and they rendered services to him under the contract, they were entitled to recover what their services were reasonably worth, there being no stipulation as to the amount the plaintiffs were to

receive, and it can make no difference, in this view of the case, whether the third issue was answered or not, there being enough left, if that issue had not been answered, to support the judgment. *Sprinkle v. Wellborn* (at last term) 52 S. E. 666. But we think the jury must have understood the court to charge as to the third issue that the burden was on the plaintiffs to satisfy them, by the greater weight of the evidence, that the defendant had accepted the benefit of plaintiffs' services. Besides, there was no serious controversy as to the fact that the defendant had been benefited by what plaintiffs had done. As to the first and second issues, the charge was correct as to the burden of proof and sufficient in other respects to inform the jury as to the quantum of proof required of the plaintiffs to establish the affirmative of those issues, and it was also correct as to the fourth issue. The evidence was so simple that the jury could hardly have been misled by the charge as to the true inquiry involved in each issue. The defendant did not ask for any special instructions, nor did he request the court to amplify its instructions, or to present the case in any particular manner to the jury, or to charge as to any principle of law he may have thought should be considered by the court and explained. In the absence of any such request, we cannot say that it was reversible error for the court to have charged in the general terms employed by it, especially in a case like this one, which involves so little complication that a jury could not well have misunderstood the legal aspect of the matter. If a party desires fuller or more specific instructions, he must ask for them, and not wait until the verdict has gone against him, and then for the first time complain of the charge. *Kendrick v. Dellinger*, 117 N. C. 491, 23 S. E. 488; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *State v. Debnam*, 98 N. C. 712, 8 S. E. 742; *Clark's Code* (3d Ed.) pp. 535, 536.

The decision in *State v. Boyle*, 104 N. C. 800, 10 S. E. 696, 1023, upon which the defendant's counsel relied, has no application to the point now being discussed, namely, that the charge was too general. In *State v. Boyle* there was a prayer for special instructions. The case was fully explained, and the erroneous impression in regard to it corrected, in *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357, *State v. Brady*, 107 N. C. 822, 12 S. E. 325, *McCracken v. Smathers*, 119 N. C. 620, 26 S. E. 157, and especially in *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032. In subsequent decisions it has been treated as overruled. *State v. Beard*, 124 N. C. 813, 32 S. E. 804; *State v. Edwards*, 126 N. C. 1051, 35 S. E. 540; *State v. Kinsauls*, 126 N. C. 1095, 36 S. E. 31; *Turrentine v. Wellington*, 136 N. C. 312, 48 S. E. 739. Whatever may be its real status, it has been so frequently disapproved, and so much has been said against it, that it may now be consider-

ed no longer of any value as a precedent. The rule which requires that the complaining party should ask for specific instructions, if he desires the case to be presented to the jury by the court in any particular view, does not, of course, dispense with the requirement of the statute that the judge shall state in a plain and correct manner the material portions of the evidence given in the case and explain the law arising thereon. *Revisal 1905*, § 535; *State v. Kale*, 124 N. C. 816, 32 S. E. 892. But a party cannot ordinarily avail himself of any failure to charge in a particular way, and certainly not of the omission to give any special instruction, unless he has called the attention of the court to the matter by a proper prayer for instructions. So, if a party would have the evidence recapitulated, or any phase of the case arising thereon presented in the charge, a special instruction should be requested. *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032. In the last cited case the court held, citing *State v. Lipsey*, 14 N. C. 486, and *State v. Haney*, 19 N. C. 390, that "the judge is not bound to recapitulate all the evidence to the jury. It is sufficient for him to direct their attention to the principal questions which they have to investigate, and to explain the law applicable to the case, and this particularly when he is not called upon by counsel to give a more full charge." In *Boon v. Murphy* the respective duties of the judge and counsel under the act of 1796 (*Revisal 1905*, § 535) are clearly and fully defined, and it is now commended as a safe guide in practice. That case and *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357, and *McCracken v. Smathers*, 119 N. C. 620, 26 S. E. 157, seem to be directly in point in this case, and to dispose of the defendant's objections to the general terms in which he alleges the charge of the court was couched.

There was no error in the trial of the case.
No error.

(140 N. C. 377)

MITCHELL et al. v. GARRETT et al.
(Supreme Court of North Carolina. Feb. 27, 1906.)

EJECTMENT—TITLE TO SUPPORT ACTION.

Acts 1905, p. 947, c. 773, in relation to actions involving the title to real estate in Hertford county, provides that it shall not be necessary for either party to prove title out of the state, that the plaintiff shall set out in his complaint the name of the party under whom he claims title, and the chain of title, and its source under which he claims, and that the defendant shall set out in his answer the source and chain of his title. By section 3. (page 948) adverse possession such as has or may ripen into title, and any other mode of acquiring title, may be pleaded by either party, and the party proving the superior title is entitled to recover. *Held*, that the statute merely dispenses with proof of the fact that the state parted with its title, and where plaintiff merely showed a succession of deeds, older than those under which defendant claimed, without any other evidence that he had acquired the title, he was not entitled to recover.

Appeal from Superior Court, Hertford County; Peebles, Judge.

Action by G. H. Mitchell and others against Richard Butler and J. R. Garrett. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Plaintiffs brought the action to recover possession of a tract of land and damages for cutting timber therefrom. They claimed to have established title under the provisions of a recent act of the General Assembly, entitled "An act to facilitate and cheapen the trial of actions involving the title to or interest in real estate," being chapter 773, p. 947, of the Public Laws of 1905. The chain of title of each of the parties was set out in the pleadings. The plaintiffs' is as follows: (1) Deed from Ellisha A. Chamblee to John Stallings, dated May 25, 1835. (2) Deed from John Stallings to Charles Northcott, dated November 30, 1836. (3) Deed from Charles Northcott to John A. Anderson. (4) Deed from John A. Anderson to Luke McGlaughon, dated March 12, 1844. (5) The will of Luke McGlaughon, dated April 10, 1858, and proof that the plaintiff, G. H. Mitchell, married Martha McGlaughon, daughter of Luke McGlaughon, and after her death the other daughter of Luke McGlaughon, Nancy Vann, widow of Jesse Vann, and that the other plaintiffs are the children of said daughters, the latter being dead. Plaintiffs claim under the said will and by descent from their mothers, except G. H. Mitchell, who claims as tenant by the curtesy. Plaintiffs introduced in evidence the deed from John A. Anderson to Luke McGlaughon, which recites the other deeds of prior date and refers to them as deeds conveying the same tract of land, but did not introduce any of the other deeds. They then offered to prove by G. H. Mitchell that the deed from John Stallings to Charles Northcott was lost, except the bottom part of it, which the witness had in his possession, and, further, that he had seen the deed before it was mutilated and destroyed, and that it had been duly registered some time before this action was brought, and that the records of Hertford county were burned in 1862. This evidence was offered to show that said deed conveyed the land in dispute. The court excluded the evidence, and the plaintiffs excepted. There was evidence on the part of the plaintiffs tending to show that the land, which is known as the "Stallings Tract," has fixed and definite boundaries, which consisted of marked trees around the tract, and that this is the same land described in the complaint. There was no evidence of adverse possession in plaintiffs, or those under whom they claimed, for seven years. The defendants introduced the deeds constituting their chain of title and evidence which, as they claimed, tended to show title in them; but it is not necessary to set it forth. Defendants moved to nonsuit the plaintiffs at the close of their testimony, which motion was refused.

At the close of all the testimony they moved again to nonsuit the plaintiff. The motion was granted, and the action dismissed. Plaintiffs excepted and appealed.

Winborne & Lawrence, for appellants. Pruden & Pruden and Shepherd & Shepherd, for appellees.

WALKER, J. (after stating the case). The mode of proving title to land in this state has become so thoroughly settled by the decisions of the court that it is hardly necessary to enter again upon a discussion of the subject or to do more than refer to the most recent cases in which the different methods have been stated. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201; *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142. It is clear that plaintiffs have not established any title whatsoever to the locus in quo by any of the ordinary ways known to the law. Their counsel have admitted in the first sentence of their brief that they have not shown any adverse possession of the land sufficient to ripen any color of title they may have had into a good and perfect title, and they must, therefore, fail in this action upon their own showing, unless by virtue of the provisions of Acts 1905, p. 947, c. 773, they can succeed. We do not think that act, upon the facts as they now appear, can possibly bear any construction which will aid the plaintiffs or create in their favor a prima facie case which would put the defendants to proof in their defense. The meaning of the act is palpable. It does not profess to confer title on any one who may be able to produce a succession of deeds which are not connected with the original title of the state, or are not shown by proof of adverse possession or an estoppel or in some other way to vest a good title in him. It was intended merely to dispense with proof of the fact that the state had parted with its title, because of the difficulty of showing a grant since the destruction of the county records, and any person asserting title to land in that county is still required to otherwise prove it in the same manner as it must be established in a cause pending in a court of any other county, where no such statute is in force and where it has either been shown or admitted that title is out of the state. In other words, the statute, by doing away with the necessity of proving that the title is out of the state, does not go further and provide that the title shall be presumed to be in any person who may bring suit and exhibit a perfect chain of deeds without any other proof of title; but the claimant must also show by proof, sufficient in law for that purpose, that he has in some way acquired the title. That this is obviously the meaning of the act will appear by the most cursory examination of its provisions. Each party to the action is required by section 2 to set out his chain of title, and it is provided that, when this is done, "the party proving the superior title shall be entitled to recover in the action."

It will be observed that the act in express terms requires that the plaintiff, in order to prevail in the action, must "prove" or establish a title superior to that of defendant; for, the burden of the issue being upon him, he cannot rely upon the weakness of his adversary's title. The language of the act which we have just quoted does not change in the least the general rule in the law of ejectment that the plaintiff must fail unless he shows a title good against the world or good against the defendant by estoppel. By the provisions of the act each of the parties is given precisely the same advantage he would have had if the act had not been passed and he had been able to show title out of the state, by introducing a grant to some third party or by showing such adverse possession as would raise a presumption that the title was out of the state. In trials involving title to land in Hertford county, title is presumed to be out of the state, but not to be in either of the parties to the suit or in any person from whom he derails his title. It is still open to either of them to show a grant from the state, if it can be done, to any person under whom he claims and with whose title, thus derived, he can connect himself by mesne conveyances; or he can show open, notorious, continuous, and adverse possession for 20 years without color or for 7 years with color, or he may establish title in any other way allowed by law. That this is the construction of the act is rendered absolutely certain by the language of section 3, in which it is provided that adverse possession, such as will ripen title, may still be shown by either party in order to establish his title, either by proving that the person under whom he claims had acquired title by such a possession and then connecting himself with the title so acquired, or by proving such a possession in himself for the required time. But, however this may be, the act in explicit terms requires that the plaintiff must show a title superior to that of the defendant before he can succeed in the action and this he did not do. If we assume that neither party introduced any evidence of title, the plaintiff, being the actor and the one who carries the burden of the issue, must, of course, be cast in the suit. Possession, being prima facie evidence of ownership, will protect the defendant, unless the plaintiff shows a title or right to oust him. 2 Lewis, Blk. p. 663, note (7); Tyler on Ejectment, 204; Newell on Ejectment, 433 (13).

We need not pass upon the question of evidence. The general subject is discussed in *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519. If the evidence was competent and had been admitted, it would not have strengthened the plaintiffs' case, as they did not introduce the deed from Northcott to Anderson, or in any other way connect themselves with the title alleged to be in Charles Northcott; and if George Stallings had the title, it would have passed by his deed to Charles Northcott,

and plaintiffs, having failed to show that they had acquired the latter's title, would have proved the title to be, not in themselves, but in a third party, namely, Charles Northcott. Besides, whether the evidence was competent, and should have been admitted or not, can make no difference in the result, as plaintiff failed to show any adverse possession for a sufficient length of time under any of the deeds to ripen their title, and they did not attempt to show title from the state by grant and mesne conveyances or otherwise to themselves. The only contention made in the case by the plaintiffs' counsel was that, under the act, their title was superior to that of the defendants, because their deeds were older in date. Such a construction of the act would not, in our opinion, be a sound or safe one. It would present an anomaly in the law, and might threaten, if not destroy, vested rights and established titles, which surely could not have been contemplated by the Legislature.

The ruling of his honor was clearly right, and must be sustained.

No error.

(141 N. C. 734)

STATE v. ATKINSON.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. ASSAULT AND BATTERY—POINTING PISTOL AT ANOTHER.

Under the direct provisions of Laws 1899, p. 502, c. 527, the pointing of a pistol at another is an assault with a deadly weapon, whether the pistol is loaded or not.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, §§ 74, 80.]

2. SAME — POINTING PISTOL WHILE IN POCKET.

A person having a pistol in his pocket, and pointing it at another without removing it from the pocket, is guilty of an assault with a deadly weapon.

3. CRIMINAL LAW—APPEAL WITHOUT BOND—AFFIDAVIT—INSUFFICIENCY—DISMISSAL.

Under Revisal 1905, § 3278, requiring the affidavit for an appeal without bond in a criminal case to state that it was made in good faith, the court is required to dismiss such an appeal, where the averment as to good faith is wanting.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2719.]

Appeal from Superior Court, Pitt County; E. B. Jones, Judge.

Dennis Atkinson was convicted for assault with a deadly weapon, and appeals. Appeal dismissed.

The Attorney General, for the State.

CLARK, C. J. Indictment for assault with a deadly weapon, to wit, a pistol. The court charged the jury that if the state "had satisfied them beyond a reasonable doubt that the defendant pointed a pistol at the prosecutor, whether loaded or not, this would be an assault," and to find the defendant guilty. Laws 1889, p. 502, c. 527 (now Revisal 1905, § 3622), expressly so provides, whether the unloaded pistol is pointed at

another in fun or otherwise; and it is unnecessary to consider whether this would be so independent of the statute.

The court further charged the jury that if they were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket, and "with pistol and hand on the inside of his pocket he pointed the pistol at the prosecutor, this would be an assault, and they should find the defendant guilty." This was not error. Firing a pistol concealed in the pocket of a coat, through the cloth, without the risk of first taking it out of the pocket, is a most cowardly and unfair advantage, and such user should be punished more severely than the use of the weapon openly, when the other party would have some warning. Pointing the pistol at the prosecutor in this manner was an assault.

We pass upon these exceptions, though we must dismiss the appeal because the affidavit to appeal, without giving bond, is fatally defective, in that it omits the averment that it is "made in good faith." This is required as to such appeals in criminal cases (Revisal 1905, § 3278), though this is not required as to appeals in forma pauperis in civil actions. Revisal, § 597. Such dismissal is a matter of right, and does not rest in the discretion of the court. An appeal without bond is valid only when the statutory requirements are complied with. *State v. Bramble*, 121 N. C. 603, 28 S. E. 269, and numerous cases there cited.

Appeal dismissed.

(140 N. C. 439)

CROCKER, County Treasurer, v. MOORE, Town Treasurer.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. INTOXICATING LIQUORS—DISPENSARIES—DISPOSITION—ROAD FUND—NET PROCEEDS.

Laws 1903, p. 921, c. 538, § 7, providing that one-half of the net proceeds of dispensaries "now established or hereafter established" in a county shall go to the road fund, appropriates to the road fund one-half of the net proceeds of dispensaries established under Laws 1899, p. 324, and appropriated by section 16, providing that one-third of the net proceeds of dispensaries shall be applied to the use of the town, and two-thirds for the benefit of the schools thereof, as the method of appropriation, is not a vested right, and the remaining half must be applied in the ratio stated by the act of 1899.

2. HIGHWAYS—TAXES—AUTHORITY TO LEVY.

Laws 1903, p. 920, c. 538, providing for the working of the public highways in a county, and directing that the road commissioners shall ascertain the amount needed for working the roads and the rate of taxation necessary to raise that sum and report to the county commissioners, who shall levy the taxes, is not invalid as taking the power of levying taxes for road purposes out of the hands of the county commissioners.

3. SAME—RATE OF TAXATION.

The act is not invalid because the rate of taxation when increased by the taxes for road purposes will exceed the constitutional limit; the Legislature having authority to authorize

a county to exceed such limit for necessary purposes, which includes the working of the roads.

4. SAME—DISPOSITION OF POLL TAX.

The act, though applying a part of the county capitation tax to the use of the public roads, is not in conflict with Const. art. 5, § 2, appropriating the state and county poll tax to the purposes of education and the support of the poor; the provision applying to the levy of taxation for general, and not for special, purposes.

5. SAME—NECESSARY EXPENSE.

The act does not violate Const. art. 7, § 7, prohibiting the creation of a debt except for "necessary expenses," unless by a vote of the people; the working of the roads being a necessary expense.

6. SAME—AUTHORITY OF COUNTY COMMISSIONERS OVER HIGHWAYS—LEGISLATIVE INTERFERENCE—VALIDITY.

The act does not violate Const. art. 7, § 2, making it the duty of the county commissioners to exercise general supervision over roads because it attempts to direct the commissioners in the supervision over roads, since by section 14 the General Assembly is given power to modify the provisions of the article, except sections 7, 9, and 18.

Appeal from Superior Court, Northampton County; Long, Judge.

Action by J. G. L. Crocker, treasurer of Northampton county, against W. P. Moore, treasurer of the town of Jackson. From a judgment for plaintiff, defendant appeals. Affirmed.

Peebles & Harris and Winborne & Lawrence, for appellant. Gay & Midyette and W. E. Daniel, for appellee.

CLARK, C. J. Chapter 538, p. 921, Laws 1903, which establishes a system for working roads in Northampton county, in section 7 thereof, provides that one-half of the net proceeds of all dispensaries "now established or hereafter established" in that county shall go to the road fund. Under chapter 189, p. 321, Laws 1899, a dispensary had been established at Jackson in said county, section 16 whereof provided that one-third of the net proceeds thereof should be applied to the uses of said town, and the other two-thirds for the benefit of the public schools of that township. The dispensary was established by virtue of the police power of the state, which had the right to appropriate the net proceeds to any purpose the Legislature thought best for the public welfare. The method of appropriation provided by the act of 1899 was not a vested right in the beneficiaries therein named, and the method could be changed at will by any subsequent Legislature. It is true the act of 1903 does not refer by name to the act of 1899, but it specifically appropriates one-half the net proceeds of all dispensaries "now established" or hereafter to be established in Northampton county. This certainly applies to the dispensary at Jackson, and the power of the General Assembly over dispensaries in their creation, abolition, and the application of their net proceeds is plenary. The dispensary is not the contract, but a privilege conferred on the town of Jackson, and, like

the charter of the town itself, the act creating the dispensary may be changed at the will of the Legislature. As one-half of the net proceeds is thus subtracted to be applied to the roads, the other half only remains to be applied in the ratio stated by the act of 1899, i. e., one-third of said remaining one-half will go to the town, and two-thirds of said remaining one-half to the public schools of the township.

It is, however, further contended that chapter 538, p. 920, Laws 1903, is unconstitutional as to certain other provisions, and hence the attempted appropriation of one-half of the net proceeds of the dispensary thereunder falls with it. But the above part of the statute is valid, and the money from the dispensary should be paid to the road commissioners, even though other parts of the act were unconstitutional. However, we cannot sustain the objections made to the constitutionality of the act.

1. The first objection raised is that it takes the power of levying taxes for road purposes out of the hands of the county commissioners. The act provides merely that the board of road commissioners shall ascertain and decide as to the amount needed for working the road and the rate necessary to raise that sum, and report to the board of county commissioners, who shall levy the taxes.

2. The second objection is that the rate of taxation, when swelled by the taxes for road purposes, will exceed the constitutional limitation. If the amount reported as needed by the road commissioners, added to the other necessary taxes, shall exceed the limitation upon taxation, there could be a reduction agreed upon, if necessary, by the two boards, or the county commissioners may not levy the excess, but that the road commissioners may possibly report an excessive sum does not render the statute invalid. It does not appear that in fact any levy has been made in excess of the constitutional limitation. An injunction against such excess would not invalidate, but would make more necessary, the payment of money from the dispensary for road purposes. The language of the act authorizing the levy of a special tax for these roads is almost identical with that sustained in *Herring v. Dixon*, 122 N. C. 420, 29 S. E. 368, and *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352. The Legislature can authorize a county to exceed the constitutional limitation for necessary purposes, and working the roads is a necessary purpose.

3. In that the act applies a part of the county capitation tax to the use of the public roads in violation of Const. art. 5, § 2, which appropriates the state and county poll tax "to the purposes of education and the support of the poor." But that provision applies to the levy of taxation for general, not special, purposes. *Board of Education v. Commissioners*, 137 N. C. 810, 49 S. E. 353.

4. That the act violates Const. art. 7, § 7, by authorizing the county commissioners to

levy taxes in Northampton county, for other than necessary purposes, without a vote of the people. But working the roads is a "necessary expense." *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352; *Herring v. Dixon*, 122 N. C. 420, 29 S. E. 368; *Satterwhite v. Commissioners*, 76 N. C. 153; *Brodnax v. Groom*, 64 N. C. 249.

5. For that the act attempts to direct the board of county commissioners in their supervision and control of roads and bridges, in violation of Const. art. 7, § 2. But under section 14 of article 7, inserted by the convention of 1875, the General Assembly is given full power to modify, change, or abrogate all the provisions of article 7, except sections 7, 9, and 13.

We find no error.

(140 N. C. 418)

ATKINSON v. RICKS.

(Supreme Court of North Carolina. Feb. 27, 1906.)

EXECUTORS AND ADMINISTRATORS — MODE OF ENFORCING CLAIMS AGAINST ESTATE.

A creditor who has procured a judgment against the personal representative of his debtor cannot proceed by motion in the same cause to have land sold, either by the representative or a commissioner, though the land be subject to the lien of an attachment levied on it during the life of decedent; but the proceedings for payment of the claim must be pursuant to Revisal 1905, §§ 43, 100, 103-131; any lien acquired by the attachment being preserved under sections 81, 767, in the application of the assets.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1915.]

Appeal from Superior Court, Northampton County; Peebles, Judge.

Action by W. J. Atkinson, executor, against W. S. Ricks, executor. From an order, defendant appeals. Reversed.

The plaintiff sued J. J. Boyd, testator of the defendant, before a justice of the peace, to recover a debt of \$65 and interest, and caused an attachment to be issued and levied on a tract of land belonging to him. He afterwards recovered judgment. The defendant appealed to the superior court, where a judgment was rendered against his executor; he having died in the meantime. In that judgment it is provided that the land attached be condemned to the payment of the judgment in the action, which is declared to be a lien on the same. On August 11, 1905, the plaintiff moved before the judge, then holding the superior court of Northampton county, for an order to the defendant to show cause why a commissioner should not be appointed in the said action to sell the land described in the judgment, and which had been attached, to satisfy the said judgment. The order was issued, and on the return day the judge found as facts that the defendant is insolvent and is not a fit person to sell the land, and he thereupon made an order appointing the two persons named therein commissioners to sell the land for the purpose of satisfying

the judgment and report to the court. The defendant excepted and appealed.

Mason & Worrell, F. R. Harris, and S. J. Calvert, for appellant. Peebles & Harris and Winborne & Lawrence, for appellee.

WALKER, J. (after stating the case). The counsel devoted much of the argument to alleged irregularities in the proceedings, such, among other defects, as want of sufficient notice and the hearing of the motion in Halifax, instead of Northampton, county. We do not deem it necessary to notice the questions thus raised, as there is one objection that goes to the root of the matter and is fatal to the plaintiff's right to have relief of any kind in this form of proceeding. When a creditor has a claim against a decedent's estate, whether by judgment or otherwise, the law is explicit in its directions as to how payment may be enforced. If the personal representative has failed to file his inventory or his accounts, as required by the statute, he can be compelled to do so upon application to the clerk of the superior court. Revisal 1905, §§ 43, 100, 103. If he improperly refuses to apply the personal assets to the payment of the debts due by the decedent, or if there are no such assets, and he fails to apply for an order to sell the land for the payment of debts, ample provision is made for proceedings at the instance of any creditor who considers himself aggrieved by his misconduct to compel him to account and apply the personal assets in his hands to the payment of debts. If there are no personal assets, the creditors may have an order for the sale of the land. Sections 104-131. The remedies thus afforded to the creditor are adequate for the full protection and enforcement of all his rights, and they should be pursued, if he would seek to have satisfaction of any claim he holds which the personal representative of his debtor, having assets, willfully refuses to pay. The executor or administrator, where good cause is shown, may also be removed from office, and there are perhaps other subsidiary remedies provided by law, not necessary to be mentioned, which in a proper case may be used by the creditor in ultimately securing payment of any claim held by him. But we know of no law authorizing the proceeding by which the defendant was temporarily ousted from his office as executor and commissioners appointed in his stead to sell his testator's land, or conferring jurisdiction upon a judge of the superior court to entertain such a proceeding.

The land of a decedent, against whose executor a judgment has been obtained, cannot be sold through a commissioner by an order in the cause, even though the land may be subject to the lien of an attachment levied upon it during the decedent's lifetime. We must think that such a proceeding is entirely without precedent or warrant in law to sustain it, as the learned counsel who argued for the plaintiff was unable, even with all his accustomed zeal and diligence in the preparation of his cases, to refer us to a single authority in its support, and we have not been able ourselves, after a most careful search, to find one. If J. J. Boyd, the original defendant, was now alive, the payment of the judgment could be enforced by the sale of the land under an execution issued to the sheriff. Revisal 1905, § 784: May v. Getty (at last term) 53 S. E. 75. The plaintiff can now proceed against the executor under the statute we have cited, and, in the application of the assets to the payment of the claims of creditors, any lien he may have acquired by the levy of the attachment will be preserved to him. Revisal 1905, §§ 87, 767.

But the proceeding in the court below cannot be sustained. To uphold it would not only violate the spirit but contravene the express provisions of the statute, and produce confusion and uncertainty in the administration of the estates of deceased persons. It might also result in giving one creditor an advantage over the others, to which he is not entitled under the law. The intention of the Legislature is that the assets of a decedent shall be administered, as far as may be done, in one proceeding, under proper safeguards, for the benefit of all the creditors, and we must effectuate this intention when it does not conflict with any other special provision of the law in favor of a particular creditor, who has legitimately secured priority. We take it to be clear, therefore, that a creditor who has procured judgment upon his demand against the personal representative of his debtor cannot proceed by motion in the same cause to have the land sold, either by the representative or a commissioner, for the purpose of paying the judgment, unless the suit was also brought to enforce a lien acquired by mortgage or some other kind of security. But the lien of an attachment levied in the lifetime of the debtor cannot, as we have said, be enforced in that way. There was error in granting the plaintiff's motion. The proceeding should be dismissed. Error.

(140 N. C. 415)

HARRELL v. BLYTHE et al.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. JUDICIAL SALES—CONFIRMATION—SETTING ASIDE.

Where land is sold under a decree of court, the purchaser acquires no independent right, but is regarded as a mere preferred proposer until confirmation, and until that time the bargain is not complete, and the court may set the sale aside.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Judicial Sales, § 59.]

2. SAME—DEFICIENCY IN BID.

Where, on motion to confirm a judicial sale, the court found that the property had sold for less than one-third of its value, it was justified in refusing to confirm the sale.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Judicial Sales, § 77.]

Appeal from Superior Court, Northampton County; Peebles, Judge.

Proceeding by A. J. Harrell, as executor of James McDaniel, against George Blythe and others, to obtain an order for the sale of land. Pending the proceeding the executor died, and J. A. Worrell, as administrator de bonis non with the will annexed, was substituted as plaintiff. The sale was ordered, and James Bolton purchased at the sale, assigning his bid to Godwin M. Powell, who conveyed to Cornelius Futrell; and from an order denying a motion to confirm the sale, Futrell appeals. Affirmed.

Motion in the cause to confirm a sale. This proceeding was brought in the late county court by A. J. Harrell, as executor of James McDaniel, for a sale of his land for assets. Harrell has since died, and J. A. Worrell, who has qualified as administrator de bonis non with the will annexed of James McDaniel, has been substituted as plaintiff in his stead, and other interested persons have been made parties by the service of process. The county court ordered a sale of the land. The plaintiff, Harrell, sold the same, and made a report of the sale to the court. James Bolton, who was the purchaser of the land at the sale, assigned his bid to Godwin M. Powell; and Cornelius Futrell, who claims an interest in the land under him by mesne conveyances, moved before the clerk of the court to confirm the sale. The clerk refused to grant the motion, and he appealed to the superior court. The judge found as a fact that the land was sold for \$125, which was less than one-third of its value, as it was worth at the time of the sale at least \$450. He found other facts which it is not necessary to state in the view we take of the case. Upon his findings of fact he affirmed the judgment of the clerk and refused to confirm the sale, whereupon Cornelius Futrell excepted and appealed.

Winborne & Lawrence and Mason & Worrell, for appellant. Gay & Midyette and Peebles & Harris, for appellees.

WALKER, J. (after stating the case). If we concede that this court has the jurisdiction to review the judge's findings of fact, which are alleged to be against the weight of the evidence, we would not disturb them, as we think there was abundant evidence in the case to sustain the court's conclusion as to the inadequacy of the sum bid for the land. The only question, therefore, which we will consider, is whether, upon the fact thus found, the court ruled correctly in refusing to confirm the sale.

Where land is sold under a decree of court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation, which is the judicial sanction or the acceptance of the court, and until it is obtained, the bargain is not complete. *Miller v. Feezor*, 82 N. C. 192; *Atty. Gen. v. Navigation Co.*, 86 N. C. 408; *Pritchard v. Askew*, 80 N. C. 86; *Ex parte Bost*, 56 N. C. 482; *In re Yates*, 59 N. C. 306. It was said by this court in *Wood v. Parker*, 63 N. C. 379, following substantially what had been decided in *Ex parte Bost*, supra, that a court certainly has the power to set aside a sale made in pursuance of its authority, either for the relief of the owner of the property if the price be inadequate, or for the relief of the purchaser if from mistake or fraud he has been induced to bid too much for the same. In the exercise of its large discretion, it will administer justice and equity to all persons interested. Sales of this character are only conditional and are not complete until they have been reported to and confirmed by the court. The bidder cannot complain of this rule, for he makes his offer to buy with the understanding that the whole matter is entirely under the control of the court, and that his bid may be rejected and the sale set aside, if, in the exercise of its sound discretion, the court should think proper to do so. In a case of a sale under order of court by an administrator, this court said, in *Mason v. Osgood*, 64 N. C. 467, that an administrator's authority is limited where he sells the land of the intestate under a license obtained from the court. He is a mere agent of the court to execute a naked power, and a purchaser acquires no right to the land until the sale is confirmed and title made under an order of the court granting the power of sale.

The subject is fully discussed in *Joyner v. Futrell*, 136 N. C. 301, 48 S. E. 649. Rorer in his work on Judicial Sales (section 122 and 124), says that, while the court will have a proper regard to the interest of the parties and the stability of judicial sales, it has a broad discretion in the approval or disapproval of a sale made under its decree; and in section 126 he further says that the court is clothed with an unlimited discretion to confirm a sale or not, as may seem wise and just. Confirmation is consent, and, the court being the vendor, it may consent or not, in its discretion. Whether there be a limit to this

discretion or not, it is not necessary for us now to determine, as it is apparent from the authorities cited that the court had the power and the right to refuse to confirm in this case. In *Pritchard v. Askew*, supra, this court, by Dillard, J., said: "In sales of the character of the one under consideration, the bidder is never considered a purchaser until the sale is reported and confirmed. He is to be taken as becoming the best bidder, subject to the understanding, in all cases, that the court may confirm the sale, or set it aside and order a resale, as in the exercise of a sound discretion it may determine to be right and proper." In *Ex parte Bost*, supra, it was held that if the court is informed, by a master's report or by affidavits, that the sum bid for land is not its full value, it will be its duty to set aside the report and order a resale. *Vass v. Arrington*, 89 N. C. 10. So that the judge not only had the power, as we have already shown, but it also seems that it was in a certain sense his duty to act as he did. We do not see how he could have decided otherwise under the circumstances.

The finding of fact as to the inadequacy of the price being sufficient of itself to support the ruling of the court, it is not necessary to inquire whether the other facts found by the judge were either singly or collectively sufficient for that purpose or whether he committed any error in respect to them.

The motion in this cause was made because the court suggested in *Joyner v. Futrell*, supra, that it was the proper, if not the only remedy. But upon an investigation of the facts in this proceeding the merits are found to be against the petitioner, *Cornelius Futrell*, and he must therefore fail to secure any relief.

There was no error in the decision of the court below.

No error.

(140 N. C. 375)

SMITH v. CASHIE & CHOWAN R. & LUMBER CO.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. JUDGMENT—PLEADING IN DEFENSE—NECESSITY.

Under Revisal 1905, § 1460, requiring the answer in justice's court to contain a denial of the complaint or any part thereof, and a statement in a plain and direct manner of any facts constituting a defense or counterclaim, a defense of estoppel predicated on a judgment in a former suit between the parties must be specially pleaded, even in an action before a justice of the peace, and is not available under the general issue or anything equivalent thereto.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1787.]

2. TRIAL—FUNCTIONS OF JURY—REVIEW OF EVIDENCE.

Where there is any evidence which reasonably tends to prove the fact in issue, or where the credibility of witnesses must be passed upon, the question of fact is for the jury under proper instructions, and it is error to instruct the jury to resolve that issue in a particular manner.

Appeal from Superior Court, Bertie County; Peebles, Judge.

Action by John T. Smith against the Cashie & Chowan Railroad & Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

Civil action tried before Peebles, J., and a jury at September term, 1905, of Bertie superior court. The plaintiff sued before a justice of the peace to recover the sum of \$150, the balance due for services. In his complaint he alleged that the defendant owed him \$150 for two months' work at \$75 per month. The defendant simply denied that it owed the plaintiff anything. The plaintiff testified that on February 5, 1905, the defendant employed him to buy lumber trees for it, for which service he was to receive \$75 per month, payable at the end of each month, and it was agreed that the employment should last four months. At the end of the first month—that is, about March 5th—the defendant paid the plaintiff for that month \$75, and without lawful excuse discharged him. For the sole purpose of showing that the justice had jurisdiction of this case, the plaintiff was permitted, over the defendant's objection, to show that after June 10, 1904, when all the instalments of his salary were overdue, he sued the defendant before a justice of the peace for that part of the salary, \$75, due for the month ending April 5, 1905, and recovered judgment for the same, which was paid by the defendant, leaving a balance of \$150 due. The defendant admitted that it employed the plaintiff at \$75, but introduced evidence to show that he was employed for one month only. In this connection Mr. Smith, a witness for the defendant, testified that the plaintiff was not hired for four months, but for only one month, and that he was paid for that month, and contended for nothing further than the salary paid to him at the end of the first month. The issues submitted to the jury, with their answers, were as follows: (1) Did the defendant hire the plaintiff for the term of four months at \$75 per month? Yes. (2) Did the defendant unlawfully discharge the plaintiff from its employment after the first month? Yes. (3) Is the defendant indebted to the plaintiff, and, if so, to what amount? Yes; \$100, with interest from June 5, 1904, until paid. The defendant's counsel requested the court to give the following instructions to the jury: "When the plaintiff sued for and collected his one month's wages under his judgment, he was by that estopped to sue for the balance, because his contract was entire, and not divisible, and suing for less than the amount of the whole claim was in law a decision of what was due him in full." The court refused to give the instruction, and the defendant excepted. Upon the second issue the court charged the jury that, "If the first issue was answered 'Yes,' the second issue should be answered 'Yes,' for upon that issue

the burden was upon the defendant, and it had offered no evidence to satisfy the discharge if the contract was for four months." Judgment on the verdict was rendered for the plaintiff, and the defendant appealed.

Francis D. Winston and St. Leon Scull, for appellant. Day, Bell & Dunn and J. B. Martin, for appellee.

WALKER, J. (after stating the case). The defendant relied upon the judgment recovered before the justice of the peace for the second month's instalment of salary as a bar to this action, and assigns as a reason why it should have this effect that there was a single contract to pay a salary by monthly instalments, and as all the instalments were overdue at the time the suit was brought, and the judgment rendered, the plaintiff was required to sue for all of them in one action, and could not make any one instalment the subject of a separate suit and obtain judgment for it, without losing the right to recover for the others. The interesting question thus raised in the argument is fully discussed in *Jarrett v. Self*, 90 N. C. 478, and that case has since been cited with approval in *Kearns v. Heitman*, 104 N. C. 332, 10 S. E. 467, and *McPhail v. Johnson*, 109 N. C. 571, 13 S. E. 799. But the pleadings do not present this matter for our consideration, and we do not, therefore, pass upon it. In order to derive any benefit from a former judgment as a bar to the further prosecution of a pending suit, it must be properly pleaded, as such a defense is not covered by a plea of the "general issue" or anything that is equivalent to it. It is provided by statute that the answer shall contain a denial of the complaint, or of any part thereof, and also a statement in a plain and direct manner of any facts constituting a defense or counterclaim. Revisal 1905, § 1460. This court has repeatedly held that such defensive matter as is now relied on, even in actions before justices of the peace, must be specially pleaded, and will not be considered under a plea merely denying the indebtedness alleged in the complaint. The cases in which this rule was laid down were not materially different in their facts from the case at bar. Indeed, in several of them the facts were substantially identical. *Blackwell v. Dibbrell*, 103 N. C. 270, 9 S. E. 192; *Hicks v. Beam*, 112 N. C. 644, 17 S. E. 490, 34 Am. St. Rep. 521; *Montague v. Brown*, 104 N. C. 161, 10 S. E. 186; *Cotton Mills v. Cotton Mills*, 115 N. C. 487, 20 S. E. 770; *Curtis v. Piedmont Co.*, 109 N. C. 405, 13 S. E. 944; *Harrison v. Hoff*, 102 N. C. 128, 9 S. E. 638; *Hawkins v. Hughes*, 87 N. C. 115.

Assuming that there was proof in this case, as the defendant's counsel contended there was, that a judgment for the second instalment had previously been recovered before a justice of the peace, the court below could not have based an instruction upon it, as it is a well-settled principle that there

must be allegation, as well as proof, and they must correspond. In this case the defendant merely denied that he owed the plaintiff, and did not specially plead the former judgment. There was no motion to amend, and, in the present state of the pleadings, the court was clearly right in refusing the defendant's prayer for instructions, if we are to follow established precedents. But there was an error committed in that portion of the charge upon the second issue, which is set out in our statement of the case. It is apparent from this instruction the court assumed that the defendant had discharged the plaintiff. An affirmative answer to the first issue did not necessarily call for the same kind of answer to the second issue. Besides, the evidence relating to the discharge of the plaintiff by the defendant was not all one way, and, even if it had been, it was for the jury to find the fact, and in order to do so to pass upon the credibility of all the witnesses. The testimony of the witness Smith was proper for the consideration of the jury upon this issue. Even if it may fairly be regarded as slight, it is yet, without taking into account the excluded portion, some evidence of the fact that the plaintiff had quit the service of the defendant voluntarily. In no view of the testimony do we think the court's peremptory instruction upon the second issue can be sustained; for where there is any evidence that reasonably tends to prove the fact in issue, or where the credibility of the witnesses introduced by either party must be passed upon, the question of fact involved is always one for the jury under proper instructions from the court as to the law.

The error in the charge entitles the defendant to another trial.

New trial.

(140 N. C. 336)

SMITH v. NEWBERRY et al.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. JUSTICES OF THE PEACE—APPEAL—ISSUES.

Revisal 1905, § 1459, requires the complaint in justice's court to plainly state the facts constituting the cause of action. Section 1463 provides that the pleadings need not be in any particular form, but must be such as to enable a person of common understanding to know what is meant. Section 1496, forms 38, 40, prescribe the forms of justices' docket entries and return of notice of appeal, both of which provide for minutes of the substance of the pleadings. Section 496 provides that, when the allegations of a pleading are indefinite or uncertain, the court may require the same to be made definite and certain by amendment. *Held*, that where a justice's summons commanded defendant to answer plaintiff's complaint "for deceit and breach of warranty and false warranty" in the sale of a horse, and the justice's return on appeal to the superior court failed to contain any statement of the complaint or answer, and defendants failed to move that the complaint be made more specific, it was proper for the superior court to submit the case on the issue of false warranty, where it seemed

sustained by the evidence, and to refuse to submit the issue of deceit and require plaintiff to show scienter of which there was no evidence.

2. PLEADING—DEMURRER—GROUNDS—MISJOINDER OF CAUSES OF ACTION.

An objection on the ground of the improper joinder of causes of action should be raised by demurrer for misjoinder.

3. JUSTICES OF THE PEACE—OBJECTION TO JURISDICTION.

An objection to the jurisdiction of a justice of the peace should be taken by demurrer for want of jurisdiction.

[Ed. Note.—For cases in point, see, vol. 31, Cent. Dig. Justices of the Peace, §§ 97, 223.]

4. ACTION—JOINDER OF CAUSES OF ACTION—CONTRACT AND TORT.

Where a cause of action for breach of warranty and a cause of action for deceit both arise out of the same transaction, they may be joined in one action.

5. SALES—WARRANTY—BREACH—WAIVER.

Where there was a breach of warranty in the sale of a horse, and after the breach the buyer took the horse back and traded it with the seller for another horse, without reserving any claims for the breach of warranty in the original transaction, he thereby surrendered his right to damages by virtue of such transaction.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 817-819.]

6. TRIAL—EXCEPTIONS—REQUEST FOR INSTRUCTIONS.

In the absence of a request by the complaining party, an exception will not lie to the failure to submit issues.

7. SALES—BREACH OF WARRANTY—DAMAGES.

Where the buyer of a horse, after discovering a breach of warranty, took the horse back to the seller and received in exchange another horse, of the full value of the consideration paid for the first horse, he could recover but nominal damages for the breach of the warranty.

8. APPEAL—ERRORS REVIEWABLE—INSTRUCTIONS.

An error committed by the court in instructing the jury is reviewable on exception, although the instruction was given on the court's own motion without any request being made therefor.

Appeal from Superior Court, Carteret County; E. B. Jones, Judge.

Action by Thomas Smith against Y. Z. Newberry and others. From a judgment for plaintiff, defendants appeal. Reversed.

Civil action for breach of warranty in sale of horse. There were no pleadings, oral or written. The only indication of the plaintiff's cause of action is found in the warrant or summons issued by the justice of the peace, in which the defendant is commanded to appear and "answer the complaint of Thomas Smith for deceit and breach of warranty and false warranty, in that the defendants fraudulently warranted a horse which they sold to plaintiff for \$—— to be one which would not kick, when in fact he did kick, and the defendants well knew said horse would kick, to the plaintiff's damage in the sum of fifty dollars." The return on appeal of the justice does not contain any statement of plaintiff's complaint or defendants' answer, simply stating that judgment was rendered, etc. The cause was tried on appeal to the superior court upon three is-

ssues, submitted by the court as follows:

"(1) Did the defendants warrant the horse not to kick? (2) Was there a breach of said warranty? (3) What damage has plaintiff sustained?" Defendants objected to the first and second issues, and requested the court to submit issues as in an action for deceit, etc. To the refusal to do so defendants excepted. The jury having answered the issues in the affirmative and assessed the damage at \$35, judgment was rendered accordingly, and defendants appealed.

D. L. Ward, for appellants. Simmons & Ward, for appellee.

CONNOR, J. The defendants urged two exceptions in this court. The first was to the refusal of his honor to submit the issue as for a deceit, and to charge the jury that the plaintiff must show a scienter. Confusion in respect to the character of the action grows out of the failure of the justice to observe the requirement of section 1459, Revisal 1905, that "the complaint must state in a plain and direct manner the facts constituting the cause of action." This may be done orally, and is not required to be "in any particular form, but must be such as to enable a person of common understanding to know what is meant." Section 1463. The form in which the justice should make his docket entries, noting the pleadings, etc., is prescribed by section 1496 (No. 38), and the "return or notice of appeal" (No. 40). It is usual in the summons to indicate in general terms the basis of the demand whether for nonpayment of an amount due on account or promissory note or for damages for breach of contract, but when the parties come to trial the justice should require them to state "in a plain and direct manner the facts constituting the cause of action," and a denial by defendant or other facts constituting a defense. Large power of amendment is vested in the superior court, limited only by the condition that the amendment show a cause of action within the jurisdiction of the justice. *Mfg. Co. v. Barrett*, 95 N. C. 36; *Planing Mills v. McNinch*, 99 N. C. 517, 6 S. E. 388. Treating the warrant as a complaint, two causes of action are set forth—breach of warranty and deceit. If the defendants had so desired, they might have called upon the plaintiff to make his complaint more specific, either in the justice's court or after the case reached the superior court upon appeal. Revisal 1905, § 496; cases cited in *Clark's Code*, § 281. In the absence of any more definite pleadings or any motion to make them so, his honor properly submitted the issue upon the cause of action which seemed, and, as the jury found, was sustained by the evidence. If the plaintiff was content to rely upon a cause of action entirely contractual, in which he could call only for execution against the property of the defendant, and waive the cause upon which he may have had

an execution against the person, we do not see how the defendants can complain. The evidence did not show any scienter, and if an issue had been submitted upon the deceit his honor would have been justified in so instructing the jury. We do not understand the defendants as contending that the two causes of action could not be joined, or were not within the jurisdiction of the justice. If they desired to raise the first objection, they should have demurred for misjoinder, and, if the second, for want of jurisdiction. It is sufficient to say that neither objection could have been sustained. While it is true that an action for breach of warranty arises out of contract and deceit is for a tort, when they both arise out of the same transaction, they may be joined. *Solomon v. Bates*, 118 N. C. 321, 24 S. E. 746. We find no error in his honor's ruling in this respect.

The second exception is directed to his honor's charge. Plaintiff testified to the transaction, the warranty, and breach. He says that after driving the horse, which was the subject of the controversy, he returned to defendants. "He refused to exchange. I left the man there and went home. I came back and tried to compromise. They got cart and harness and my pony." Defendant Newberry testified to transaction, denying warranty, etc. After describing manner in which plaintiff drove the horse away, he says: "He came back and I swapped him another mare, and he paid me \$10 to boot. I told him, when he came first, here were his papers, and 'now take the cart and harness and go.' He said, 'No; I came to trade,' and he was going to trade. I finally did get him another horse for \$10 to boot. He gave me road cart and harness for \$5 of \$10 to boot, and gave note for another \$5. He then brought this mare back, and said his wife said they could not raise the money for the mare. I kept the mare and bought the pony." Plaintiff introduced no evidence in reply to the foregoing testimony. His honor, after reciting this portion of defendant's testimony, said: "The court charges you that you may consider this evidence in making up your minds as to whether there was a warranty and a breach as contended by plaintiffs." Defendants excepted. We are unable to see how this testimony casts any light upon the question whether there was a warranty. It was most material upon two other phases of the controversy. If true, it tended to show a new contract substituted for the original one, in which the jury found there was a warranty. Plaintiff says that, when he found that the horse kicked, he carried it back "and tried to compromise." He concludes his testimony with the statement: "They got cart and harness and my pony." The defendant testifies that he did make a new trade with plaintiff, taking the mare back and giving him another one for \$10 to boot, a part of which was paid by the delivery of "cart and harness," and that a second arrangement was

made by which, at the request of the plaintiff, he took the mare back. If all of this is true, whatever rights the plaintiff had under the original contract were surrendered by the second and third contracts. It is but common fairness to require men to deal frankly with each other, and when new and substituted contracts are made to say whether they intend to reserve controverted claims and demands growing out of the original transactions. It may well be that in making the second trade both parties took into account the conditions attaching to the first. If they did not do so, they should have said so. The defendants are confronted with the difficulty that no issue was asked upon this phase of the testimony, and while there are a few carefully guarded exceptions the general rule is that, in the absence of a request by the complaining party, an exception will not lie to the failure to submit issues. The testimony presented a defense in the nature of a plea in confession and avoidance. We have held at this term, following other decisions, that a defense of this character (*Smith v. Lumber Co.*, 140 N. C. —, 53 S. E. 233) must be specially pleaded. We think, however, that the testimony was material to be considered by the jury upon the third issue in regard to damages. While, for the reasons stated, the defendants are precluded from using the testimony in bar of the action, and that upon the finding on the first and second issues they are in any aspect liable for nominal damages, they should be permitted to have the jury consider the testimony upon the damage sustained by the breach of the warranty. If, by the second trade, the plaintiff accepted in exchange for the mare which kicked, another mare, for which he paid \$10 to boot, of the full value of the consideration paid for the first mare, his damage for the breach of the warranty would be but nominal. While it is true that, in the absence of any request to do so, the failure of the judge to present this phase of the testimony could not be assigned as error, yet, when he undertakes to instruct the jury in respect to the testimony and commits an error, it is reviewable upon exception. The jury gave the plaintiff \$35 damages, which was about the value of the pony, less the mortgage upon it paid by defendants. It is evident that no consideration was given to the testimony of defendant upon the second trade.

We have felt embarrassment in disposing of this appeal by reason of the condition of the record. We find that a very large bill of cost has accumulated. The case presents a striking illustration of the danger of departing from well-settled rules of pleading. If at the beginning the parties had been brought to a simple statement of their controversy and the real issues fairly presented, the long delay—three years—and the large expense incurred, would have been saved. The purpose of the Code system of pleading

is to bring the parties at their entrance into court to an issue either of law or fact and a speedy trial upon the merits. We feel constrained to remand this case for a new trial to the end that the jury be instructed to consider the evidence of defendant Newberry, with such other evidence as may be introduced upon the question of plaintiff's damage. The cost of this court will be divided equally between the parties.

New trial.

(140 N. C. 379)

JENKINS v. HOLLEY.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. FRAUDS, STATUTE OF—AGREEMENT TO ANSWER FOR DEBT OF ANOTHER.

Revisal 1905, § 974, requiring a special promise to answer for the debt, default, or miscarriage of another to be in writing, does not affect an oral contract to assume the debt of another who is thereupon discharged of liability.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Frauds, Statute of, §§ 47-49.]

2. SAME—ASSUMPTION OF DEBT—EVIDENCE—QUESTION FOR JURY.

On an issue as to whether defendant had agreed to become absolutely responsible for the payment of a debt due from a third person to plaintiff, or merely to become responsible if such third person did not pay, evidence held to require submission to the jury.

Appeal from Superior Court, Bertie County; Peebles, Judge.

Action by Joseph T. Jenkins against Thomas D. Holley. From a judgment for defendant, plaintiff appeals. Reversed.

One Wilson, a colored man, was indebted to Jenkins in the sum of \$20, for advances which he agreed to pay or work out. Wilson got employment from defendant, Holley, and brought him to see Jenkins. The plaintiff testified: "Holley asked if Wilson owed me, and how much. I told him I had a paper in which the said Wilson had agreed to pay me in 30 days or do that amount of work. He asked to see the paper and said that Wilson was going to work with him to pay him, and he wanted to write one by it. I handed him the paper and he said: 'I will pay you. You need not look to Wilson.' I asked him when he would pay me, and he said: 'On Saturday next.' I replied: 'Mr. Holley, that is all right. I do not look to Wilson for pay, but look to you.' Holley replied to this: 'All right. You look to me; I will pay you.' And Holley took the paper, and he and Wilson went off. I asked Holley for pay several times, and he did not pay me, and I sued him." Wilson testified: "I owed Jenkins \$20. He demanded the cash or work. I told him that I would get Holley to pay him; that I was working for Holley. I saw Holley and he agreed to do so, and saw Jenkins, and Jenkins agreed to look to Holley for it. I have not paid Jenkins. The promise of Holley was not evidenced by any writing." Upon the close of this evidence the court nonsuited

the plaintiff on the ground that the promise of Holley was not in writing.

Francis D. Winston and J. H. Matthews, for appellant. Day, Bell & Dunn and J. B. Martin, for appellee.

CLARK, C. J. (after stating the case). The provision of the statute of Frauds (now Revisal 1905, § 974), which requires a "special promise to answer the debt, default, or miscarriage of another" to be in writing, applies only to invalidate verbal agreements to be surety for the debt, etc., of another for which that other remains liable. It does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor; the promisor thus becoming sole debtor in his place and stead. *Haun v. Burrell*, 119 N. C. 547, 26 S. E. 111; *Whitehurst v. Hyman*, 90 N. C. 489. The point was clearly restated last term by Hoke, J., in *Sheppard v. Newton*, 139 N. C. 533, 52 S. E. 143. The language here used to plaintiff by Holley, "I do not look to Wilson for pay, but look to you," and Holley's reply, "All right you look to me; I will pay you on Saturday next"—was very strong, if not, indeed, conclusive, evidence, and is strengthened by Wilson's testimony. The evidence offered by plaintiff should have been left to the jury, with any evidence the defendant might offer, upon the issue whether Holley became sole debtor, or was merely responsible if Wilson did not pay. A promise to assume the debt of another, who is thereupon released, need not be in writing. *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612. The arrangement that Wilson was to work for Holley instead of Jenkins, was consideration to support the promise. The surrender of the paper is not conclusive evidence, of itself, for the defendant contends that this was only for the purpose of making a copy. But upon the whole evidence the case should not have been withdrawn from the jury by a nonsuit.

Error.

(140 N. C. 433)

KING v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. MASTER AND SERVANT—CREATION OF RELATION—CONTRACT—CONSTRUCTION.

Where defendant telegraphed plaintiff, "Can offer" employment, and plaintiff accepted the offer and was placed in the position, a contention that the words "can offer" did not make a positive offer, but were only intended to open negotiations, was untenable.

2. SAME—WRONGFUL DISCHARGE—ACTION—BURDEN OF PROOF.

A general or indefinite hiring is prima facie a hiring at will, and, if the servant seeks to make it a yearly hiring in an action for wrongful discharge, the burden is on him to establish it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 8-11, 19, 47.]

3. SAME—CONTRACT OF EMPLOYMENT—TERM.

Where the master telegraphed plaintiff that he could offer him employment at \$65 per month, and that the job would last all the year, and plaintiff accepted the offer, there was a hiring for a year.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 9.]

4. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—RAILROAD ROADMASTER.

The general roadmaster of a railroad had implied authority to employ one to supervise a piece of work.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 274.]

Appeal from Superior Court, Halifax County; E. B. Jones, Judge.

In an action by J. W. King against the Seaboard Air Line Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Action to recover damages for breach of contract of hiring. The following issues were submitted to the jury without objection, and answered as follows: "(1) Was the contract of employment for the balance of the year? Yes. (2) Was the contract of employment for an indefinite period, leaving to the parties the right to sever their connection at will? No. (3) Is defendant indebted to plaintiff? If so, in what amount? \$440, with interest from January, 1904, to date, March 14, 1905." The plaintiff's action is founded on the following telegram, sent by J. T. Elmore, general roadmaster of the defendant: "Henderson, N. C., April 2, 1903. J. W. King. Can offer you extra force at \$65 per month. Will want you at once to ditch D. & N. Road and R. & G. Answer quick. Job will last all the year. J. T. Elmore." There was evidence tending to prove that the plaintiff accepted the offer at once; that he was placed in charge of the work, and at the end of 11 days discharged. From the judgment rendered the defendant appealed.

Day, Bell & Dunn and Murray Allen, for appellant. Claude Kitchin, E. L. Travis, and W. E. Daniel, for appellee.

BROWN, J. There are a large number of exceptions presented in the record, but, since the defendant deems only one worthy of notice in the brief, we deem it unnecessary to discuss the others, although we have carefully considered them and find them to be without merit. The defendant contends that: First, the telegram to King did not constitute an offer of employment that would become binding upon acceptance; second, it was an offer of employment for a definite time; and, third, if it was a binding offer, the court should have read into it the rules of defendant company that employes are engaged to work by the month, subject to discharge at will.

The argument of counsel that, by using the potential "can offer," Elmore did not make a positive offer of employment, but only intend-

ed to open negotiations, is entirely destroyed by the undisputed evidence that the plaintiff accepted the offer by wire, reported for duty, and was placed in charge of the work, and prosecuted it for 11 days until discharged. The reasons for his discharge are given in the answer, as well as Elmore's letter to the plaintiff of April 23, 1903. There is evidence for the defendant tending to prove a different contract after the plaintiff reported for duty, but that evidence seems to have been discredited by the finding of the jury. The question was submitted to them to determine the duration of the employment, and they have said it was for the remainder of the year; the burden being properly placed on the plaintiff to prove it. A general or indefinite hiring is prima facie a hiring at will, and, if the servant seek to make it out a yearly hiring, the burden is upon him to establish it by proof. Wood, Master & Servant (2d Ed.) § 136. In his charge upon this issue his honor instructed the jury that the language of the telegram indicated a contract for the remainder of the year, and that if they should find it was accepted by the plaintiff, and no other agreement was afterwards substituted for it, they should answer the first issue "Yes." We are unable to place any other construction upon the written words of the telegram, unless it be that the contract was to ditch the D. & N. road, and that the employment was to last until that job was completed. That construction would not help the defendant, as there is no evidence that the work was completed before the expiration of the year.

Counsel for the defendant rely upon Edwards v. Railroad, 121 N. C. 490, 28 S. E. 137, to sustain their construction of the words of the telegram, as indicating a clear intent to hire by the month. We are unable to see that the case supports their contention. The letter, in the latter case, advised Edwards of his appointment as general storekeeper—"your salary will be \$1,800 a year." Edwards accepted, and at once, about July 10, 1894, entered upon the performance of his duties, and was paid \$150 per month until he was discharged January 1, 1896. The court held that the contract was not specific as to the term of service, that there was nothing on its face to justify the construction that the employment was for a year, and that the sum mentioned was merely the measure of compensation, leaving the parties to sever their relations at will. In the case before us the compensation and term of service are both plainly indicated, the one to be paid monthly, the other to endure for the current year. The language is sufficiently clear to justify a prudent man in so interpreting it before accepting the offer. Mining Co. v. Harris, 24 Mich. 115.

It is contended that according to the rules of the defendant its servants are employed by the month, subject to be discharged at its will, and that the plaintiff knew this.

There is abundant evidence tending to prove the existence of such a general rule in relation to the hiring of its regular employes. But this transaction does not appear on its face to be the ordinary taking of a servant into the regular service of the company and placing him upon its pay roll. It appears to be more in the nature of a special contract to supervise a certain piece of work until completed, accompanied by a statement as to how long the service will be required. The plaintiff had been section master and knew of the general rule and custom of the defendant, but he also testified that he had known the company before to make yearly contracts of hire. *Prima facie*, Elmore had the right to make the contract with the plaintiff, and there is nothing in the evidence to rebut it. No rulebook is in evidence containing any rule denying such authority to a general roadmaster. Elmore's jurisdiction was extensive, extending from Portsmouth to Raleigh, and over the D. & N. and other branch roads, so that he seems to be "one in authority" among the defendant's employes. There is evidence upon the part of the defendant which, if believed, fully justified the discharge of the plaintiff. All of it was contradicted by him. The contentions of both parties upon this feature of the case were fully presented by the judge below to the jury under the third issue. We find no vice in the instructions.

Upon review of the entire record, the judgment must be affirmed.

(140 N. C. 427)

CRADDOCK v. BARNES et al.

(Supreme Court of North Carolina. Feb. 27, 1906.)

APPEAL—DOCKETING—DISMISSAL.

An appeal not docketed seven days before the call of the district to which it belonged, as required by Supreme Court rule 5 (28 S. E. v.), will not be dismissed when docketed at the next term of the Supreme Court after the trial below, if the appellee does not file his motion to dismiss on appellant's failure to so docket the appeal and before the case is actually docketed by appellant.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3133-3135, 3149-3154.]

Appeal from Superior Court, Washington County.

Action by H. D. Craddock against Priscilla Barnes and others. On motion to dismiss appeal. Denied.

Aydlett & Ehringhaus, for appellant. W. M. Bond and H. S. Ward, for appellee.

PER CURIAM. This case, from the First district, was tried below last fall and was docketed here three days before the district was called at the opening of this term. The appellee moved on the first day of this term to dismiss the appeal, because not docketed seven days before the call of the district, as required by rule 5 (28 S. E. v.). We have held

that, though the appeal is not docketed seven days before the call of the district to which it belongs, it will not be dismissed (when docketed at the next term here after the trial below) if it is docketed before the motion is made to dismiss. *Curtis v. Railroad*, 137 N. C. 308, 49 S. E. 213; *Benedict v. Jones*, 131 N. C. 474, 42 S. E. 909, and other cases there cited. The appellee contends that these decisions ought not to apply to the First district, because, if they do, an appellant from that district can always obtain six months' delay by docketing later than seven days before the call of the district and thus the case will not stand for hearing at this term, and yet the appellee cannot move to docket and dismiss if the appeal is docketed before court meets for this term, since, court not being in session till the day the call of the First district begins, the appellee will have no opportunity to move to dismiss till after the appeal is docketed.

There would be great force in this suggestion but for the fact that if the appeal is not docketed seven days before the call of the district to which it belongs the appellee can file his motion to dismiss with the clerk, whether the court is in session or not. He need not file it in open court. This is true of any district. When the call of the district begins, the motion should then be called to our attention, if not before, and, if it antedates the docketing of an appeal which was not docketed seven days before the call of the district, the motion to dismiss must be allowed. Here the appeal was not docketed seven days before the call of the district. The appellee, instead of filing his motion then with the clerk, did not file it till the first day of this term, when the call of that district began and after the appeal had been docketed. His motion to dismiss comes too late.

Motion denied.

(124 Ga. 633)

WOLFE v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. Jan. 13, 1908.)

CARRIERS—SEPARATION OF WHITE AND COLORED PASSENGERS—MISTAKE OF CONDUCTOR.

If it be actionable per se, as against a street railway company, for its conductor, in endeavoring to comply with the statute requiring the separation of white and colored passengers, to negligently mistake a white passenger for a colored one, and in the presence and hearing of others inform him that he must be seated in the portion of the car set apart for negro passengers, it is essential to the maintenance of such an action that the petition allege the plaintiff to be a white man. The petition in the present case not containing such necessary allegation, it was properly dismissed on general demurrer.

Gobb, P. J., and Evans, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Nathan F. Wolfe against the Georgia Railway & Electric Company. Judg-

ment for defendant, and plaintiff brings error. Affirmed.

This was an action for damages against a street railway company. The petition was dismissed on general demurrer, and the plaintiff excepted. The plaintiff's case, as made by his petition, is substantially as follows: On a day stated the plaintiff, accompanied by his sister, boarded a car of the defendant at a designated point in the city of Atlanta, for the purpose of being transported to another point reached by the lines of the defendant company. He paid the conductor the required fares for himself and his sister, and asked for and received transfers to the line which would take him to his destination, and at the proper transfer point he boarded a car on this line. The car to which he and his sister were transferred had two long seats, one on each side of the car, with a broad aisle between. Plaintiff and his sister entered the car from the rear, walked forward, and seated themselves in the front part of the car. Under the laws of Georgia railroad companies are required to separate the white and negro passengers as much as practicable; and the defendant company has a regulation, which is conspicuously posted in many of its cars, requiring white passengers to seat from the front, and negro passengers from the rear, of cars. On the occasion in question there were a number of passengers in the car; the white passengers being seated toward the front and the negroes toward the rear. "Petitioner further shows that in Georgia the negro race is recognized and considered inferior to the white race, and that the law of the state of Georgia recognizes this distinction in various ways, notably by its provisions to separate the races in railroad cars, by laws against the intermarriage of members of the two races, and by laws preventing the mingling of the said two races in the common schools of said state." After plaintiff and his sister had seated themselves, and while they were engaged in conversation, the conductor came to them and took up their transfers. As he did so, he said to plaintiff: "You cannot sit there." "Petitioner thereupon arose, thinking there must be something the matter with the seat, and asked the conductor, 'Where do you wish me to sit?' The conductor thereupon replied, 'You must sit in the rear portion of the car.' Petitioner then said, 'Where?' to which the conductor replied: 'Beyond that white gentleman.' Petitioner thereupon responded, 'Why do you wish me to sit there?' to which the conductor replied: 'That is all right. Sit down here'—indicating space between the last white man and a negro, whereupon petitioner and his sister both asked, 'What is this for?' to which the conductor replied, 'Because white people seat from the front and negroes from the rear of the car.' Petitioner thereupon asked, 'What has that to do with me?' and the conductor responded, 'Haven't I seen you

in colored company?' Petitioner's sister then addressed the conductor as follows: 'Do we look like colored people?' and petitioner, for the first time understanding the import of the conductor's language, demanded an explanation and apology, whereupon the conductor stated that he might be mistaken, but that he thought he had seen petitioner with some colored people." This colloquy took place in the presence of all the passengers, some of whom knew plaintiff, and was in a tone of voice loud enough to be heard all over the car, and plaintiff was extremely mortified and humiliated by the occurrence. The "conductor by his statements intended to charge, and did charge, petitioner and his sister with being negroes, * * * and the effect of said colloquy was to create on the minds of strangers that petitioner had colored blood in his veins, and that he was attempting to pass as a white person; that the effect of said colloquy on persons who knew petitioner was that as a white person he had been associating with negroes." Plaintiff's feelings were outraged by the conductor's conduct, not only on his own account, but by reason of the humiliation and mortification which resulted to his sister under the circumstances. "Petitioner shows that [neither] he nor his sister had ever been seen with, nor had they associated with, negroes, and there was absolutely no excuse for such a statement on the part of said conductor, and that said conduct was the result of the greatest negligence on his part." The petition closes with a prayer for judgment for damages in the sum of \$2,000 and for process.

Dorsey, Brewster & Howell, for plaintiff in error. Rosser & Brandon, Walter S. Colquitt, and Ben J. Conyers, for defendant in error.

FISH, C. J. (after stating the case). Plaintiff based his claim to recover upon an alleged violation of the well-established rule that it is the duty of a railroad company to protect a passenger from injury, violence, insult, and ill treatment at the hands of the servants of the carrier, who are in charge of or connected in any way with the carriage in which the passenger is being transported. *Savannah, F. & W. Ry. Co. v. Quo*, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85; *Georgia R. & Elec. Co. v. Baker*, 120 Ga. 991, 48 S. E. 355, and citations; *Hutch. Carriers*, §§ 595, 596; *Thomp. Negl.* § 3186; *Booth on Street Railways*, § 682. The question sought to be made by the petition is whether it is an insult, for which an action lies against a street railway company, without an allegation of special damages, for a conductor on one of its cars, while endeavoring to comply with the statute requiring him, as far as practicable, to separate white passengers from colored passengers, to negligently mistake a white passenger for a colored one, and, in the presence and hearing

of other passengers, to inform him that he must be seated in that portion of the car set apart for negro passengers. As to whether it is actionable per se to call a white man a negro, or to publish him as such, see *Eden v. Legare*, 1 Bay (S. C.) 171; *Wood v. King*, 1 Nott & McC. (S. C.) 184; *Barrett v. Jarvis*, Tappan (Ohio) 244; *Johnson v. Brown*, 4 Cranch, C. C. 235, Fed. Cas. No. 7,375; *Scott v. Peeples*, 2 Smedes & M. (Miss.) 546; *McDowell v. Bowles*, 53 N. C. 184; *Sportono v. Fourishon*, 40 La. Ann. 423, 4 South. 71; *Upton v. Times-Democrat Pub. Co.*, 104 La. Ann. 141, 28 South. 970. However interesting the question sought to be made in the present case may be, and whatever opinion we may entertain in regard to it, we are not authorized, under the view entertained by a majority of the court, to decide it, for the reason that the petition fails to allege that the plaintiff is a white man. Such an allegation was, of course, essential to maintain the contention that he was insulted by the language used by the conductor. It is true that the petition alleged "that the effect of said colloquy was to create on the minds of strangers that petitioner had colored blood in his veins, and that he was attempting to pass as a white passenger; that the effect of said colloquy on persons who knew petitioner was that as a white person he had been associating with negroes." Merely alleging the effect the colloquy created on the minds of others is very far from alleging plaintiff to be a white man, as such effect might have been produced, though the plaintiff may not be a white man.

The allegations as to the effect of the colloquy upon strangers does not show, or clearly indicate, that the plaintiff is a white man; that is, a member of the Caucasian race. The plaintiff might be a mulatto and still the effect of the conversation upon the minds of persons to whom he was a stranger might be that he had colored blood in his veins, and that he was attempting to pass as a white person. The allegation "that the effect of said colloquy on persons who knew petitioner was that as a white person he had been associating with negroes" simply amounts to an allegation that the effect of the colloquy upon such persons was that the plaintiff had been associating with negroes as a white person. A given conversation might produce the effect upon the minds of persons who knew a mulatto, or a Chinaman, that he, as a white person, had been associating with negroes; that is, that he had been associating with negroes, as a white person, or, in other words, posing and passing among negroes as a member of the Caucasian race. The general demurrer assailed every substantial imperfection in the petition, and, as the petition was defective in a substantial particular, the demurrer was properly sustained.

Judgment affirmed. All the Justices concur, except BECK, J., not presiding, and COBB, P. J., and EVANS, J., dissenting.

COBB, P. J., and EVANS, J. (dissenting). Certainty to a common intent is all that was required, under the rules of common-law pleading, in a declaration. Every reasonable presumption was indulged in order to sustain a declaration. Statements involving a less degree of certainty than that above referred to were sometimes permissible in a declaration, when they would not be allowed in a plea. A statement by way of recital, instead of a direct allegation, was insufficient in a plea, though it was otherwise in a declaration. 1 Chitty on Pleading (16th Am. Ed.) 257. The rule is even more liberal in Georgia than it was at common law. However, even under the common-law rule, the allegations of the petition were certainly, as against a general demurrer, amply sufficient to show that the plaintiff was a white person. The petition containing such allegations, the case should have been determined upon its merits.

(124 Ga. 902)

UNION FRATERNAL LEAGUE OF BOSTON, MASS., v. JOHNSTON.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. INSURANCE—RIGHTS OF MEMBERS—SUIT AGAINST ASSOCIATION—RESORT TO TRIBUNALS OF ORDER.

Where the constitution of a benefit society declared that "no suit shall be brought against this order without first referring the matter to the grievance committee," with right of appeal to the "cabinet" and from them to the "annual congress," a suit by a member on a claim for a "sick benefit" could not be maintained without first exhausting the remedies so prescribed, especially in the absence of a valid reason for not so doing.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1987.]

2. SAME—CONSTITUTION AND BY-LAWS—AMENDMENT.

Where a member of such a society expressly agreed to comply not only with the constitution, laws, and rules thereof in force at the time of the issue of his certificate, but also with such as might thereafter be adopted, it was error for the court, on the trial of an action against the society brought by such member on a claim for a "sick benefit," in which the defense was set up that the plaintiff had not followed the procedure prescribed by the constitution and by-laws of the society, to charge that the plaintiff was bound only by the constitution and by-laws in force when his certificate was issued.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1855.]

3. APPEAL—QUESTIONS REVIEWABLE—CONTENTIONS NOT MADE BELOW.

A ground for the dismissal of an appeal in the superior court, which was not there raised and insisted upon, cannot be successfully urged in the Supreme Court as a reason for the affirmation of the judgment rendered in the superior court in the case on appeal.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by J. H. Johnston against the Union Fraternal League of Boston, Mass. There

was judgment for plaintiff, and defendant brings error. Reversed.

Johnston sued the Union Fraternal League of Boston, Mass., in a justice's court, for \$100, on a "sick or benefit claim," under a benefit certificate issued to him by the defendant. From a judgment against the defendant, in the justice's court, it appealed to the superior court, where a verdict was rendered against the defendant, and its motion for a new trial having been overruled, it excepted. The defendant resisted the plaintiff's action on the ground that he was not entitled to sue, for the reason that he had not exhausted his remedies under the constitution and by-laws of the order, by which it was contended he was bound under his certificate. On the trial in the superior court, the following facts appeared: The certificate was issued to the plaintiff July 12, 1898, and expressly stipulated that it was issued on condition "that said member * * * complies with the constitution, laws, and rules now governing or that may hereafter be enacted for the government of the order"; and that "All benefits during life [were] payable to the member, * * * in accordance with and under the provisions of the laws governing said fund of the order upon satisfactory evidence to the officers of the order, of the accruing of any benefit hereunder." Article 11, § 3, of the constitution of the order, as amended by its "annual congress" of 1900, declares that no sick or disability benefits will be allowed for certain diseases, among them eczema, if contracted prior to the issue of the certificate. Section 8 of the same article is as follows: "In case of contention as to any claim by virtue of sickness or accident, in any class granting benefits for the same, the matter shall be referred to the committee on arbitration for adjustment. No suits will be allowed on sick or disability claims. Likewise, in case of contention upon any point of membership involving any financial benefit, the committee on arbitration shall adjust the differences." By section 2 of article 12 it is declared: "No suit shall be begun against this order without first referring the matter to the grievance committee; and if its action be objected to by either party, an appeal can be taken to the cabinet, and from thence to the annual congress. Until this action is resorted to, no member, or beneficiary of a member, shall be entitled to proceed at common law against the order, and it shall be deemed a sufficient answer on the part of this order that the member or beneficiary has failed to comply with these laws to dismiss his action and compel him or her to proceed as herein provided. Provided however, that in no case shall the tribunals of this character except in the matter of sick or accident benefits, preclude bringing suits after such an appeal be taken, if decided adverse to the claimant." The plaintiff testified: "I continued my payments in it [the league] for some

time after my illness, for which they decline to pay me. * * * I sent on proper notice of this claim, filled out proper papers and blanks, and forwarded them. So did my physician: I had eczema and was disabled for 10 weeks, was entitled to \$10 a week. They did not pay me, but wrote me that under their by-laws they were not liable, referring me to a certain section of their by-laws. They refused to pay me, saying they were not liable for eczema. (Witness here identified a letter to him, dated July 18, 1904, from James F. Reynolds, cabinet secretary of the league) * * * I did not appeal to the grievance committee. I think when I first wrote the league, they notified me they had not received any certificate from the doctor. I then had doctor fill out one and he sent it off. Still there was delay. I wrote them again and then got this letter [referring to letter already identified] declining to pay. They had paid me before for the same disease; and I thought they would pay me this time." B. D. Lester testified, that he was treasurer of the local chapter, in Augusta, Ga., of the defendant league, and that no change was made in the sick benefits under the constitution of the league of 1904, "only an increase in the assessments." The letter which the plaintiff testified he had received from the "cabinet secretary" of the defendant league was dated July 18, 1904, addressed to the plaintiff, and was in the following language: "In response to your letter of inquiry of the 12th inst., regarding your claim. I wish to call your attention to the fact that that we have not received the affidavit of your attending physician. Hence why no action has been taken on your claim. We sent him a blank the same day that your own blank was sent out, and this paper has never been returned to us. I also wish to call your attention to the fact that the nature of your disease is eczema and under the provisions of article 11, section 3, of the constitution and laws, we are prohibited from paying benefits for eczema."

C. P. Pressley, for plaintiff in error. Austin Branch and C. Henry Cohen, for defendant in error.

FISH, C. J. (after stating the facts). 1. A member of a benefit society must, in applying for benefits under its by-laws, follow the procedure therein prescribed. It is a well-settled rule that before resorting to the civil courts for redress, a member must exhaust all the remedies provided by the society by appeal or otherwise. Bacon, Benef. Soc. and Life Ins. § 94. In *Harrington v. Workmen's Benevolent Ass'n*, 70 Ga. 340, it appeared that the by-laws of the association provided, that no claim for benefit would be received or acted on except through the sick committee and on a doctor's certificate furnished it; that 12 members should be annually appointed by the president as a grievance

committee, with power to try all complaints brought to their notice, from whose decision there should be no appeal. It was held that such by-laws were not contrary to law, and a member could only avail himself of the rights to be enjoyed in the way and manner provided by such rules; and that the furnishing of a doctor's certificate to the sick committee was a prerequisite to receiving a benefit under a claim for sickness. In rendering the opinion Mr. Justice Crawford said: "Among the objects of the organization of this benevolent association, it is evident that the mutual aid to be rendered to the members thereof by the observance of self-imposed duties and obligations was among the most important. It was to be a brotherhood of workmen; governed, managed, and controlled by its own membership, under its own laws, without extrinsic compulsion. Its operation for the execution of its benevolent designs were to be internal, and by persons of its own appointment; provision was made to accomplish all the ends in view; there was nothing in any of its laws prohibited by statute or constitution; hence, whosoever became a member, could only avail himself of the rights to be enjoyed in that way and manner provided by its rules."

Leave was granted to the defendant in error to review that case; and after a careful consideration of the same, we are of opinion that the ruling therein made should be adhered to. In the present case, it appeared from the contract between the plaintiff and the defendant league, as shown by the certificate issued to him, that he agreed to comply with the constitution, laws, and rules of the league in force at the date of the certificate, and also those that might thereafter be enacted for the government of the league. The constitution required that in case of contention as to any claim by virtue of sickness, the matter should be referred to the committee on arbitration, for adjustment, and provided that no suit should be brought against the league without first referring the matter to the grievance committee, with right of appeal to the cabinet and from thence to the annual congress. The plaintiff admitted that he had not followed this prescribed procedure; that he had never even appealed to the grievance committee. He sought to relieve himself from the necessity of so doing by showing that the defendant had absolutely denied any liability on his claim. Granting that such denial on the part of the defendant would amount to a legal excuse for the plaintiff's failure to exhaust the remedies prescribed by the constitution and by-laws of the league, we think that the evidence shows that he wholly failed to prove his contention as to such denial of liability. It is true that he, in general terms, testified: "They refused to pay me, saying they were not liable for eczema." But he also testified: "I think when I first wrote

the league, they notified me that they had not received any certificate from the doctor. I then had doctor fill out one and he sent it off. Still there was delay. I wrote them again, I think, and then got this letter [referring to the letter above quoted from the 'cabinet secretary'], declining to pay." By reference to this letter it will be seen that the secretary stated that no action had been taken on the plaintiff's claim, because no affidavit of his attending physician had been received, though proper blank for such affidavit had been sent him. The letter also called the attention of the plaintiff to the fact that the nature of his disease was eczema, and that under article 11, § 3, of the constitution and laws, the league did not pay benefits for eczema. The article and section of the constitution referred to declared: "Nor will sick and disability benefits be allowed for the following diseases or complaints, if contracted prior to the issue of the certificate: rheumatic, gouty or neuralgic diseases, eczema, and other named diseases." The secretary expressly called the attention of the plaintiff to this article and section of the constitution, a casual examination of which would have shown him that it was only where eczema had been contracted prior to the issuance of the certificate that a member was debarred from a sick benefit on account thereof. The plaintiff was evidently aware of this, for he testified: "They had paid me before for the same disease, and I thought they would pay me this time." From the foregoing we think it clear that the verdict was without evidence to support it, and that, for this reason, the court should have granted a new trial.

Whether benefit societies or associations of like character, may create tribunals for the final and conclusive settlement of controversies arising under their contracts of membership, or their contracts of insurance, is a question upon which the authorities do not agree, some courts holding that they may, and others that they may not. *Niblack, Acc. Ins. & Benef. Soc.* § 49. In the case under consideration, we do not deem it necessary to decide the validity of the provision of the constitution of the defendant league declaring that "no suits will be allowed on sick or disability claims." What we do decide is that under the evidence the plaintiff bound himself to comply with the prescribed procedure for the collection of his claim before bringing suit thereon, and that he failed to do so without legal excuse.

2. The court instructed the jury that "the by-laws and constitution that were in effect, at the time Mr. Johnston became a member of this fraternal society, are the by-laws and constitution alone which are binding upon him, and that any adopted thereafter are not binding upon him." This charge was erroneous, as Johnston, when his certificate was issued, agreed to comply not only with the constitution, laws, and

rules then governing the order, but with all that might thereafter be adopted for its government. Under such agreement, he was bound to comply with the procedure prescribed for the collection of sick benefits, even though such procedure was prescribed by amendment to the constitution or by-laws subsequently to the date of his certificate.

3. It appears from the record that D. B. Lester, the sole surety on the appeal bond given by the Union Fraternal League, was the garnishee in a garnishment proceeding founded on the case under consideration. No objection was raised in the superior court by Johnston, the appellee in that court, as to the sufficiency of the bond, nor was any ruling there invoked as to that matter. In this court, counsel for Johnston for the first time raises the question as to the sufficiency of the appeal bond, and contends that the judgment of the superior court rendered in the case should be affirmed for want of a sufficient appeal bond. We are clear that the contention is without merit. Counsel cites, as authority for his contention, the case of *McMurria v. Powell*, 120 Ga. 766, 48 S. E. 354. The ruling made in that case is obviously not in point here. That was a claim case tried in a justice's court and there decided against the claimants, who appealed to the superior court. The sole surety on the appeal bond was the same person as the surety on the claim bond. For this reason, the appellee moved in the superior court to dismiss the appeal, contending that no proper appeal bond had been given. This motion was overruled, and upon a review of such ruling it was reversed by this court, upon the ground that the plaintiff in execution had no additional security on the appeal bond, as the surety on it was the same as the surety on the claim bond.

Judgment reversed. All the Justices concur.

(124 Ga. 735)

**SOUTHERN RY. CO. v. GRIZZLE
O'NEAL v. SAME.**

(Supreme Court of Georgia. Jan. 13, 1906.)

1. RAILROADS—ACCIDENT AT CROSSING—LIABILITY OF ENGINEER.

The act of a railroad engineer in running a train over a public road crossing, in violation of the requirements of the blowpost law, is not a mere nonfeasance of the agent, but is a misfeasance, which renders him individually liable to persons injured as a result of such conduct.

2. SAME—JOINT LIABILITY—ENGINEER AND RAILROAD COMPANY.

A railway company and its engineer may be jointly sued for a negligent homicide, where the negligence of the company results solely from the act and conduct of the engineer.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 858.]

3. VENUE—ACTION FOR PERSONAL INJURIES—COUNTY OF ACCIDENT.

A foreign railroad company operating in this state and an engineer in its employment may be jointly sued in the county in which the cause of action originated, even though the

residence of the engineer be in another county in this state.

4. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

The petition, when considered in its entirety, sought a recovery solely upon the ground that the engineer had failed to comply with the requirements of the blowpost law. The averments in reference to the location of the warehouses near the crossing were made as a matter of inducement, and not as a ground of recovery, and these allegations did not make a separable controversy between the railway company and the plaintiff. As the engineer was a resident of the state of Georgia, the refusal of the judge to pass an order removing the case to the Circuit Court of the United States was not erroneous.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by America H. Grizzle against T. A. O'Neal and the Southern Railway Company. From an order overruling a demurrer to the complaint, O'Neal brings error. From an order refusing to remove the case to the Circuit Court of the United States, the railway company brings error. Affirmed.

Mrs. America H. Grizzle filed her petition to the superior court of Gwinnett County, alleging in substance that the Southern Railway Company is a corporation operating a line of railway in and through the county of Gwinnett, having an agent and agency therein, and is doing business in said county; that T. A. O'Neal is a resident of Fulton county; that petitioner's husband, Henry M. Grizzle, was killed by the negligence of the railway company and of O'Neal, who was the engineer in charge of the train, while the train was being operated over a public road crossing in the corporate limits of Norcross, in the county of Gwinnett; and damages for the homicide were laid at \$30,000. It was alleged that at this crossing the railway company had three tracks, and the road upon which the plaintiff's husband was traveling passed over all of these tracks; that the intersection of the road and the tracks was on the east side of the public road and of the railroad; that two warehouses, within two feet of the tracks, obstructed the view and sound of approaching trains; and that the train in question came from behind the two warehouses without any warning of its approach, running at a speed of 50 or 60 miles an hour, striking the husband of petitioner and instantly killing him. It is alleged that no bell was rung nor whistle sounded, nor the speed of the train checked, and that the requirements of the blowpost law were entirely disregarded by the engineer. It is also alleged that O'Neal had been in the employ of the company for a long time, and that the alleged negligence of the company was the act of O'Neal, which is alleged to be the joint negligence of both defendants. Process is prayed against the railway company and O'Neal. To this petition O'Neal filed a demurrer, on the grounds that there

was no cause of action set forth; that the suit was improperly brought in Gwinnett county, as it should have been brought in the county of Fulton, which is the county of his residence; that no acts of negligence were charged to him except such as were charged to have been done by him as the servant of the railway company, and for that reason he could not be sued jointly with the railway company; that the suit was based on the statutory right to recover against the railway company, and there is no common-law or statutory right authorizing him to be joined as a codefendant. This demurrer was overruled, and O'Neal excepted.

The railway company filed a petition asking that the case be removed to the Circuit Court of the United States for the Northern District of Georgia. This petition alleged that the declaration did not charge O'Neal with any actionable wrong; that he was merely a nominal party, joined for the purpose of preventing a removal of the case; that the declaration makes a case involving separable controversies between the plaintiff and the railway company, citizens of different states, in that there is a distinct charge of negligence against the railway alone sufficient to give rise to a cause of action; that the plaintiff was a resident and citizen of the state of Georgia; and that the railway company was a corporation under the laws of Virginia, and a resident and citizen of that state, and a nonresident of the state of Georgia. The court refused to pass an order removing the case to the Circuit Court of the United States, and to this ruling the railway company excepted.

Jno. J. Strickland and J. J. Winn, for plaintiffs in error. Atkinson & Born, for defendant in error.

COBB, P. J. 1. An agent is not ordinarily liable to third persons for mere nonfeasance. *Kimbrough v. Boswell*, 119 Ga. 201, 45 S. E. 977. An agent is, however, liable to third persons for misfeasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care and diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some

act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. See 2 Clark & Skyles on Agency, 1297 et seq.

Misfeasance may involve also to some extent the idea of not doing, as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution, or does not exercise that care, which a due regard to the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. *Mechem on Agency*, § 572. As was said by Gray, C. J., in *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 439: "If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly." In that case the agent was held liable by the fall of a tackle block and chains from an iron rail suspended from the ceiling of a room, which fell, for the reason that the agent had suffered them to remain in such a manner and so unprotected that they fell upon and injured the plaintiff. In *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 742, *Metcalf, J.*, said: "Assuming that he was a mere agent, yet the injury for which this action was brought was not caused by his nonfeasance, but by his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do. The defendant's omission to examine the state of the pipes * * * before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff."

In the present case the failure of the engineer to comply with the requirements of the blowpost law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway. The engineer having once undertaken in behalf of the

principal to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance. This view is strengthened by the fact that the blowpost law renders the engineer indictable for failure to comply with its provisions. The allegations of the petition were therefore sufficient to charge O'Neal with a positive tort, for which the plaintiff would be entitled to bring her action against him.

2. The engineer may be sued, and the railway company is also liable to suit, on account of his conduct. Can the engineer and the railway company be jointly sued, when the sole ground of the liability of the railway company is the act of the engineer himself? While the case of *Central Railway Company v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250, is not identical with this case in its facts, it is controlling in principle. In that case the railway company and a passenger were sued jointly for an assault upon another passenger, in which the conductor took part. The liability of the railway company resulted solely from the act of the conductor. It was held that the railway company and the passenger who participated with the conductor in the assault could be jointly sued. It is unnecessary to add anything to the reasoning in that case. It is conclusive upon the question now before us.

3. Suits against foreign railroad companies for causes of action originating in this state must be brought in the county where the cause of action originated, if the company has an agent in that county. If the foreign corporation is operating under a domestic franchise, and there is no agent in the county where the cause of action originated, suit may be brought in the county of the residence of the company owning the franchise. But if it is not operating under a domestic franchise, it has no residence in this state, within the meaning of Civ. Code 1895, § 2334. If an action against such a company is instituted in this state, it must be brought in the county where the cause of action originated, without reference to whether there is an agent in that county or not. *Hazlehurst v. Seaboard Air Line Ry.*, 118 Ga. 858, 45 S. E. 703; *Coakley v. Southern Ry. Co.*, 120 Ga. 960, 48 S. E. 372. The petition alleges distinctly that the cause of action arose in the county of Gwinnett, and that the company has an agent in that county. A suit against the company alone would therefore have to be brought in that county. A suit against O'Neal alone would have to be brought in the county of Fulton. The Constitution declares that suits against joint trespassers residing in different counties may be tried in either county. Civ. Code 1895, § 5872. Here we have a joint liability. O'Neal resides in Fulton county. The question is

whether the Southern Railway Company has such a residence in Gwinnett county that a joint suit may be maintained in that county against it and O'Neal, who is a nonresident of the county.

The determination of this question depends upon whether, under the laws of this state, the Southern Railway Company is a resident of Gwinnett county within the meaning of the constitutional provision above referred to. "The Constitution, in fixing the venue of suits against joint defendants, was intended to be exhaustive, and not to leave a hiatus in which the right to bring a single suit against joint defendants might be lost because of the want of jurisdiction to apply the remedy." *Cox v. Strickland*, 120 Ga. 104, 47 S. E. 912. If the Southern Railway Company does not reside in Gwinnett county, within the meaning of this section of the Constitution, then the railway company and O'Neal cannot be jointly sued in that county. Neither can they be jointly sued in Fulton county, for the jurisdiction depends not only upon the residence of the defendants in the county where suit is brought, but also upon the residence of the other defendant in another county in this state; the Constitution declaring that, "joint trespassers residing in different counties" may be sued in either county. The Southern Railway Company is engaged in doing business in this state, and has agents located here for that purpose, and it is, so far as the right to sue is concerned, a resident of the state. *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674. It has a residence in Gwinnett county, so far as the right to bring a suit against it for a cause of action originating in that county is concerned. Within the true intent and spirit of the constitutional provision, it therefore resides in Gwinnett county. So residing, it may be sued there alone on a cause of action originating in that county, or it may be there sued jointly with other wrongdoers, who are also residents of this state in other counties.

4. O'Neal being a resident of this state, the right to remove the case to the Circuit Court of the United States depends upon whether there is a separable controversy between the railway company and the plaintiff. It is claimed that there is. It is said that the railway company had located two warehouses within two feet of the tracks, and that the warehouses obstructed the sound of approaching trains, and likewise the view, and that this was an act of negligence on the part of the railway company, in which O'Neal did not at all participate, and this act of negligence made a separable controversy between the plaintiff and the railway company, independent of O'Neal's act in failing to comply with the blowpost law. We cannot concur in this view. We do not think that the petition, properly construed, alleges that the manner in which

the warehouses were constructed and located was an act of negligence on the part of the railway company. It is nowhere in the declaration distinctly alleged as an act of negligence. It is in that part which deals with the question of the exercise of proper care and diligence on the part of the plaintiff's husband, and gives a reason why he was not negligent in approaching the crossing. The location of the warehouses, and the effect of the warehouses in obstructing the sound and view of an approaching train, were alleged merely by way of inducement, and not as a ground of recovery. Construing the petition as a whole, the plaintiff seeks to recover alone upon the negligence of the railway company and engineer on account of the failure to comply with the requirements of the blowpost law.

Since this case was argued, the Supreme Court of the United States, on January 2, 1906, in the case of *Alabama Great Southern Ry. Co. v. Thompson*, 28 Sup. Ct. 161, 50 L. Ed. —, rendered a decision on the right of removal in a case similar in many respects to the one now under consideration. We have had before us a certified copy of the opinion which was prepared by Mr. Justice Day. While the court seems to have left open the question as to whether it would hold that a suit against a railway company and an engineer upon facts similar to those in the present case was properly brought as a joint cause of action, still it was distinctly held that, in determining the question of removal to the Circuit Court of the United States, the cause of action must be deemed joint if the pleader in the state court has made it joint; and that there would then be no separable controversy between the railway company and the plaintiff which would authorize a removal of the case to the federal court. The petition in the present case clearly sets forth a joint cause of action. We have reached the conclusion that under the facts alleged there was a joint cause of action. It is clear, therefore, that the case was not removable, if we have construed the petition properly as to the location of the warehouses. We do not think there was any error in refusing to pass an order of removal.

Judgment affirmed. All the Justices concurring.

(124 Ga. 723)

WEBB v. HARRIS et al.

(Supreme Court of Georgia. Jan. 13, 1906.)

1. HUSBAND AND WIFE—SALE TO HUSBAND—VALIDITY.

A transfer by a married woman to her husband of a bond for titles, upon the consideration that he carry out her obligations as to the payment of the debt therein referred to, is a sale by the married woman of her separate property, and is invalid, in the absence of an order of the superior court of her domicile allowing the same.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 722.]

2. SUBROGATION—VOLUNTARY PAYMENT.

The payment by the husband of the debt referred to in the bond for titles under such circumstances is a mere voluntary payment, and will not entitle him to be subrogated to the rights of the creditor.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action by A. G. Webb against C. P. Harris, administrator, and another. Judgment for defendants, and plaintiff brings error. Affirmed.

A. G. Webb brought an equitable petition against Mrs. Gairdner, administratrix of H. R. Gairdner, and C. P. Harris, administrator of Mrs. M. M. Webb, and alleged: Petitioner's wife, the intestate of the defendant, borrowed from Mrs. Bowman a certain sum of money, and gave her note for it, and to secure the payment of the note made a conveyance to Mrs. Bowman of certain property in Elberton, taking from Mrs. Bowman a bond for title to the property. Mrs. Bowman died, and Tate qualified as her executor. Mrs. Webb's note became due, and she, being unable to pay it, assigned her bond for title to petitioner, who paid the note. The assignment was without any other consideration than that petitioner should pay the note. At the time of this payment the bond for title was lost, and the executor of Mrs. Bowman refused to make a deed to petitioner, but canceled upon the record the deed from Mrs. Webb to Mrs. Bowman, thus leaving title to the property in Mrs. Webb. Later the bond for title was found, but Tate had been discharged as executor, and could not make a deed to petitioner. After this transaction Mrs. Webb borrowed a certain sum of money from Mrs. Gairdner, administratrix, and made her a deed to the above property to secure the debt, taking a bond for title from her. When this note became due Mrs. Webb was unable to pay it, and assigned this bond for title to petitioner. Mrs. Webb has died, and her estate is insolvent. Petitioner tenders the amount of the debt and interest due Mrs. Gairdner, administratrix, and prays: (1) That, upon the payment of the Gairdner note, Mrs. Gairdner, administratrix, be directed to make him a quitclaim deed to the premises; (2) that C. P. Harris, administrator of Mrs. Webb, be directed to reimburse petitioner the amount advanced by him to Mrs. Webb on the bond for titles, with interest, and that his judgment be a special lien against the property, superior to all other liens or debts against the estate, except as provided by law. When the case was called for trial, it was agreed between the parties that Mrs. Gairdner, administratrix, had, since the filing of the petition, accepted the petitioner's tender, and had made him a quitclaim deed to the property as prayed, and that the suit should proceed only against C. P. Harris, administrator of Mrs. Webb. By an amendment to the petition it was alleged that Tate, executor of Mrs. Bowman,

instituted suit on the note of Mrs. Webb, that several payments on the note were made by petitioner before judgment, and that a judgment was rendered against Mrs. Webb for the balance due, which was paid by petitioner. At the trial evidence was introduced tending to support the allegations of the petition, and all the evidence offered was ruled out, and the petition dismissed. To these rulings the plaintiff excepted.

Geo. C. Grogan, for plaintiff in error. C. P. Harris, for defendants in error.

COBB, P. J. (after stating the foregoing facts). Prior to 1866 whether the wife's property was her separate estate depended upon marriage contracts and settlements. Whenever there was a separate estate created for her the law treated her as a feme sole as to the property so embraced, but the settlor had a right to restrict her power over the property composing her separate estate. Ordinarily she was allowed to contract with reference to her separate estate, but there were certain contracts which she was not permitted to make. She could make no contract of suretyship, nor could she assume the payment of the debts of her husband. A sale of her separate estate for the purpose of paying her husband's debts was absolutely void, and no contract of sale as to her separate estate with her husband or trustee was valid unless the same was allowed by an order of the judge of the superior court of the county of her domicile. Code 1863, §§ 1732-1735. Under the married woman's act of 1866, which is now a part of the Constitution of the state, the separate estate of the wife depends, not upon marriage contracts and settlements, but upon whether title to the property has passed into her. If she owned the property at the time of her marriage, no change in the title is effected by the marriage. If she derives title during coverture, the title remains in her. So far as her property is concerned, no matter from what source derived, she is the owner, and the husband has no interest therein as the result of the marriage. The law has simply created a separate estate for the wife out of all her property of every character whatever, instead of leaving the volume of her separate estate to be determined by contracts and settlements. She is a feme sole as to her separate estate, and may contract in reference to the same subject only to the same restrictions which were placed upon her prior to the passage of the married woman's act. These provisions were for her protection, when the existence of her separate estate was largely dependent upon the conduct of others, and therefore her estate might be large or small as they might determine, and are still maintained for her protection when her separate estate embraces all of that which she owns. As was said by Judge Bleckley in *Humphrey v. Copeland*, 54 Ga. 546: "These restrictions upon the wife's power, imposed for her own

benefit and protection, are perfectly consistent with the act of 1866 and the new Constitution, which simply secure to the wife all her property and make it her separate estate. She is as much exposed to 'the kicks and kisses,' especially to the kisses, of her husband, with all as with only a part. If the husband and his creditors are allowed to prey upon her estate at all, it is not likely that they will be the less eager to digest it because it happens to be large. On the contrary, that would render it all the more tempting."

Therefore a sale by a wife in payment of her husband's debts is "absolutely void." Civ. Code, 1895, § 2488. And a contract of sale by the wife to the husband is valid only when allowed by an order of the superior court of the county of her domicile. Civ. Code, 1895, § 2490. Prior to 1866 a deed to a married woman was ineffectual to pass title to her; but where such deed was made either by the husband or by a third party, and the evident intent of the parties was that the property should be the separate estate of the wife, although the title never passed into the wife, or, if passing into her, immediately passed to the husband, he was deemed in equity, although the holder of the legal title, the trustee for the wife. *Fears v. Brooks*, 12 Ga. 195; *Johnson v. Hines*, 31 Ga. 720-728; *McQueen v. Fletcher*, 77 Ga. 444; *Follendore v. Follendore*, 110 Ga. 359, 362, 35 S. E. 676. In *Booker v. Worrell*, 55 Ga. 332, it was held that a husband, since the passage of the married woman's act of 1866, could make a deed directly to his wife, and, if a husband was indebted to his wife for rents of her separate estate, that such an indebtedness would be a valuable consideration to support a deed from him to her. No question was raised as to the necessity of an order of the superior court to make valid such a transaction. When the same case came before this court a second time (57 Ga. 235), the deed from the husband to the wife was treated as if it were valid; still no question being raised as to the necessity of an order of the superior court rendering the transaction valid. In *Humphrey v. Copeland*, 54 Ga. 545, Judge Bleckley, after referring to these provisions of the Code, one of which makes void the sale of the wife's separate estate to the husband's creditors in extinguishment of the debt, and the other which declares invalid any sale by her to her husband made without the sanction of the judge of the superior court, says: "Money is clearly within the reason and spirit of these restrictions upon the wife's power. Although the word 'sale' does not, in the letter, comprehend a transaction in which money alone passes, yet the transaction itself, with respect to its effect on the wife's fortune, would be the same; and that is the thing to be regarded. * * * Payment by the wife of the husband's debt, whether made in money or other effects belonging to her, is void if the creditor have notice of her title,

He acquires nothing and she loses nothing. And the same rule applies where, with like notice to the creditor, the payment is made by the husband with her money, whether she consents to it or not. Under such circumstances, her consent passes for nothing."

In *Chappell v. Boyd*, 61 Ga. 662, it appeared that the husband paid the wife's money on his own debt for land, and then conveyed the land to her, leaving one-half of the purchase money unpaid, he having only a bond for titles. It was held that the wife was not estopped by accepting the deed from suing the vendor for her money, the conveyance from her husband to her never having been allowed or approved by a court of competent jurisdiction. It was also held that the wife had no power to consent to the application of her money to her husband's debts, nor to ratify such application, even for value, unless the ratification was approved by a court of competent jurisdiction. On the inability of a wife to ratify the appropriation of her money to her husband's debts, see, also, *Windsor v. Bell*, 61 Ga. 671; *Klink v. Boland*, 72 Ga. 493; *Smith v. Head*, 75 Ga. 755. In *Hood v. Perry*, 75 Ga. 310, it was held that a sale made by a married woman to her husband, when the same was not allowed by an order of the superior court of the county of her domicile, was not only voidable, but void. See, also, *Fulgham v. Pate*, 77 Ga. 454; *Flannery v. Coleman*, 112 Ga. 648, 37 S. E. 878. In numerous cases a sale by a husband to a wife, when there was no order of court allowing the sale, has been treated as valid. The consideration in some of these cases has been a debt due by the husband to the wife, as it was in *Booker v. Worrill*, supra. In others the consideration does not appear. As illustrations of this class of cases, see *Vizard v. Moody*, 119 Ga. 921, 47 S. E. 848, and citations. In *Moore v. Cary*, 116 Ga. 28, 42 S. E. 258, it was said that a wife may be a bona fide purchaser without notice from her husband, and no reference is made to the necessity of an order from the judge of the superior court. In *Sirmans v. Bush*, 61 Ga. 170, a transaction which in effect amounted to a sale of a promissory note, the property of the wife, to the husband, was held to be invalid for the reason that there was no order of the court allowing the sale. In *Butts v. Trice*, 69 Ga. 74, it was held that an agreement by a wife to accept certain land from her husband in lieu of dower is, in effect, a sale by the wife to the husband; and some doubt was expressed as to whether a transaction of this character could be made valid even by an order of the superior court. In *Comer v. Allen*, 72 Ga. 1, a mortgage made by a husband to secure a debt due to the wife was held to be valid, and was allowed to take precedence over subsequently acquired liens of other creditors; and this, too, notwithstanding the fact that the debt was barred by the statute of limitations at the time the mortgage was given, and the husband was in falling

circumstances—these facts not having the effect to render the transaction fraudulent, but being merely circumstances to be considered in passing upon the fairness of the transaction. In *Palmer v. Smith*, 83 Ga. 84, 13 S. E. 956, it was held that, though a conveyance of land by a married woman in payment of her husband's debts was declared by the statute to be absolutely void, it was only so as against her, and upon her election to treat it as void; coverture being a personal privilege which is not available in behalf of a stranger to her title.

The foregoing citations do not by any means embrace all the decisions of this court involving directly or indirectly the meaning of the words "absolutely void" in the statute, declaring that any sale of her separate estate to a creditor in payment of her husband's debt shall be absolutely void, and the word "valid" in the provision of law which declares that no contract of sale of the wife as to her separate estate with her husband or trustee shall be valid unless allowed by an order of the superior court of her domicile. A sufficient number of the decisions, however, have been cited to indicate that there is an apparent, if not a real, conflict in the rulings in reference to the provisions of law above referred to. There are a number of other decisions which follow either one or the other of the lines of decisions above cited. Is the conflict between the decisions real or only apparent? Can they be reconciled upon any underlying principle? If the case of *Booker v. Worrill*, supra, and the cases which follow it be restricted to the exact questions which were before the court, they simply establish that since the married woman's act of 1866 a deed from a husband to a wife passes the legal title into the wife, and that the intervention of a trustee is no longer necessary for this purpose. The legal title passes immediately. Whether the transaction be complete, and the legal title shall remain in the wife or be revested in the husband, depends upon whether the transaction between the husband and the wife is thereafter confirmed by a proper order of the superior court. The title passes, but the transaction is in an inchoate condition until the judge approves the same; that is, the wife becomes the owner of the property, but her ownership is provisional only. If the judge of the superior court refuses to approve the sale, then the conveyance is set aside and the title reverts in the husband. In *Chappell v. Boyd*, supra, it was held that where a deed was made by the husband to the wife, she was not the absolute owner of the property until the transaction was approved by the proper court. "Such title as vested in her is provisional, and dependant upon future allowance and ratification by the court having competent jurisdiction."

As between the husband and the wife, the title of the wife is provisional only, and the transaction is subject to repudiation at her

instance upon application to a court of competent jurisdiction. But until the transaction is set aside and the provisional title in the wife is taken away and revested in the husband, the wife is the owner of the property so far as the husband, and those claiming under him are concerned. She may apply to the superior court at any time for an order approving the transaction, or for an order setting it aside. But this is a personal privilege, not available in behalf of a stranger to her title. It may be exercised by her, but as to those who are strangers the provisional transaction between the husband and wife stands as the completed transaction until set aside by an order of a court of competent jurisdiction upon application by a proper person. For this reason, where a wife holds title by virtue of a conveyance of her husband, although never allowed by an order of court, she may interpose a claim upon property levied upon, and may take any other steps the law authorizes an owner of property to take to protect it in the hands of the owner. Simply because her title is provisional, it is no less a title, and this would not justify third persons in depredating upon it, and she may protect her provisional title in the same way that any one is allowed to protect property to which they hold absolute title. It is to be kept in mind that, when husband and wife deal with each other in reference to the separate estate of the wife, one party, the husband, has full capacity to contract, and the capacity of the other party, the wife, is restricted. A distinction between transactions where the husband conveys to the wife, and where the wife conveys to the husband, grows out of this fact. If the husband conveys his property to his wife, he cannot afterwards have the same set aside, except under those circumstances where any person would be allowed to rescind the transaction. As long as the wife or some one claiming under her, having a right to raise an objection to the transaction, does not move, the matter stands so far as the husband is concerned. On the other hand, if the wife conveys to the husband, she has the right to elect either to apply to the superior court for an order making absolute her title, which is only provisional, or she may repudiate the transaction altogether. If she desires the title to be made complete, an order of the superior court is essential. If she desires to repudiate the transaction, nothing is needed except an act of repudiation on her part. Until the sale is approved by the superior court, the husband deals with the property as his own at his risk, and pays out money at his peril. The facts of the case of *Flannery v. Coleman*, supra, furnish an illustration of the application of this rule in regard to such transactions. In that case there was a conveyance by the husband to the wife, and also a conveyance by the wife to the husband. The conveyance by the husband to the wife had never been approved by an

order from the superior court, but the wife was allowed to maintain the position of an owner of the property, and stand upon the title which the husband had given her, while she was allowed to repudiate a subsequent conveyance from her to the husband of the same property upon the ground that it had never been approved by an order of the judge of the superior court. That was a claim case. The wife was the claimant. Her title depended upon a deed from her husband. The plaintiff in execution depended upon a subsequent deed from the wife to the husband. The wife was allowed to repudiate the latter deed, and her claim was sustained by the title obtained by the first deed, which was a deed from the husband in a transaction which had never been approved by any court.

If the transaction between the husband and the wife in the present case was a sale, then the case is to be determined by the application of the principles above referred to. If it was a gift, of course, the husband would obtain a good title to the property of the wife involved in the transaction. Civ. Code 1895, § 2490; *Cain v. Ligon*, 71 Ga. 692, 51 Am. Rep. 281. But the transaction was a sale. The assignment of the bond for title was in the following language: "For \$1,100, the same being for value received, I hereby transfer the within bond for titles in fee simple to my husband, A. G. Webb, he to fulfill my obligation in the within bond. This 1st day of November, 1896." If this assignment is looked to alone, it is clear that the transaction was a sale. It is not only stated to be for value received, but the consideration received is set forth in dollars and cents. The petition avers that there was no other consideration than the agreement of the plaintiff to carry out the obligation of his wife as to the payment of the money evidenced by the note. It is sufficient to say that there was no evidence to support this allegation. But, even if the allegation be taken as true, the husband agreed to pay the note of Mrs. Bowman, which was a liability on the wife binding her separate estate. The consideration of the transaction thus moving to the wife was valuable; that is, when the contract of the husband was performed, she would be relieved from a liability which she had undertaken and which was binding upon her. Mrs. Webb's interest in the land represented by the bond for titles was her separate estate. No sale to her husband of her interest in the land represented by the bond for titles would be valid without an order of the superior court allowing the sale. The title of the husband and his right to use the property and deal with it as his own was, so far as he was concerned, dependent upon an order of the superior court approving the transaction. If the husband upon the faith of this assignment had paid the debt to Mrs. Bowman, or her legal representative, and surrendered the bond for titles, and obtained a conveyance to himself, and the wife had

been compelled to go into equity to cancel this conveyance, it might be that a court of equity would compel her to do equity; that is, to repay to the husband the balance of the purchase money which he had paid. But this was not done. The husband attempted to do this, but on account of the loss of the bond for titles the executor of Mrs. Bowman refused to make him a deed. Instead of establishing a copy of the bond for titles and insisting upon the conveyance to him by the executor, he permitted, even if he did not request, the executor to cancel the security deed upon the record and, when this was done, by force of the statute applicable in such cases the title to the property immediately vested in his wife. Civ. Code 1895, § 2774. He was not required to do this. This was his voluntary act.

The question now is whether a court of equity will, at the instance of the husband after the death of the wife, make valid the transaction between the husband and the wife, made during the lifetime of the latter, which the husband knew was invalid, and which the husband by his own act has practically set aside. The legal representative of the wife's estate simply stands upon the legal title which was in his intestate at the time of her death. The legal representative of the wife might have had a right to repudiate the transaction, but no act of repudiation on his part was necessary. The transaction was at an end by the conduct of the husband. The legal title was again in the wife, and there for the reason that the husband had seen fit to give the matter a direction which brought about that result. The transaction not having been approved by an order of the superior court at the time that the husband paid the amount due Mrs. Bowman, he paid at his peril. He could have taken an assignment of her claim against his wife, to be used in the event either the wife repudiated the transaction, or the superior court upon application refused to confirm the sale. If he had taken a transfer of the note at the time of the payments on the note, or if he had taken a transfer of the judgment at the time he paid the judgment, of course, his status would have been entirely different. But he paid the note and he paid the judgment, each of which was canceled by the payment, at a time when he was under no legal or moral obligation to pay either. In a transaction like this, where the husband deals with the wife in reference to her separate estate, the husband should promptly apply to the superior court of the county of the wife's domicile for an order confirming the transaction, and should not deal with the property as his own, nor pay out money on the faith of the transaction until the same has been confirmed by the court. In every transaction between husband and wife which amounts to a sale, there is involved a sale of the separate estate of the wife. If land of the husband be conveyed to the wife for a

consideration, the consideration, whatever it be, money, property, or a chose in action, is the separate state of the wife. Hence it follows that in every case of sale between husband and wife, there must, in order to render the transaction valid and complete as between them, be an order of the superior court approving the transaction, at least so far as the wife's property involved is concerned.

The payments on the note and judgment by the husband in the present case were voluntary payments. It was not claimed that the evidence made out a case of conventional subrogation. We do not think that, under all the circumstances, a case of legal subrogation has been established. In this connection, see *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

Judgment affirmed. All the Justices concur.

(124 Ga. 596)

GEORGIA R. & BANKING CO. v. WRIGHT,
Comptroller General, et al.

(Supreme Court of Georgia. Jan. 9, 1906.)

1. JUDGMENT — ESTOPPEL — MATTERS CONCLUDED.

In a suit in equity in the Circuit Court of the United States, A. and B. were nominally codefendants, though, in reality, B.'s interests were adverse to those of A. and identical with those of the plaintiff. Judgment was rendered for the plaintiff, whereupon A. notified his codefendant to join in an appeal. This B. declined to do, expressing himself as content with the decree rendered; and A. then took an order allowing him to sever and appeal alone. On final trial in the United States Supreme Court the judgment of the trial court was reversed and the original bill dismissed; that in a subsequent action by B. against A., growing out of the same cause of action in the state courts, B. was estopped to set up any matter which was or might have been pleaded by him in his own substantial interest in the federal court.

2. SAME—ENJOINING COLLECTION OF TAXES.

A suit to enjoin the collection of taxes for one year is no bar to a suit to enjoin similar taxes for another year. This is so because the taxes for each year constitute a separate cause of action. (Lumpkin, J., dissenting.)

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1115.]

3. SAME.

If there is any estoppel by judgment at all in this case, under the pleadings and decree in the record from the federal court, it extends not alone to the tax of one year, but to the taxability of the stock. Under the pleadings and evidence before it and the prayers of the bill, the decree of the Circuit Court of the United States contained the following: "It is further ordered and adjudged that the said William A. Wright, Comptroller General, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as Comptroller General so to do, and he is hereby perpetually enjoined from issuing any execution or taking any steps to collect said taxes upon said shares of stock, and that the said Georgia Railroad & Banking Company is enjoined from making any return of said shares of stock for the purpose of taxation, or from paying any taxes thereon, or doing any act or thing recognizing liability of said shares of stock to be taxed." This was the decree re-

versed by the Supreme Court of the United States. (Per Lumpkin, J.)

4. TAXATION—STOCK IN FOREIGN RAILROAD CORPORATION.

The case of *Wright v. Southwestern R. Co.*, 64 Ga. 783, announced as the law of this state that the situs of stock in a foreign railroad corporation whose road was located outside of Georgia was in the state where the road was located, and that therefore the stock was not taxable in this state. That case was of binding statutory effect until the passage of the act approved October 20, 1885, which gave such stock a situs for purposes of taxation in Georgia.

5. STATUTES—TITLES.

Under the title "An act to provide for the correct returns of the property in this state for the purpose of taxation, and for other purposes" (Acts 1884-85, p. 30) the General Assembly could constitutionally enact that certain specified objects should be considered personal property for the purpose of taxation.

6. SAME—CODIFICATION—OMISSION OF STATUTE.

The failure of the compilers of the Code of 1895 to embrace therein the provisions of the act of 1885 (Acts 1884-85, p. 30) referred to in the third headnote did not, in the absence of conflicting statutes in that Code, amount to a repeal by implication of the portion of the act referred; and that portion of the act is still the law of Georgia.

7. CONSTITUTIONAL LAW—EQUAL PROTECTION.

The failure of the taxing authorities to directly tax shares of stock in domestic corporations whose property is located in Georgia as property in the hands of the shareholders (the corporate property being taxed instead), while at the same time levying a direct tax upon shares of stock in foreign corporations whose property is outside the state belonging to citizens of Georgia, is not a denial to the holder of the foreign shares of the equal protection of the laws.

8. SAME.

It is not in this case necessary to determine whether shares of stock in a domestic corporation in the hands of a stockholder are required to be taxed as such in order to comply with the uniformity clause of the Constitution. Nor is it necessary to determine, if domestic shares are taxable, whether it would be double taxation to assess them for taxation in the hands of the shareholder and also include them in the return made by the president of the corporation as required by law.

9. TAXATION—CORPORATE STOCK—UNIFORMITY.

All property in the state, not exempt under the Constitution, must be taxed. Stock in corporations is property. When the corporate property is in Georgia, a tax upon it is in effect a tax also upon the stock. When the corporate property is outside the state and cannot be taxed, and the stock is held by a citizen of Georgia, the stock must be directly taxed as the property of the citizen. This is not a violation of the constitutional provision that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." (Per Candler, J.)

10. CONSTITUTIONAL LAW—EQUAL PROTECTION—FINDINGS.

The court below was fully authorized to find that in the administration of the law the policy of the state was not such as to deny to the plaintiff in error the equal protection of the laws.

11. TAXATION—ASSESSMENT OF OMITTED PROPERTY—STATUTES—CONSTRUCTION.

The sections of the Political Code which prescribe the steps to be taken by the Comptroller General in the event of the failure of individuals or corporations to make returns for taxation are not restricted to cases where no return whatever is made, but apply equally to cases where property owned by the citizen and subject to taxation is withheld from the return.

12. SAME—ACCEPTANCE OF INCOMPLETE RETURN.

The acceptance by the Comptroller General of a return from which taxable property of the citizen has been omitted does not bar the state of its right subsequently to proceed against the delinquent for the tax due on the omitted property.

13. SAME—GENERAL SCHEME OF ASSESSMENT—CONSTITUTIONALITY.

The Georgia scheme of taxation requires the citizen to know what property owned by him is subject to taxation and contemplates that he will disclose it fully to the taxing officer. Every opportunity in the way of notices, protest, hearing, and arbitration is afforded him to correct any mistake of that officer and to obtain exact and even justice. To the defaulter no "machinery" is furnished for the correction of his own error. He is entitled to no notice, hearing, or arbitration; but the officer is required, from the best information obtainable, to ascertain the value of the property and assess it accordingly. This scheme of taxation is not unconstitutional.

14. SAME—ASSESSMENT.

It does not appear that the Comptroller General, who, in arriving at the value of the property taxed, was only obliged to proceed upon "the best information he could procure," made an excessive assessment.

15. SAME—OMISSION OF PROPERTY FROM RETURN—KNOWLEDGE OF OFFICER.

The fact that the plaintiff in error made annual statements showing its ownership of the stock sought to be taxed, and that these statements were accessible to the Comptroller General, does not bar the right of the state to collect the tax on the stock for the years when it was not returned.

16. SAME—INTEREST ON TAXES.

Until the passage of the act approved November 11, 1889 (Laws 1889, p. 81), taxes did not bear interest in this state.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 981.]

17. SAME—FORM OF ASSESSMENT.

The assessments made showed on their face every jurisdictional fact necessary to authorize the Comptroller General to proceed thereunder.

18. SAME—RETURN.

A statement made to the taxing officer "for the purpose of furnishing the office of the Comptroller General with information sought by said office, and not for the purpose of making a return of property for state taxation," cannot be treated as in any sense a return.

19. LIMITATION OF ACTION—CONSTRUCTION OF STATUTE.

Section 3777 of the Civil Code of 1895, providing a bar for the state in certain cases when the citizen would under like circumstances be barred, is in derogation of the common law and of the right of the state to exercise its sovereign power of taxation, and should be strictly construed.

20. EQUITY—LACHES—ENJOINING ACTION AT LAW.

Section 3775 of the Civil Code of 1895, providing an equitable bar in cases where "from the lapse of time and laches of the complainant, it would be inequitable to allow a party to en-

force his legal rights," is not available to a complainant in an equitable proceeding to enjoin the enforcement of a purely legal right.

21. LIMITATION OF ACTIONS—TAXES.

A tax is not a debt in the sense that it will be barred by a statute of limitations against "actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking."

22. TAXATION—LIEN FOR TAXES—ENFORCEMENT—LIMITATION.

The act of 1887 (Pol. Code 1895, §§ 890, 891), when construed as a whole, provides a statute of limitation against the right of the state and its subordinate public corporations to enforce a lien for taxes. Such a lien is barred, not only by a failure to have the proper entries made on the tax execution and recorded as required by the act, but also by a failure to issue the tax execution within seven years from the date that such execution may be lawfully issued. The lien of the state or its subordinate public corporations is to this extent placed by the act above referred to fully under the operation of the "dormant judgment act." (Candler, J., dissenting.)

23. SAME.

Sections 890 and 891 of the Political Code of 1895 interpose a bar to the enforcement of claims for taxes only after they have been placed in execution, and do not apply to the state's claim for taxes before an execution has been issued. (Per Candler, J.)

24. SAME—INTERUPTION OF STATUTE.

The statute of limitations does not run against the state during the time that the Comptroller General was enjoined by the federal court from issuing any executions for taxes on the stock in dispute.

(Syllabus by the Court.)

Error from Superior Court, Fulton County: J. T. Pendleton, Judge.

Suit by the Georgia Railroad & Banking Company against William A. Wright, as Comptroller General, and others, to enjoin the enforcement of executions issued for delinquent taxes. There was judgment for defendants, and plaintiff brings error. Affirmed.

By an act approved February 27, 1875 (Acts 1875, p. 235), the General Assembly authorized the Georgia Railroad & Banking Company and the Central Railroad & Banking Company of Georgia to become purchasers of the Western Railroad of Alabama, its property and franchises, or any part thereof, at any sale of the property that might be had in Georgia or Alabama, or both; the act providing that the companies mentioned "may hold the title to the same under their existing corporate capacities, or may acquire and hold stock in the present Western Railroad Company of Alabama, or any new corporation that shall be organized to take the place of the same." Under this act the two railroad companies referred to purchased on September 1, 1875, each an undivided one-half interest in fee of the property and franchises of the Western Railroad Company of Alabama. On May 7, 1881, the Georgia Railroad & Banking Company leased to William M. Wadley and assigns all of its interest in the Western Railroad of Alabama for a

period of 99 years from April 1, 1881, "and he and his assigns have remained in possession thereof ever since, and have, to the exclusion of [the Georgia Railroad & Banking Company], controlled, managed and used said railroad and its franchises and received all the gross earnings of said half interest; have paid one half of the operating expenses, taxes, and other fixed charges; and have retained for themselves a half of the net earnings, when there were any net earnings." In October, 1882, the two railroad companies [which, for convenience will be called the Georgia and the Central Railroads], acting in concert, procured their incorporation under the laws of Alabama as the Western Railway of Alabama; and the Georgia Railroad made a deed to the new corporation conveying all of its interest in the railroad properties already mentioned. The Western Railway of Alabama was eventually capitalized at \$3,000,000, and one-half of the stock, or 15,000 shares, was issued to the Georgia Railroad. William A. Wright, Comptroller General of Georgia, early in the year 1906 made a demand upon the Georgia Railroad for taxes on these 15,000 shares of stock for each of the years from 1883 to 1904, inclusive, with interest on the tax of each year from December 20th of that year at the rate of 7 per cent. per annum; the aggregate of the principal of the taxes demanded being \$125,974. The demand was refused, whereupon the Comptroller General issued 22 executions, aggregating the amount mentioned, and placed them in the hands of Nelms, sheriff of Fulton county, for levy. The present suit arises upon the petition of the Georgia Railroad to enjoin the enforcement of the executions or the collection of the tax on its stock in the Western Railway of Alabama for the years mentioned. The petition and the amendments thereto are voluminous, and, together with the answer of the defendants, present a large number of points for adjudication. In the interest of brevity these points will not be enumerated at this stage of the discussion, but will be taken up and disposed of seriatim. The trial court denied an injunction, and the plaintiff excepted.

Jos. B. & Bryan Cumming, Alex C. King, Jos. R. Lamar, and Sanders McDaniel, for plaintiff in error. Jno. C. Hart, Atty. Gen., Boykin Wright, and Hoke Smith, for defendants in error.

CANDLER, J. (after making the foregoing statement.) 1. Shortly after the lease by the Georgia Railroad to Wadley was made it was assigned to the Louisville & Nashville Railroad Company, which subsequently became the sole lessee of the Western Railway of Alabama; and in 1899 the Atlantic Coast Line Company acquired a half interest in the lease. Under the terms of the lease the lessee companies were bound to pay all taxes that might be collectible from the lessors. In August, 1901, the Louisville &

Nashville Railroad Company and the Atlantic Coast Line Company, citizens, respectively, of Kentucky and Virginia, filed in the United States Circuit Court for the Northern District of Georgia a bill in equity against Wright, Comptroller General, and the Georgia Railroad & Banking Company, reciting that the Comptroller General had demanded of the Georgia Railroad taxes upon its 15,000 shares of stock in the Western Railway of Alabama for the year 1900; that under the lease to them the lessee companies, and not the Georgia Railroad, would have to pay the tax if it were collected; that under the laws of Georgia the shares in question were not subject to taxation; and praying that the Comptroller General be enjoined from collecting, and the Georgia Railroad from paying, the tax demanded. On the hearing before the judge of the Circuit Court an injunction was granted. 116 Fed. 669. The Comptroller General, desiring to appeal the case, served on his codefendant, the Georgia Railroad, the following written notice: "A decree having been entered in the above-stated case against the defendants, and William A. Wright, Comptroller General, one of the defendants, desiring to appeal to the Circuit Court of Appeals, you as a codefendant therein are hereby respectfully notified to appear and join in the appeal." Service of this notice was acknowledged, and the reply made thereto that "defendant hereby refuses to join in said appeal, being content with the decree rendered in said cause." An order was then taken by the Comptroller General permitting him to make the appeal alone, and this was accordingly done. The Circuit Court of Appeals (117 Fed. 1007, 54 C. C. A. 672) affirmed the decision of the Circuit Court, and the case was then taken by certiorari to the Supreme Court of the United States (23 Sup. Ct. 857, 47 L. Ed. 924), where the decisions of the courts below were reversed (25 Sup. Ct. 16, 49 L. Ed. 167), and the cause "remanded to the Circuit Court of the United States for the Northern District of Georgia, with directions to dismiss the bill of complaint." The mandate of the Supreme Court was duly made the judgment of the Circuit Court. In their answer to the petition filed by the Georgia Railroad in the present case the defendants pleaded *res adjudicata*, or, to be more accurate, *estoppel by judgment*, claiming that the Georgia Railroad is concluded by the judgment against it entered in accordance with the mandate of the Supreme Court of the United States, whereby the original bill of complaint was dismissed; and this plea raises one of the most difficult and important questions in a case abounding in questions of that character.

In the suit in the federal court the Georgia Railroad was nominally a codefendant of the Comptroller General; but in reality an adverse party at interest. The judgment enjoining it from paying the tax was exactly what it desired, and its interests lay in af-

firming, rather than in disturbing, that judgment. Consequently, when its codefendant, the Comptroller General, took the case to the higher court, if it desired, in its own name, to be represented in the appellate proceedings as to its real and substantial, rather than its fictitious interests, it had every opportunity by appropriate adversary pleadings to place itself nominally, as well as really at arm's length, with its codefendant. It preferred, however, to leave its lessees to defend its substantial rights, and to allow the judgment, nominally against it, but really in its favor, to remain undisturbed by any act of its own. The judgment of the Supreme Court of the United States was rendered in a case to which nominally it was not a party, but which involved questions very vital to it, and to which it had every opportunity to be made a party in its own name. The judgment against the Louisville & Nashville and Atlantic Coast Line Companies necessarily and in terms carried with it in adjudication that the Georgia Railroad was liable for the tax on this stock for the year 1900, and when, in accordance with the mandate of the Supreme Court of the United States, the original bill in equity filed by the two plaintiff companies was dismissed, the Georgia Railroad was concluded as to all questions growing out of that cause of action which were or might have been raised by it to protect its interests in that suit. "The mere circumstance of any persons having been formally arrayed on the same side in a suit is immaterial, * * * and it is agreed upon now that they will be estopped by a decision on a matter which was actually in issue between them, and as to which they had an active controversy against each other." *Hukm Chand, Res Adjudicata*, § 78; *Van Fleet, Former Adjudication*, p. 576, § 256; 24 Am. & Eng. Enc. L. (2d Ed.) 733; 1 Dan. Ch. Pl. & Pr. (6th Am. Ed.) 659; *Foster, Fed. Pr.* § 300; *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004; *Corcoran v. Chesapeake Canal Co.*, 94 U. S. 741, 24 L. Ed. 190; *Riley v. Bank*, 81 Md. 14, 81 Atl. 585; *Louis v. Brown Township*, 109 U. S. 163, 3 Sup. Ct. 92, 27 L. Ed. 892; *Scotland County v. Hill*, 112 U. S. 183, 5 Sup. Ct. 93, 28 L. Ed. 692; *Waldo v. Waldo*, 52 Mich. 91, 17 N. W. 709.

2. Counsel for the Georgia Railroad, however, contend that, even if it is concluded by the judgment of the Supreme Court of the United States as to its liability for the tax sought to be enjoined in the proceeding before that court, the estoppel of the judgment extends only to the question of the railroad's liability for the tax for the year 1900, and that it is not cut off from contesting the validity of the tax for all the other years involved in the present suit, from 1883 to 1904, inclusive. The question turns, of course, largely, if not entirely, upon whether suits for different taxes, or for taxes for different years, constitute different causes of action, for suits to enjoin the collection of

taxes would necessarily be governed by the same principles. In 2 Cooley on Taxation, 845, it is said: "Upon the question whether a judgment establishing a liability to pay taxes for certain years is, in a subsequent action between the same parties, *res adjudicata* as to the liability for taxes of a succeeding year when the facts affecting the liability are the same in the two cases, the authorities do not agree. It is held in Iowa, Kentucky, Michigan, Mississippi, and Tennessee that the judgment for a tax is conclusive as to that tax merely, and in suits for taxes of other years is important only as a precedent [citing *Davenport v. Chicago R. Co.*, 38 Iowa, 633, 640; *Newport v. Commonwealth* (Ky.) 50 S. W. 845, 45 L. R. A. 518; s. c. 51 S. W. 433, 45 L. R. A. 518; *Louisville Bridge Co. v. Louisville* (Ky.) 58 S. W. 598; s. c. 65 S. W. 814; *Michigan R. Co. v. Auditor General*, 9 Mich. 448; *Lake Shore R. Co. v. People*, 46 Mich. 193, 9 N. W. 249; *Adams v. Yazoo R. Co.*, 77 Miss. 194, 24 South. 200, 317, 23 South. 956, 60 L. R. A. 33; *State v. Bank*, 95 Tenn. 222, 31 S. W. 993; *Union Bank v. Memphis*, 101 Tenn. 154, 46 S. W. 557]. Recent decisions of the federal Supreme Court maintain the contrary doctrine, but have not met the approval of the state tribunals." In *Keokuk R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450, relied upon by counsel for the railroad company in the present case, it was held that "a suit for taxes for one year is no bar to a suit for taxes for another year"; and in the opinion Mr. Justice Brown said: "The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in *Cromwell v. County of Sac.*, 94 U. S. 351, 24 L. Ed. 195. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. * * * In the case of *Davenport v. Chicago R. Co.*, 38 Iowa, 633, 640, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the state from collecting the tax for a subsequent year; each year's taxes constituting a distinct and separate cause of action. 'The cases,' said the court, 'are unlike those where two causes of action [as two promissory notes] forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. * * * Taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two promissory notes made upon

two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision." As indicated by the quotation which we have made from *Cooley on Taxation*, however, the Supreme Court of the United States has not adhered to the principles announced in the case cited. See *New Orleans v. Citizens Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; *Baldwin v. Maryland*, 179 U. S. 220, 21 Sup. Ct. 105, 45 L. Ed. 160; *Deposit Bank v. Frankfort*, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. Ed. 276. In *Newport v. Commonwealth* (Ky.) 50 S. W. 845, 45 L. R. A. 518, it was held that a judgment for the defendant in an action to recover taxes for one year is not a bar to an action to recover taxes on the same property for another year. *Hazelrigg, C. J.*, and *Burnam, J.*, concurred in a separate opinion on this branch of the case, which is reported in 51 S. W. 433, 45 L. R. A. 518, and from which the following forcible language is quoted: "The power to tax is a high governmental power exercised against the will of the person taxed, and, in our opinion, a decision as to one cause of action arising under a tax statute is no more binding upon the government or the citizen than the construction of a penal statute would be in a second prosecution against the same person for an offense exactly similar. The former adjudication would, in such case, have weight as a precedent, but would not bind the parties by way of estoppel. The rulings of the court upon the legal questions involved are authority here to the extent, and no further, that like decisions would be in a suit between different parties. As matter of public policy, and upon grounds of public necessity, we think the principle of *res adjudicata* ought not to be applied to questions of taxation where the state is exercising its sovereign power."

In Georgia authority on the subject now under consideration is scant, and only indirectly in point. *Mayor of Savannah v. Dehoney*, 55 Ga. 33, was a case in which a number of livery stable keepers filed their bill to enjoin the municipal authorities of Savannah from collecting a license fee or tax on vehicles for transporting passengers. It was held, for reasons which appear in the opinion, that an injunction was properly granted. Subsequently *Feely*, one of the plaintiffs in the case cited, brought suit against the city to recover money which it was alleged he had been compelled unlawfully to pay for license fees for the privilege of running omnibuses. On the hearing the final decree in the case of *Mayor v. Dehoney* was admitted in evidence in behalf of the plaintiff. This was held to be error, and the court, through Chief

Justice Jackson, said: "It was an agreed or compromise verdict and decree, and that alone should exclude it; but it was not the same tax, not for the same year, not under the same ordinance, and how much it may have prejudiced the city's case we cannot estimate." And in *Brady v. Pryor*, 69 Ga. 697, which was not a tax case, it was held, on the authority of *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, as to the effect of a judgment upon a subsequent action involving the same issues, but a different, though similar, subject-matter, "that, when an issue is in fact litigated and determined, such determination is conclusive upon parties and privies in any subsequent action in which the same issue is in question, though the subject-matter of the action be different. But to invoke successfully this rule it must be shown that in the former action the issue was in fact litigated and decided. It is not sufficient that it was there so involved that it might have been litigated." Somewhat in point, also, is the case of *Worth v. Carmichael*, 114 Ga. 699, 40 S. E. 797, where it was held that, "where two notes were given upon a consideration arising in one and the same transaction, a judgment rendered in favor of the payee against the maker upon one of such notes did not operate to estop the latter from setting up, in a subsequent action brought by the former against him on the other note, a defense which was not in issue when the judgment was rendered."

As stated in *Anderson's Law Dictionary*, p. 157, jurists have found it difficult to define the term "cause of action." It is defined as "the right which a party has to institute and carry through a proceeding. The act on the part of the defendant which gives the plaintiff his cause of complaint. * * * A wrong committed or threatened." *Id.* "Matter for which an action may be brought." 1 *Bouv. L. Dict.* 295. "A 'cause of action' is the entire set of facts that gives rise to an enforceable claim. The phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment." 1 *Stroud, Jud. Dict.* (2d Ed.) 275. See, also, *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318 (3). If, as indicated by the definition given by *Bouvier*, the subject-matter of the suit be the cause of action, there is no room for doubt that the present suit is on a different cause of action from the one instituted in the federal court, except in so far as it seeks to enjoin the collection of taxes for the year 1900; and this view seems to be in harmony with the great weight of authority in tax cases. Identity of principles involved does not give rise to an estoppel by judgment. It may be controlling as precedent in the decision of the later case; but it does not cut the losing party off from a hearing in court. If such were not the case, to adopt the illustration given in the *Kentucky* case of *Newport v. Commonwealth*, which has already been cited, a man charged under two

indictments for exactly similar offenses against the same penal statute would be cut off, after conviction under one indictment, from setting up any defense under the other. Confusion on this subject, we think, is doubtless responsible for the later decisions of the Supreme Court of the United States, to which reference has already been made. Our conclusion is that as to the taxes for the year 1900 the Georgia Railroad is now estopped, for all of the grounds of attack now made on the validity of the tax were, or might have been, urged on the trial in the federal courts; but, as to the taxes for the remaining years between 1883 and 1904, inclusive, it may insist upon all of the grounds for injunction contained in its petition.

3. It is contended broadly by counsel for the plaintiff in error that shares of stock in a foreign railroad company, whose line of road lies outside this state, are not taxable in Georgia; and they rest this contention upon the decision in *Wright v. Southwestern R. Co.*, 64 Ga. 783, where (page 799) it was held that stock in railroads without the limits of this state is not taxable here, and that "stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least, and taxable by the state in which the road is located." Counsel for the Comptroller General in their brief refer to the language quoted as a "dictum" of Mr. Justice Jackson, who delivered the opinion, and contend that the decision was ill-considered and unsound. It is not contended, however, that the language was obiter, or that the question decided was not necessarily involved in the decision of the case. A careful study of the opinion, as well as of the original record in that case, convinces us that the point was necessary to the decision, and, however ill considered, unsound or unsupported by authority it may have been, it was the solemn judgment of a full bench, having, until overruled by a later decision or altered by legislative enactment, the force of a valid statute. See *Heard v. Russell*, 59 Ga. 54. The decision was not so much one of taxation or exemption, for, as pointed out in the able brief of counsel for the plaintiff in error, the tax act of 1874, with which the decision had to deal, required that all the property of railroads should be taxed; nor (though the language of the opinion might be considered susceptible of a different construction) did it decide that stock of a railroad or other corporation is not property, for at the time the decision was rendered there was in existence a statute, which is still of force, expressly declaring stocks representing shares in an incorporated company holding lands, or a franchise in or over lands, to be personalty. *Wright v. Southwestern R. Co.* adjudicated merely that the situs of stock in a railroad company whose road lies outside the state of Georgia is in the state where the road lies. But by an act approved October 20, 1885 (Acts 1884-

83, p. 30). the General Assembly very effectually and emphatically upset the doctrine of that case by declaring (section 2) that "personal property shall be construed, for purposes of taxation, to include * * * all stocks and securities, whether in corporations within this state or in other states, owned by citizens of this state, unless exempt by the laws of the United States or of this state." It follows that, if this act was valid and binding, the doctrine of *Wright v. Southwestern R. Co.* ceased to be the law of this state from the date of its passage.

4. It is insisted, however, that the act of 1885 was unconstitutional, in that it contained matter different from that expressed in its title, and, as persuasive evidence of that contention, it is pointed out that in compiling the Code of 1895 the codifiers left out the second section of the act, though other portions of the act were codified. The title of the act is as follows: "An act to provide for the correct returns of the property in this state for the purpose of taxation, and for other purposes." The body, so far as it relates to this discussion, has already been set out in the preceding division of this opinion. It is well settled that "provisions germane to the general subject-matter embraced in the title of an act, and which are designed to carry into effect the purpose for which it was passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by the use of the words 'and for other purposes.'" *Banks v. State*, 124 Ga. 15, 52 S. E. 74, and citations. The general subject-matter embraced in the title of the act now under consideration is to provide for the correct returns for taxation of the property in this state. Certainly the ascertainment of what constitutes different classes of property, so as to facilitate the making of correct returns, is germane to that general subject-matter; and we do not hesitate to hold that the attack made upon the constitutionality of the act is without merit.

5. It is further contended, however, that by reason of the fact that this section of the act of 1885 was not incorporated in the Code of 1895 it has been repealed by implication; and in support of this position the cases of *Central R. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518, and *Barnes v. Carter*, 120 Ga. 895, 43 S. E. 387, are cited. Those cases merely hold, as was inevitable, that by the adoption of the Code of 1895 all prior conflicting laws were repealed by implication; but they do not go to the length of holding, nor do we know of any authority to that effect, that by the adoption of the Code any previously adopted valid and constitutional law, not in conflict with anything contained in the Code, was wiped out. It would, indeed, be an extreme view to hold that the codifiers, whose duties do not require them to pass on the constitutionality of legislation, might, because they considered a certain law unconstitutional, or even through

mere oversight, by omitting it from the Code, put at naught the solemnly expressed intent of the Legislature; and it would be equally illogical to hold that the enactment of a code of laws carried with it by implication the repeal of other valid laws in complete harmony with the contents of the Code. As the second section of the act of 1885 is not in conflict with any of the laws enacted in the adoption of the Code of 1895, we rule that it is still the law of Georgia.

6. There is no arbitrary classification of shares in a foreign railroad corporation for taxation in this state. Shares in domestic corporations are taxed, not in the same manner, but to a like extent with shares in foreign corporations. They are taxed indirectly, through the taxation of the corporation. It is the aim of the state to tax these shares once only in this state. In the case of domestic corporations they are taxed through the medium of the corporate property, while in the case of foreign corporations, where the corporate property cannot be reached, the shares themselves are directly taxed. That this is lawful, and is not a denial of the equal protection of the laws guaranteed by the Constitution of the United States, is abundantly established by authority. *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; *Wright v. Louisville & Nashville R. Co.*, 195 U. S. 219, 25 Sup. Ct. 16, 49 L. Ed. 167.

7. Nor is this system of taxation in violation of the provision of the Georgia Constitution that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." This question was squarely decided adversely to the contentions of the railroad company in the case of *Wright v. Louisville & Nashville R. Co.*, 195 U. S. 219, 25 Sup. Ct. 16, 49 L. Ed. 167, and the reasoning of Mr. Justice Holmes, of the Supreme Court of the United States, on that subject, seems to the writer in every way convincing. The case of *People ex rel. Burke v. Badlam*, 57 Cal. 594, is also very strong authority for the position I now take. In that case it appeared that the Constitution of California contained provisions very similar to those in our own Constitution in regard to taxation. By the organic law "stocks" and "franchises" were declared to be included in the definition of the word "property," and it was provided that all property should be taxed in proportion to its value. It was held that, when the corporate property of a company was taxed, this was in effect a taxation of the stock of the corporation, also, and that the stock was not liable for separate and additional taxation. Said Ross, J., who delivered the opinion: "What is the stock of a corporation but its property, consisting of its franchise and such other property as the corporation may own? Of

what else does its stock consist? If all this is taken away, what remains? Obviously nothing. When, therefore, all of the property of the corporation is assessed—franchise and all of its other property of every character—then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with." But it is argued, applying this reasoning to the case in hand, the property of the Western Railway of Alabama is taxed in the state of Alabama, and to subject the shares of stock to taxation in Georgia is to place upon the owner of the shares the burden of double taxation. The answer to this argument, as is pointed out in the case of *Wright v. Louisville & Nashville R. Co.*, supra, is that the Georgia authorities are bound to tax all property found in Georgia. The shares of stock in the foreign corporation are property, and therefore must be taxed. The corporate property not being situated in Georgia, and it being impossible, therefore, to tax the stock through the medium of the corporate property, the only thing left to the Georgia authorities is to tax the stock directly, as is done in the present case. The Georgia authorities have exacted no double taxation. The fact that Alabama has placed upon the corporate property a tax may work a hardship upon the holder of the stock, but it is not a reason why the mandate of the Constitution that all property within the limits of the state not exempted shall be taxed should be disobeyed or disregarded.

A majority of the court, however, do not think that a decision as to the taxability of domestic stock is necessary in this case. This view is as follows: The Constitution declares all property subject to taxation, except such as the General Assembly is therein specifically permitted to exempt. It is not necessary to decide whether shares of a domestic corporation in the hands of a stockholder are required to be taxed as such, in order to comply with the uniformity clause of the Constitution. If it is necessary to tax them as such, there is no statute of which we are aware which has the effect to prevent the collection of the tax. Nor are we called upon to decide whether, if domestic shares are taxable, it would be double taxation to assess them for taxation in the hands of the shareholder and also include them in the return made by the president of the corporation as provided by law, and therefore if the demands of the Constitution would be satisfied by the indirect tax of the shares in the assessment on the corporate return. The precise question presented in this phase of the matter is whether the uniformity clause is offended by the imposition of a tax on foreign shares. The Constitution, with regard to declaring what property is liable for taxation, is self-executing. If the Legislature, in the scheme for levying and collecting taxes, does not exempt or attempt to exempt property constitutionally liable for taxation, it is

no objection that the tax levy is not uniform on the subjects of taxation, because in the administration of the law certain property may escape taxation because of the delinquency of the tax officers.

8. In further support of the contention that in the levy of these taxes the railroads were denied the equal protection of the laws, it was claimed that only the Georgia and Central Railroads had been proceeded against for back taxes on shares in nonresident corporations, and that other owners of such foreign shares were not required to pay either present or past due taxes thereon. In support of this claim affidavits of some 40 tax receivers of different counties in the state were introduced in evidence to show that during their respective terms of office the owners of shares of stock in foreign corporations residing in Georgia had not returned said stock for taxation, and that it had been the uniform practice of the tax receivers not to require them to return such stock. The record discloses that "it was admitted that the Georgia Railroad & Banking Company and the General of Georgia Railway Company were the only persons owning foreign railroad stock proceeded against for taxes on these kinds of shares. The Comptroller General's statement that he knew of no other delinquent was also admitted." Certainly on this showing the court below was authorized to find that there had been no such unequal and discriminating administration of the taxing laws as to amount to a denial to the railroad companies in question of the equal protection of the laws. Affidavits from tax receivers of less than one-third of the counties of the state, coupled with an admission that the Comptroller General had proceeded against the only delinquents who had been brought to his notice, certainly cannot be said to establish that the policy of the state has been and is to single out these two railroads, or railroads as a class, as the only citizens who are to be required to pay taxes on shares of stock in foreign corporations. Clearly there is no merit in this contention.

9. On January 27, 1905, the Comptroller General wrote to the president of the Georgia Railroad & Banking Company the following letter: "The Supreme Court of the United States having recently held, as you doubtless are aware, that the shares of stock of the Western Railway of Alabama owned by the Georgia Railroad & Banking Company are taxable in Georgia, it becomes my duty to assess these shares of stock for taxation for each of the years in which they are in default for their taxes. This assessment is required to be made by the Comptroller General from 'the best information obtainable.' I desire to proceed to the discharge of this duty intelligently, and therefore respectfully request you to furnish me any data in your possession which will enable me to make perfectly fair, just, and legal assessments of this property. From your long con-

nection with the property as president of the Georgia Railroad & Banking Company, and your familiarity with its value, you doubtless are in possession of information which will very greatly aid me in making an equitable assessment of the property. I trust, therefore, you will submit at your earliest possible convenience any facts or suggestions bearing upon this line which you may deem proper. I would be glad to have any data which you may submit with reference to its value for each year beginning with the year 1883, the year I am informed your corporation became the owner of these shares of stock. I expect to proceed with this matter some time the early part of next week, if possible." Other correspondence took place between the Comptroller General and various officers of the Georgia Railroad, including the general counsel, who eventually submitted to the Comptroller General a statement regarding what he considered the value of the railroad property in question, together with a tabulated statement of the dividends which the Georgia Railroad had received from the stock, at the same time protesting that the stock was not liable for taxation, and refusing to make any return of it for that purpose. The Comptroller General thereupon, according to his affidavit, "assessed the same from the best information obtainable." It is insisted with great earnestness and ability that the levy of executions under such circumstances, without giving notice to the railroad company or allowing it any opportunity to be heard as to the basis of valuation upon which the assessment was made, amounted to a seizure of its property without due process of law. It is not claimed that the Comptroller General violated the provisions of any existing statute, but that the laws of Georgia do not provide for the collection of taxes on omitted property after a return has been made by the taxpayer and accepted by the Comptroller General.

Section 812 of the Political Code of 1895 prescribed the method by which "corporations, companies, persons, agencies or institutions" shall make returns of their property to the Comptroller General for taxation, and provides that "such returns shall be carefully scrutinized by the Comptroller General, and if in his judgment the property embraced therein is returned below its value, he shall assess the value, within sixty days thereafter, from any information he can obtain, and if he shall find a return of * * * matters required to be returned as aforesaid, below the true amount, or false in any particular, or in any wise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such returns shall receive notice and shall have the privilege, within twenty days after such notice, to refer the question of

true value or amount, as the case may be, to arbitrators, * * * and their award shall be final." Section 813 is as follows: "In cases of failure to make return, the Comptroller General shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions." By section 814 it is provided that "In all cases of default of payment of taxes upon returns or assessments, the Comptroller General shall enforce collections in the manner now provided by law." "If any corporation, company, person, agency, or institution, who are required to make their returns to the Comptroller General, shall fail to return the taxable property or specifics, or pay annually the taxes for which they are liable to the State Treasury, the Comptroller General shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties." Section 874. "When there is no return by which to assess the tax, the Comptroller General shall, from the best information he can procure, assess in his discretion." Section 879. These sections of the Political Code are thus set out in order that we may have before us at the outset the various statutes bearing on the power of the Comptroller General to collect taxes on property which has not been returned. And at this point we will take occasion to say that in our opinion all considerations of the good faith of the railroad company should be eliminated from this discussion. It may be conceded that the officials of the company honestly believed that this stock was not taxable, and that there has never been on their part the slightest effort to conceal the Georgia Railroad's ownership of it, or to deceive the Comptroller General in any way. In no jurisdiction has the maxim "*Ignorantia legis neminem excusat*" been more rigidly applied than in Georgia. The railroad company was bound to know that this stock was taxable, and its mistaken, though honest, belief to the contrary, furnishes no excuse for nonpayment. The sole question now to decide is whether or not the steps taken by the Comptroller General to enforce the collection of the tax are legal. A question of vital importance is whether sections 813 and 874, entitled, respectively, "When No Return, Comptroller to Assess," and "Defaulting Corporations," have reference only to a total failure on the part of the citizen to make a return, or extend to cases where there has been a return which only partially sets out the property of the taxpayer. The latter contingency is certainly not covered by section 812, which has reference, not to an incomplete return, but to an insufficient valuation by the taxpayer. It must be borne in mind that tax laws are to be construed liberally in favor of the power of the state to tax. 27 Am. & Eng. Enc. L. (2d. Ed.) 699, and note; Board of

Commissioners v. Anderson, 68 Fed. 341, 15 C. C. A. 471. In our opinion the only rational construction to be placed on sections 813 and 874 of the Political Code of 1895 is that they cover as well a partial as a total failure to make returns. Any other construction would lead to a manifest absurdity, and would place the state at the mercy of the tax dodger, who, by returning at its full value a mere tithe of his property, would thus escape taxation on the bulk of his estate.

10. The same reasoning is applicable to the contention that by an acceptance of the return on the part of the Comptroller General the transaction is closed, and cannot be reopened by the taxing officers. Such a holding would place a premium on deception, would deny the right of the state to correct mistakes for which its officers were not responsible, and would, in effect, give to the acceptance of a tax return the solemn and binding effect of a judgment fixing the amount of taxable property owned by the taxpayer. "An assessment is not a judgment within the doctrine of *res judicata*, and does not bar or estop a supplemental assessment of property which was, in fact, erroneously omitted, even though its omission in the first instance was the result of a decision by the officers making the regular assessment, holding it to be exempt." 27 Am. & Eng. Enc. L. (2d Ed.) 701; *Sturges v. Carter*, 114 U. S. 518, 5 Sup. Ct. 1014, 29 L. Ed. 240. Whatever may be the binding effect of the acceptance of returns by the tax officer in a matter involving judicial action (24 Am. & Eng. Enc. L. 723), it cannot be claimed that the ascertainment whether the returns accepted embrace all the property owned by the citizen is a judicial act. The fallacy of the "closed book" theory is shown, we think, by section 855 of the Political Code of 1895, which provides that "receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default, which taxes shall be assessed according to the law in force at the time the default occurred, and shall be so specified in the digest." It is true that this section in terms refers only to tax receivers and tax collectors, and does not mention the Comptroller General of the state. But it must be borne in mind that the section was enacted into law in 1818, at a time when the Comptroller General was merely an auditor of public accounts, and had no power as a taxing officer, and when all taxable property of every kind was returned to the tax receiver and collected by the tax collector. In 1861, for the first time, the comptroller was made a tax officer; and it is only reasonable to assume that in delegating to him certain duties which had hitherto been performed by the county officers the General Assembly intended that he should be clothed with the same power as they for the complete and efficient discharge

of those duties, so far as applicable. If we are correct in this reasoning, the language of Judge McCay in his concurring opinion in the case of *Walker v. Whitehead*, 43 Ga. 551, 552, furnishes an irresistible argument for holding that the Comptroller is not concluded by the acceptance of returns from making a subsequent assessment for omitted property. Discussing what is now section 855 of the Political Code of 1895, it was said "that [the taxes] were due five, four, three, and two years ago, and have gone unpaid, is no relaxation of the obligation to pay them. Can it be contended that, because one in 1866 or 1868 managed to conceal his taxable property, he is thereby released from his obligation to pay the tax thereon when he finds it no longer possible to hide it?" * * * These taxes are just as much due now as they were in the year they were incurred. They are a present, subsisting, legal obligation, and, if the remedies provided at the time have proved inadequate to enforce their payment, the state may take any new remedy that may suggest itself. * * * The duty to pay exists now. It is a continuing, present obligation and duty, just as imperative to-day as it was last year. The 866th section of the Code of 1868 [now Pol. Code 1895, § 855] provides how taxes for previous years shall be given and paid, and one who to-day fails to give in and pay taxes upon property not given in and paid in former years fails in a present duty, and it is perfectly competent to affix a penalty on him, not for his past, but for his present and future, failures."

Again, by the act of 1813 (Pol. Code 1895, § 847), it is provided that if a person fails to make a return, in whole or in part, it is the duty of the receiver to make the valuation and assess the taxation thereon, and in all other respects to make the return for the defaulting person from the best information he can obtain; while by the act of 1804 and its amendments (Pol. Code 1895, § 949, para. 2, 11) it is made the duty of the tax collector "to search out and ascertain as far as possible all polls and professions, and all taxable property not returned to the receiver or not found in his digests," and "to issue executions against all tax defaulters who are residents of the counties in which said tax-collectors are holding their offices, for any and every year preceding and including the years for which they are elected, and to collect the tax due from said defaulters, and pay over the same to the proper authorities." Reading together the provisions of sections 847 and 949, and all of the provisions of the Code on the subject of the collection of taxes, the conclusion is necessarily reached that there was a legislative intent to clothe the Comptroller General as a tax receiver and collector with all the powers of the county receiver and collector, wherever applicable to his duties in these capacities, whether the law conferring these powers was in force when the

Comptroller General first became a tax officer, or were thereafter enacted.

11. The Georgia law affords to every citizen, individual or corporate, ample facilities for the preservation of his rights as against the tax gatherer, always provided that he makes a return to the proper officer of the property that he owns. It presupposes that the taxpayer will disclose to the officer all of his taxable property, and it requires him to know whether his property is taxable or not. The requirement of candor in disclosing the ownership of property is really at the foundation of our tax system. So long as the citizen complies with that requirement, he is afforded every opportunity to dispute with the state the question of the value of his property and the amount of tax to be levied thereon. When he fails to return, in whole or in part, fraudulently or through an honest mistake, he then and there becomes a defaulter, and the door of opportunity is closed to him, so far as the right to have the mutual rights between himself and the tax power adjusted by arbitration is concerned. In other words, ample "machinery" is available to the citizen who makes full returns. Deprivation of the right to be further heard is one of the penalties visited upon the defaulter. The collecting officer must ascertain as best he can the amount of property to be taxed, as well as its value, and take summary means for its collection. This, it seems to us, is the scheme of taxation contemplated by the laws of this state. Whether or not it is consistent with a wise public policy we do not undertake to determine. That it is not unconstitutional we are fully satisfied. 1 Cooley, Taxation, 819-824, and cases cited in notes; Board of Commissioners v. Anderson, 68 Fed. 341, 15 C. C. A. 471; Lott v. Hubbard, 44 Ala. 593; McMullan v. Carter, 6 Mont. 215, 9 Pac. 906; Orena v. Sherman, 61 Cal. 101; Tucker v. Alken, 7 N. H. 118; City v. Champion, 58 Conn. 268, 20 Atl. 471; McTwiggan v. Hunter (R. I.) 83 Atl. 5, 29 L. R. A. 526; Board of Revenue v. Montgomery Gas Light Co., 64 Ala. 269; Wabash R. Co. v. Johnson, 108 Ill. 11; Seigfried v. Raymond, 190 Ill. 424, 60 N. E. 868; State ex rel. Goodman v. Halter (Ind. Sup.) 47 N. E. 665; Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Pittsburgh R. Co. v. Backus, 154 U. S. 426, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Du Bignon v. Brunswick, 106 Ga. 317, 32 S. E. 102.

12. As we have seen, the Comptroller General in making his assessment was only obliged to use "the best information he could procure" as the basis of his valuation of the property taxed. There is nothing in the record to indicate that upon that basis the valuation placed upon the shares by the officer was excessive.

13. It cannot avail the railroad company that during all the years for which the tax now under consideration was levied it had is-

sued annual statements showing its possession of the shares of stock now sought to be taxed, and that the Comptroller General might have ascertained from these statements, which were easily accessible to him, the Georgia Railroad's ownership of the shares. "Estoppels against the state are not favored; and, though they may arise from its express grants, they cannot arise from the laches of its officers, since persons who deal with an officer of the government are bound to know the extent of his power and authority." State ex rel. Lott v. Brewer, 64 Ala. 287.

14. In the absence of a statutory provision to that effect, taxes do not bear interest. State v. Southwestern Railroad, 70 Ga. 32 (8). Section 887 of the Political Code of 1895, providing for the payment of interest on tax *fi. fas.*, was not approved until November 11, 1889, and consequently the Comptroller General cannot lawfully exact interest on taxes accrued prior to that time. Under the statute cited the interest dates, not from the time of the issuing of the *fi. fa.*, but "from the time fixed by law for issuing the same." "Such interest is not in the nature of a penalty." Sparks v. Lowndes County, 98 Ga. 284, 25 S. E. 426.

15. The assessment made on the stock for the year 1883 (which was identical with those made for the other years involved in this litigation, except as to dates and amounts) was in the following language: "Whereas, the Georgia Railroad & Banking Company, a corporation chartered under the laws of Georgia and doing business in this state, having failed and refused to return for taxation for the year 1883, 15,000 shares of stock of the Western Railway of Alabama, an Alabama corporation, said stock being then held and owned by said Georgia Railroad & Banking Company in this state; and having failed and refused to pay the taxes due the state thereon for the year 1883 as required by law, I hereby assess the said 15,000 shares of stock of the Western Railway of Alabama for said year as being then of the value of \$1,350,000.00. Said assessment being made by virtue of authority vested in me by law as Comptroller General, 'from the best information I can procure.'" In the light of what we have held in a preceding division of this opinion in regard to the contention of the plaintiff in error that the levy is a seizure of its property without due process of law, it is only necessary to add that the assessment which has been quoted showed every jurisdictional fact necessary to authorize the Comptroller General to proceed thereunder.

16. It is insisted by counsel for the plaintiff in error that in the years 1903 and 1904 the Georgia Railroad actually made a return of the stock owned by it in the Western Railway of Alabama, though under protest, and that, this being so, the Comptroller General had no right, until after compliance with the provisions of the Political Code

of 1895, § 812, to increase the amount of the return. As it appears from the record, however, that this so-called "return" was merely a statement "for the purpose of furnishing the office of the Comptroller General with information sought by said office, and not for the purpose of making a return of property for state taxation." There is obviously no merit in this contention.

17. But it is urged that the claim of the state for these taxes is barred by the statutes of limitation; and this contention is based on several different grounds. The Civil Code 1895, § 3777, provides that, "when, by the provisions of the foregoing sections [sections 3760 to 3776, inclusive], a private person would be barred of his rights, the state shall be barred of her rights under the same circumstances." This section became a part of the law of Georgia in 1856 (Acts 1855-56, p. 237). Up to that time the maxim "Nullum tempus occurrit regi" obtained in Georgia. *Brinsfield v. Carter*, 2 Ga. 143; *Moody v. Fleming*, 4 Ga. 116, 48 Am. Dec. 210 (7); *Smead v. Williams*, 6 Ga. 159. The act of 1856 is plainly in derogation of the common law and of the rights of the state, and under the well-established rules must be given a strict construction. In terms it is limited to the "foregoing sections"—that is, the preceding sections of the chapter relating to the general subject of limitations—and therefore it will not be extended to bar the right of the state to any actions not provided for by those sections of the Code.

18. But it is claimed that section 3775 is applicable to this case, and that by the terms of section 3777 the state is barred by the provisions of the section first mentioned. That section is as follows: "The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights." This contention is plainly founded on a misconception of the equitable doctrine of stale demands. The principle that a stale demand will not be enforced is peculiarly applicable to equity practice is available to the defendant only, and cannot be employed by the complainant in an equitable proceeding to enjoin the enforcement of a purely legal right. Indeed, by the terms of the statute cited, it is restricted to cases where the "complainant" has been guilty of laches and time has elapsed to make his claim inequitable. See, also, *Bisph. Pr. Eq.* (6th Ed.) § 39.

19. Section 3768 of the Civil Code of 1895 is also pleaded in bar of the state's right to collect these taxes. That section is as follows: "All actions upon open accounts, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, shall be brought within four years after the right of action accrues." The principal au-

thority relied on by counsel to support the contention that this section covers a claim by the state for taxes is the case of *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701. That case went to the Supreme Court of the United States from Minnesota, and was decided on the authority of the case of *County of Redwood v. Winona Land Co.*, 40 Minn. 512, 41 N. W. 465 (also cited as *State v. Lands in Redwood County*, 42 N. W. 473), in which case the Minnesota court held that by statute in that state the statute of limitations ran against the state the same as against an individual, that a tax was a liability created by statute, and that under a law providing that actions upon a liability created by statute should be barred after six years the state could not put in motion the legal machinery provided by statute for the collection of back taxes after that time. There is a vast difference, however, between a liability created by statute and an open account, a contract not under the hand of the party sought to be charged, or an implied assumpsit or undertaking. The statute passed upon by the Minnesota court, and later by the Supreme Court of the United States, is more closely analogous to section 3768 of our Civil Code of 1895, which provides that "all suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues"; and, if that section were before us for construction, the cases cited would be very strong authority for the proposition that the state's claim for taxes will be barred after the lapse of the period therein mentioned. In view of the fact, however, that we have already decided, independently of statutes of limitation, that the tax involved in this case cannot be collected except for a period of less than 20 years prior to the institution of this action, any ruling with reference to section 3768 of the Civil Code of 1895 would be obiter, and manifestly out of place. Nevertheless the writer will take occasion to say that his personal opinion is that under section 3768 of the Civil Code of 1895, read in connection with section 3777, and on the authority of the cases of *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701, and *State v. Lands in Redwood County* (Minn.) 42 N. W. 473, the state is barred of its right to collect back taxes after the lapse of 20 years.

Taxes, however, are not debts within the meaning of Civ. Code 1895, § 3768. "A tax, in its essential characteristics, is almost universally held not to be a debt or in the nature of a debt. The distinction between a debt and a tax is that the one rests on contract, and the other does not. A debt is a sum of money due by contract, express or implied, while a tax is a charge on person or property to raise money for public purposes, and operates in invitum." 27 Am. & Eng. Enc.

L. (2d. Ed.), 580, and cases cited in note. See, also, *Du Bignon v. Brunswick*, 106 Ga. 325, 32 S. E. 102. With this distinction clearly in mind, we think there can be no doubt that section 3768 of the Civil Code of 1895 does not raise any bar to the right of the state to collect back taxes.

20. Finally, sections 890 and 891 of the Political Code of 1895 are relied on to bar the collection of taxes for more than seven years. My views on this subject are hopelessly at variance with those of a majority of my Brethren. I incorporate herewith their views, and will endeavor to make clear my reasons for dissenting therefrom:

"That invisible person, or power, or being, or entity, no matter what it may be called, which, for convenience, under our system of government, we call the 'state,' was endowed in the beginning of republican institutions with many of the attributes of the visible king whose authority to rule was supposed to have its origin in divine right. Maxims that no time runs against the king and that the king can do no wrong were applied to the invisible ruler of modern institutions with somewhat the same force and rigor with which they were applied to the king of the olden days. But that which we call the 'state' is also properly called the 'public' and the 'people,' and the invisible ruler becomes visible by simply opening the eyes to that mass of individuals with whom government originates and through whose representatives government is carried on. The state—that is, the public, the people, the ideal sovereign of the more enlightened days of the world—in the steady recession from the selfish, not to say atrocious, theory that the subject exists for the benefit of the sovereign, and the latter has rights before which the interests and welfare of the former must pale and vanish, in the steady advance in the revolution of thought that government is subordinate to the people, and that, instead of being their master, is their servant, the state has voluntarily come under the operation of the statutes of limitation wholly and unreservedly in nearly every instance where such statutes are applicable to individuals.

"The general rule is that, where an individual would be barred by a statute of limitations, the state is likewise barred, under the same circumstances. The exceptions to this rule are few in number. The question now is whether the mere naked claim of the state for taxes which it has not sought to enforce by execution is barred by any statute of limitation. If the state has attempted to enforce its claim for taxes by execution, that the execution would become barred in the same manner and under the same circumstances that an execution issued under an ordinary judgment would be barred is beyond question. Acts 1887, p. 23; Pol. Code 1895, § 890. The section of the Code just cited provides: 'All state, county, city, or other tax *fi. fas.*, before or after legal transfer and

record, shall be enforced within seven years from the date of their issue; or within seven years from the time of the last entry upon the tax *fi. fa.* by the officer authorized to execute and return the same, if said entry is properly entered by said officer upon the execution docket and books in which said entries are now required to be made in cases of entries on executions issued on judgments.' The section immediately following is in this language: 'All laws in reference to a period of limitation as to ordinary executions for any purpose, or to the length of time or circumstances under which they lose their lien in whole or in part, are made applicable to tax *fi. fas.*' Pol. Code 1895, § 891. We recognize the rule of construction that statutes derogatory to the sovereign right of the state shall be construed strictly in favor of such right, and that a statute imposing upon the state a limitation as to its sovereign right which is doubtful in meaning or equivocal in its terms must be so construed as to uphold the right and defeat the limitation upon its power. The state surrenders its sovereign right only by express enactment or necessary implication. It is therefore to be determined whether the legislative intent in the act of 1887 was to destroy the right of the state to claim a tax lien against the citizen after the lapse of a given time, or whether it was intended to destroy the mere process that might have been issued and leave a lien for taxes still existing for all time when no execution had ever been issued to enforce it.

"Statutes of limitation are statutes of repose. They are intended to relieve against the hardships inevitably incident to the enforcement of demands of long standing, when the lapse of time would necessarily place the person against whom they are enforced at a disadvantage as to their defenses. In interpreting the act of 1887, the purpose of such a statute must be kept prominently in view. Construing this act as a whole, its language indicates that the purpose of the lawmaking power was to place the state in regard to its claim for taxes in the same position that a plaintiff in a judgment would be placed as to the enforcement of a right upon which a judgment was founded. While the statute uses the word 'execution,' and not the word 'judgment,' there can be no legitimate escape from the conclusion that the legislative intent was to bring the tax judgment of the state within the dormant judgment law applicable to cases of individuals. The entries required to be made on tax executions are entries similar to those required to be made on 'executions issued on judgments.' That the word 'execution' is to be interpreted in the sense of judgment becomes clear when we refer to the statutes evidently referred to by the expression: 'All laws in reference to a period of limitation as to ordinary executions.' The only law to which this expression can apply is the dormant judgment act embraced

In section 3761 of the Civil Code, the effect of which is to destroy the lien of the judgment upon which the execution is based by a failure to enforce the execution, and not merely to destroy the execution itself. That section is in the following language: 'No judgment shall be enforced after seven years from its rendition, when no execution has been issued upon it and the same placed upon the execution docket, or when execution has been issued and seven years have expired from the time of the record, upon the execution docket of the court from which the same issued, or the last entry upon the execution made by an officer authorized to execute and return the same. Such judgments may be revived by *scire facias*, or be sued on within three years from the time they became dormant.' Unless this is the section referred to (section 891 of the Political Code of 1895) is meaningless, because there are no laws in this state in reference to a period of limitation as to ordinary executions, but there is the law above quoted which is a period of limitation as to ordinary judgments. While it is to be conceded that the act of 1887 does not in terms declare that the judgment in favor of the state for taxes shall become barred, it is necessarily implied, and unless this implication is allowed to operate, the second section of the act is without meaning, and this anomalous situation arises: that the state is barred where its officers do their duty and issue their executions within due time, but fail to have entries made thereon from time to time as required by law, but the state is not barred when there has been either a negligent or a willful failure on the part of the public officers to discharge their duties under the law. That part of section 3761 which declares that no judgment shall be enforced after seven years from its rendition, when no execution has been issued thereon, is by necessary implication a part of the act of 1887, and hence, when the state has failed to issue an execution for taxes within seven years after the time for the issuing of the execution has arrived, the claim of the state for taxes is barred, and barred for the reason that in this particular the act of 1887 brings the judgment of the state for taxes within the full operation of the dormant judgment act. See, in this connection, *Staten v. Railway Co.*, 111 Ga. 803, 36 S. E. 938 (2). For reasons satisfactory to the General Assembly the right of the individual to have a dormant judgment revived within three years after dormancy has not been made a part of what we might properly call the 'dormant tax judgment act.' To allow the state after the lapse of seven years to enforce by execution a claim upon a judgment for taxes upon which no execution had been issued would be as antagonistic to the law as to allow an individual to sue on a note under seal upon which a judgment had been rendered and had become barred within less than 20 years simply for the reason that the origin-

al period of limitation applicable to sealed instruments had not expired at the time the judgment had become dormant. The analogy between the two is not altogether perfect, but it exists sufficiently to illustrate the anomaly resulting from the construction sought to be placed upon the act of 1887.

"There is no question of fraudulent concealment of property involved here. The same reasoning, that the lapse of four years did not bar the enforcement of taxes because the statute referred to suits, would likewise apply to section 3766, which reads that 'all suits for the enforcement of rights accruing to individuals under statutes,' etc., shall be barred within 20 years. Moreover, under the peculiar language of section 3766, and the construction put upon it by this court in *Bigby v. Douglas*, 123 Ga. 635, 51 S. E. 606, and in *Savannah Canal Co. v. Shuman*, 98 Ga. 171, 25 S. E. 415, it would seem not applicable here. In some courts it has been held that suits or proceedings in the nature of suits to recover taxes are like actions to enforce statutory rights, and should be barred accordingly, even though taxes be not mentioned in the statute at all. See what is said in the authority referred to by Mr. Justice Candler, *County of Redwood v. Winona Land Co.*, 40 Minn. 525-526, 41 N. W. 465. If the bar does not attach either in 4 years or 20 years, then it either attaches to the enforcement of taxes by execution under sections 890 and 891 of the Political Code of 1895, as to property alleged not to have been returned, or else no statute of limitations applies at all. If no statute applies, then there is no limit beyond which the Comptroller General or tax collector may not go in issuing *fi. fas.* It is not a mere question as to the taxes of this corporation. The amount involved in this case is of small importance compared to the establishment of correct rules of law as to taxpayers. Every property owner in the state is subject to taxation, and if the tax collector can go backwards without limitation, and declare that any taxpayer owned certain property at a given date and failed to return it, assess its value from the best information he can obtain, adding interest, and issue execution therefor, it presents a serious question for all the taxpayers of the state. If any other construction were made than that which we give the statute, few men in the state could feel safe that the titles to their homes and lands might not be subjected for some omission (accidental or intentional) from the tax returns of some former owner (many years ago perhaps), for which no claim had been made, and no execution issued. Liens attach for taxes not from the date of the execution, but from the tax day fixed by law. A sale to an innocent purchaser even does not divest them. The former owner might have honestly believed the property not returned was not subject to taxation, but this would not save the present owner, unless there is some limitation.

"A construction which would place no limitation upon the right of the tax collector to issue and enforce *fi. fas.* would mean public disaster. Tax is a valuable and necessary thing for the state; but the security of the citizen is also good. There may be 'tax dodgers,' and men who defraud the government, but tax liens affect the honest, as well as the dishonest. Without irreverence, the state in general law seeks to follow the divine example, when it is said: 'He maketh His sun to rise on the evil and the good, and sendeth rain on the just and unjust.' The laws of this state taxing property are uniform. Of course, if the law is plain, we must administer it, and not change it, whatever may be the result. But it is well recognized that in construing a statute the court may look to the old law, the mischief, and the remedy; and with this in view the legislative intent in making the laws relating to ordinary executions and judgments becoming dormant, applicable to tax executions, should be considered. If the law is not clear, the reasonableness or unreasonableness of a particular construction is a legitimate subject for consideration. *Lombard v. Trustees*, 78 Ga. 322; *Moravian Seminary v. Atwood*, 50 Ga. 382; 26 Am. & Eng. Enc. L. (2d Ed.) 646. Is it reasonable to suppose that the Legislature meant to protect purchasers only if the tax collector had done his duty and issued execution, but left them in danger and with an overhanging lien, for an unlimited time, if he did not issue an execution? True there is no intervening purchaser here. But under the statute there is no distinction; and, if there is no bar as to the defendant, there is none as to a purchaser, however honest. Furthermore the Legislature has declared that interest against a taxpayer runs from the time when an execution should have been issued, and this has been construed to mean December 20th of each year. Surely the state did not intend to fix a date when its officers should have issued the execution as a point from which interest should run against a taxpayer, but not from which the statute of limitations should run in his favor. Doubtless the Legislature considered the serious consequences resulting from thus leaving the matter open for action by the tax collector indefinitely when they passed the act of 1887, embodied in the sections of the Political Code cited above. If this be not the correct construction, in examining titles no lawyer could give his client any assurance that he would obtain a clear title; for, if there were no limitation, the danger would go back to the beginning of the taxing system.

"The constitutional prohibition against granting away the right of taxation (Civ. Code 1895, § 5796) has no relevancy, we think, to the case. The Constitution prohibits the grant of privileges and exemptions (except as specified) to corporations and other persons. It says nothing of the time when the execu-

tion must be issued or enforced. The Legislature has passed many acts prescribing the time within which actions may be brought, but these were not considered unconstitutional violations of property or property rights. A similar question has been passed on by the Supreme Court of Montana in *Board of Com'rs of Custer County v. Story* (Mont.) 69 Pac. 56."

With the greatest respect for the profound ability and learning of my Brethern, I am constrained to register a very earnest dissent from the views above expressed. Their vigorous attack upon the inherent fallacy of the obsolete doctrine of the divine right of kings, and the scholarly narrative of the evolution of human thought resulting in the rejection of this fallacy by advanced and enlightened nations, are both entertaining and instructive, but I fail to see that they illuminate the subject under discussion. It is freely conceded that the theory that the subject exists for the benefit of the sovereign is both "selfish" and "atrocious." In might be even more strongly characterized. I must insist, however, that this theory is not even remotely kin to the one that the right of self-preservation is inherent in the state, be it republican or monarchical in form, and that, growing out of this right as a necessary incident thereto, is the right to tax the citizen for the support of the government. "The right of taxation is a sovereign right, inalienable, inextinguishable—is the life of the state." I do not contend for the divine right of kings, but for the inherent, if not divine, right of the state—I. e., the people—to protect and perpetuate itself. The right to tax cannot be abridged or restricted in any degree without the consent of the state, and that consent must be so plainly expressed as to leave no room for doubt. I dispute the theory announced by the majority that "the general rule is that, where an individual would be barred by a statute of limitations, the state is likewise barred under the same circumstances," and contend that the exception has been stated instead of the rule. In my opinion section 891 of the Political Code of 1895 was designed to render tax executions dormant in the same manner that executions issued on judgments become dormant. I agree with the contention of counsel for the state that the purpose of the statute is to protect innocent and bona fide purchasers. *Stanley v. McWhorter*, 78 Ga. 38, 1 S. E. 260; *Hollis v. Lamb*, 114 Ga. 744, 40 S. E. 751; *Easterlin v. New Home Co.*, 115 Ga. 309, 41 S. E. 595. And I can conceive of no rule of construction by which there can be read into section 891 the meaning that, unless a claim for taxes is placed in execution within seven years from the date of its accrual, the state will, by analogy to the case of one who has obtained a civil judgment which has not been placed in execution, lose the right to issue a *fi. fa.* and enforce its collection. The argument that the construction

of sections 890 and 891 for which I contend would place a premium on official inaction and allow the state to derive an advantage from the negligence of its taxing officers is to me entirely unconvincing. All presumptions are in favor of the faithful and efficient discharge of their duties by officers. On the other hand, the contrary construction will place a premium on concealment, deception, and tax dodging, which, in human experience, if not in human nature, are evils more to be dreaded and more likely to be encountered than official inaction.

As has been seen, a majority of the court is of the opinion that the state's right to issue execution for taxes is barred after the lapse of seven years from the time when the right to issue such execution accrues. We are, however, unanimous in holding that the statute did not run against the state during the time that the Comptroller General was enjoined by the federal court from issuing any *fi. fas.* whatever for taxes on this stock. As will be seen from another portion of this opinion, the only question necessarily involved in the suit in the United States Circuit Court was the taxability of the stock for the year 1900; and to that extent only does the estoppel by judgment operate. But the decree in the case enjoined the issuance of any executions for taxes, not only for taxes for the year 1900, but for subsequent years, and for any year in which the state might see fit to make a claim for taxes on the stock. While neither party is estopped on the question of taxability, except for the year 1900, the hands of the state officers were absolutely tied by the injunction as to the enforcement of any claim for taxes which the state might have. In this litigation the Georgia Railroad & Banking Company was a party; and while it was not a complainant, and did not itself procure the decree, it was a party to the case and was bound by the decree to the same extent that other parties would be bound, and was actually enjoined from returning or paying any taxes whatever on this stock. With the state officers in the situation in which the final decree left them they would have been in contempt of court if they had attempted to enforce any claim for taxes against this stock in any way for any year. Under such circumstances, the plaintiff in the present case cannot in equity ask that the state be barred by a limitation of time, when the time involved is that which passed during the period when the state officers were bound to remain passive as a result of a judgment of a court of competent jurisdiction.

Mr. Justice LUMPKIN concurs with me in the conclusion that I have reached, but, as will be seen, some of the reasoning leading thereto conflicts with the position taken by him in his dissenting headnote 3.

On the main issues of the taxability of the stock in question and the legality of the procedure instituted by the Comptroller

General the court below was right, and therefore the judgment will be affirmed; direction being given, in accordance with the views of the majority, that the Comptroller General and the sheriff be enjoined from seeking to collect any tax on the stock from the plaintiff in error which accrued prior to the year 1895, and that the costs incurred in bringing the case to this court be taxed against the defendant in error.

Judgment affirmed, with direction. All the Justices concur, except CANDLER, J., who dissents as to the direction given.

(124 Ga. 846)

TASKER v. BAUGH & JOHNSON.

(Supreme Court of Georgia. Feb. 16, 1906.)

CONTRACT—MANUFACTURE OF LUMBER—PERFORMANCE—ACT OF GOD.

In a suit by millmen to recover the price for manufacturing lumber, where one of the issues raised was whether the damage to the lumber, if any, was caused by failure to promptly pile it pursuant to the contract or by prevailing weather conditions, and it appeared from the evidence that the lumber was manufactured during a rainy season, not unusual for that locality, it was error to charge Civ. Code 1895, § 3725, as to impossibility of performance by act of God being equivalent to performance. Such a charge was inapplicable, and in the connection in which it was given the meteorological condition prevailing at the time the contract was being executed may have been interpreted by the jury as the act of God.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Action by Baugh & Johnson against Charles Tasker, receiver. Judgment for plaintiffs, and defendant brings error. Reversed.

T. A. Brown and J. Z. Foster, for plaintiff in error. F. C. Tate, O. R. Dupree, and John W. Henley, for defendants in error.

EVANS, J. Baugh & Johnson, millmen, entered into a contract with the receiver of the Tasker Lumber Company to cut, log, and manufacture, and put upon sticks, timber upon the land of the lumber company, and to receive therefor certain prices according to certain specifications. The receiver refused to pay for all of the lumber manufactured by the millmen, who instituted their suit to recover the balance due. The receiver of the lumber company, in defense to the plaintiff's action, averred that the specifications alleged in the plaintiff's petition were inaccurate in certain particulars; that some of the lumber was not cut in accordance with the contract, and was damaged by rot and stain occasioned by the failure on the part of the plaintiffs to promptly and properly pile the lumber after it was manufactured. The jury returned a verdict in favor of the plaintiffs for about three-fourths of the amount claimed to be due in their suit, whereupon the defendant moved for a new trial on the general grounds and because of a certain instruction of the judge on the subject of excuse of per-

formance by the act of God. The motion was overruled and the defendant excepted.

The evidence was conflicting as to the precise terms of the contract, which rested in parol. There was also a dispute in the evidence as to whether the lumber was promptly piled after coming from the mill, in accordance with the contract. The timber belonging to the lumber company was located in a narrow mountain valley. During the time the timber was being manufactured into lumber, the weather was rainy. The plaintiffs' evidence presented the contention that the lumber was properly sawed and promptly piled, and that any stain or rot to the lumber was not traceable to any failure on their part to comply with their contract, and that if there was any stain or rot in the lumber, it was occasioned by the frequent rains which fell during the period of time they were executing their contract, or by stain in the logs before being sawed. The defendant's evidence, on the contrary, presented the contention that some of the lumber was misawed, and some of it was stained and rotted because of the failure by the plaintiffs to promptly and properly pile it in accordance with the contract. The court charged the jury that the burden was upon the plaintiffs to show compliance with the spirit, and not merely the letter, of the contract, and that if any damage resulted to the defendant because of noncompliance with the terms of the contract, the defendant would have the right to reduce whatever amount was due on the contract price by the damages sustained by the defendant resulting from nonperformance of the contract; but that if the plaintiffs had complied with the contract and the defendant had suffered no damages by reason of the acts of the plaintiffs, in such case the plaintiffs would be entitled to recover the full contract price. In immediate connection with this charge, the court charged as follows: If such performance is impossible, and became so by the act of God, such impossibility itself is a defense equivalent to performance; but if by proper prudence such impossibility might have been avoided by the promisor, it ceases to be an excuse for nonperformance. The charge on the subject of excuse of performance of the contract because of the act of God was inapplicable. If the plaintiffs performed the work in accordance with the terms of the contract, they were entitled to recover the full contract price, notwithstanding the lumber may have become damaged because of the rainy season during which it was being manufactured. On the other hand, if the lumber became stained and rotted because of a failure to pile it pursuant to the

contract, the damage thus occasioned would reduce the plaintiffs' recovery to that extent.

The charge was harmful to the defendant, as liable to be misunderstood by the jury in excusing nonperformance of the contract in the piling of the lumber, because of the interference by meteorological conditions. The jury may have found with the defendant on the facts concerning the piling of the lumber, but that the plaintiffs were prevented from complying with their obligations, because of the frequent rains, and that this would excuse nonperformance, as being the act of God. As was said by McDonald, J., in *Doster v. Brown*, 25 Ga. 26, 71 Am. Dec. 153: "While every shower of rain that falls upon the earth is the act of God, in contradistinction to the act of man, yet an ordinary freshet is not the act of God, in the legal sense which protects a man against responsibility for the nonperformance of a contract like that made by this plaintiff." Contracts are made subject to be performed under ordinary conditions which may be reasonably anticipated with reference to the localities and seasons. Nonperformance of a contract is not to be excused because one of the parties is prevented from performing his obligations in the premises by rains which are naturally and reasonably to be expected. *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 983, 116 Ga. 452, 42 S. E. 743. In no sense could the interference with the work, attributable to rains which were neither unusual nor unprecedented, be an excuse for noncompliance with the contract. We are unable to say whether the jury accepted the evidence of the plaintiffs or that of the defendant on the subject of compliance with the contract relatively to the prompt piling of the lumber, or whether the jury found the stain upon the lumber was caused by the natural condition of the logs or by a failure to promptly pile the lumber. The jury may have reached the conclusion that although the lumber was not put on sticks as soon as it should have been, yet the rainy weather prevented a strict compliance with the terms of the contract and afforded an excuse to the plaintiffs for not sooner piling the lumber after it left the mill. The charge of the court may have been understood by the jury as stating, as a matter of law, that if the lumber was not piled in accordance with the contract because of the frequent rains, the defendant would not be entitled to reduce the amount due on the contract price by any damage from rot or stain occasioned by a failure to promptly pile the lumber; and for this reason there should be another trial of the case.

Judgment reversed. All the Justices concur.

(124 Ga. 863)

AMERICAN NAT. BANK v. LEE.

(Supreme Court of Georgia. Feb. 16, 1906.)

1. ATTACHMENT—ADVERSE CLAIM—BURDEN OF PROOF—EXTENT.

Upon the trial of a claim case, where the levy of attachment does not recite that the property was found in the possession of the defendant at the time of the levy, the plaintiff successfully carries the burden of proof by showing affirmatively that the defendant in attachment was vested with title at or before the time of the levy. Accordingly, when such proof was made, the trial judge did not err in refusing to dismiss the levy upon the ground that the plaintiff had not shown title or possession in the defendant in attachment.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, § 1111.]

2. ATTACHMENT—OWNERSHIP—SALES—DELIVERY—BILL OF LADING.

Where a person orders goods, and the owner, contemplating a sale, delivers them to a common carrier, to be shipped to his own order at the station of the proposed purchaser, title does not, without more, pass from the owner. And where the owner upon such shipment of goods, makes a draft in favor of a third person on the proposed purchaser for the price of the goods and endorses the bill of lading and delivers that, with the draft attached, to the third person, for a sufficient consideration, intending thereby to sell the goods, the delivery of such draft and bill of lading so indorsed will convey to that person the title to the goods. Accordingly, when a sale is thus completed before the goods are levied upon under an attachment against the original owner, the property, upon the trial of the claim interposed by the owner of the draft and bill of lading, should be found not subject.

(Syllabus by the Court.)

Error from Superior Court, Upson County; **E. J. Reagan, Judge.**

Suit by **S. S. Lee** against **Pilcher & Co.** in which certain property was attached and claimed by the American National Bank. There was judgment for plaintiff, and claimant brings error. Reversed.

Fisinger & Davis, for plaintiff in error.
M. H. Sandwich, for defendant in error.

ATKINSON, J. **S. S. Lee** sued out a writ of attachment against **Pilcher & Co.**, nonresidents, returnable to a justice court on the 4th day of April, 1904, and caused the same to be levied upon certain flour as the property of the defendant. The levy did not state that the flour was found in the possession of the defendant. The American National Bank filed a claim to the property. By consent the case was appealed to a jury. Upon the trial the plaintiff introduced evidence, which, in so far as the rulings brought here for review are concerned, may be treated as sufficient to prove the debt, and the ground for attachment. Upon the question of title to the property, the evidence offered by the plaintiff was substantially to the effect that **T. J. Reeves** of Thomaston, Ga., had ordered 12 barrels of flour from the defendant, **Pilcher & Co.**, to be shipped from Nashville, Tenn., to Thomaston, Ga. The flour was shipped

March 26th and a bill of lading issued to the order of **Pilcher & Co.**, with direction to notify **Reeves**. The flour was shipped upon the bill of lading with the draft for the purchase money attached, and was levied on while in the hands of the common carrier at Thomaston, Ga., before **Reeves** had accepted the same or paid for it. **Reeves** testified that at the time of the levy the flour was not his property, but that according to his understanding it was the property of **Pilcher & Co.**, the defendant in attachment. Plaintiff rested; whereupon the claimant moved the court to dismiss the levy on the ground that the plaintiff had failed to prove either possession or title in the defendant. The motion was overruled. The claimant then introduced the bill of lading, dated March 26, 1904, indorsed in blank by **Pilcher & Co.**, and likewise a draft by **Pilcher & Co.**, on **T. J. Reeves** in favor of the claimant, the American National Bank, for the purchase money of the flour. Claimant also introduced the testimony by interrogatories of **Pilcher** and **Le Sueur**, the cashier of the bank, to the effect that on March 30, 1904, the bill of lading, with draft on **Reeves** for the purchase money attached, was sold and transferred, by indorsement by **Pilcher & Co.**, to the bank, intending thereby to sell the flour and the right to collect for its own account the draft. The bank paid **Pilcher & Co.** the face value of the draft, to wit, \$50.22, by passing that amount at once to the credit of **Pilcher & Co.**, against which they were authorized to check or draw. The bill of lading draft attached were then forwarded by the claimant to the bank in Thomaston, Ga., for the purpose of collecting the draft and surrendering to **Reeves** the bill of lading, which would authorize him to demand the flour from the common carrier. There is a slight difference between the testimony of **Pilcher** and that of the cashier as to dates, the former stating that the bill of lading was issued March 26th, and that the sale to the bank was on March 30th, while the cashier gives only one date, and says the transaction occurred about March 26th. As a matter of fact the bill of lading bears date March 26th and the draft March 30, 1904. There was no evidence tending to controvert the evidence offered by the claimant, except the statement by **Reeves**, who testified that the flour was the property of **Pilcher & Co.**, "according to his understanding." The jury found the property subject. Upon petition to the superior court, the case was reviewed under a writ of certiorari, and after consideration, the writ was dismissed by the judge of the superior court, and judgment was entered against the claimant for costs. The claimant comes by bill of exceptions to this court, and makes two questions which were made in its petition for certiorari and ruled adversely to it in the lower court below, to wit, (1) that at the close of plaintiff's petition, the levy should have been dismissed be-

cause there was no proof of possession or title in the defendant in attachment, and (2) that upon the uncontradicted evidence offered by the claimant, the jury should have found the property not subject.

1. As to the first question, the ruling of the court in refusing to dismiss the levy was correct. The evidence affirmatively showed that Pilcher & Co. had been vested with title to the flour, and that it had been shipped from Nashville, Tenn., for delivery to Pilcher & Co. at Thomaston, Ga., or to their order. It was not by the plaintiff's evidence shown that the title had ever passed out of Pilcher & Co. either by assignment of the bill of lading or otherwise. The ownership having been thus shown, it will be presumed to have continued in Pilcher & Co. until the contrary is made affirmatively to appear. *Dean v. American Harrow Co.*, 112 Ga. 155, 37 S. E. 176. The burden was therefore successfully carried by the plaintiff, and the levy should not have been dismissed on that ground.

2. As to the second question, however, the claimant, by clear proof, which is not substantially contradicted, showed that several days before the levy of the attachment, the bill of lading, with draft for purchase money attached, for value had been sold to claimant. This sale passed title to the flour from the defendant in attachment to the claimant. *Farmers Bank v. Allen-Holmes Co.* 122 Ga. 67, 49 S. E. 816, and cases cited; *Commercial Bank v. Armsby*, 120 Ga. 74, 47 S. E. 589, 65 L. R. A. 443, and cases cited. The transaction between Pilcher & Co. and the claimant took place on March 30th and the attachment was not levied until five days thereafter, to wit, on April 4th. It is clear, therefore, that the property at the time of the levy did not belong to the defendant in attachment, but was the property of the claimant. The testimony of Reeves cannot be accepted as sufficient to show title in the defendant. In fact he does not undertake to say that the title was in the defendant at the time of the levy. He qualifies the statement to that effect by the words, "according to my understanding," and does not attempt to give the facts upon which he based his conclusion. He evidently based his understanding upon the facts that inasmuch as the flour had been shipped to him with draft for the purchase money attached to the bill of lading and he had not paid the draft, that the flour was not his, and had not taken into consideration the fact which afterwards was made to appear by claimant's testimony that Pilcher & Co. in the meantime had transferred the draft and bill of lading to claimant. So upon the whole, the claimant has clearly and conclusively established his title, and the jury should have found the property not subject, and the court below erred in ruling to the contrary.

Judgment reversed. All the Justices concur.

(124 Ga. 951)

SWING v. FARRAR et al.

(Supreme Court of Georgia. Feb. 19, 1906.)

INSURANCE — FOREIGN MUTUAL INSURANCE COMPANY—ACTION AGAINST STOCKHOLDER.

When, by a suit instituted in a court of this state, a policy holder in a foreign mutual fire insurance company is sought to be held liable for a ratable proportion of its losses and expenses, under the laws of the state wherein the company was chartered, it is incumbent upon the plaintiff to affirmatively show by his pleadings that the laws of that state impose upon the policy holders a statutory liability to meet the demand made upon him. As the plaintiff in this case failed to do so, his petition was properly dismissed on the ground that no cause of action was therein set forth.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by James B. Swing, trustee, against E. B. Farrar and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. H. Odell and W. E. Mann, for plaintiff in error. C. D. McCutchen and F. K. McCutchen, for defendants in error.

EVANS, J. The court below dismissed the plaintiff's suit on the ground that he set forth in his petition no cause of action against the defendants, four of whom were alleged to be the surviving members of a partnership, and two the executors of a deceased partner. The action was brought in the name of James B. Swing, suing as trustee for the creditors of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, which was incorporated under the laws of that state on May 27, 1887, and was engaged in business during the years 1888-1890, but which was "disincorporated" on December 18, 1890, by the Supreme Court of Ohio in a case in which the state of Ohio on the relation of the Attorney General, was the plaintiff and the insurance company the defendant. Pending this cause, Swing was appointed trustee for the creditors and policy holders of the insurance company, and he brings the present action by order of that court of June 11, 1901, which on that day made and entered a decree of assessment against "all persons who held policies of insurance in said company on and between April 25, 1889, and December 18, 1890." It is alleged that this decree is still in full force and effect, and that the assessment upon the defendants thereunder, in order to pay the losses and expenses of the association during the time their property was insured therein, amounts to \$171.84; that they were, on or about February 11, 1904, duly notified by the trustee to pay his assessment, but they have refused to do so, and are now due to plaintiff, as such trustee, the amount just stated, besides interest thereon from March 13, 1904. The decree is set forth, as furnishing the date from which the assessment against each class of policy holders is to be ascertained, according to the liabilities of the association incurred while they were members. The

names of the parties defendant to this decree are not disclosed. Certain provisions pertaining to the organization and management of mutual insurance companies, and alleged to have been embraced in "the laws of Ohio in force during the years 1888, 1889, and 1890," are set forth in the plaintiff's petition. The following facts are also made to appear: One W. B. Farrar, now deceased, together with others who are named as defendants, in 1890 conducted business in Hamilton county, Tenn., under the firm name of W. B. Farrar Manufacturing Company. This firm accepted a policy for \$1,000 issued by the above-named insurance company on the property of the partnership, insuring it against loss by fire and lightning, the property insured being located at Ridgedale, in the state and county aforesaid. This policy was held by the firm and kept in force from July 8, 1890, to December 19th of that year, since which latter date W. B. Farrar has departed this life. It is upon the foregoing facts that the plaintiff relies as supporting his contention that the contingent liability of the defendants on this policy, under the laws of the state of Ohio and the decree of court hereinbefore mentioned, "was and is five times the agreed annual premium" on the policy, which was \$50, and that by accepting and holding this policy the partners became legally and equitably liable for their just proportion of all losses and expenses incurred by the insurance company issuing it, during the time the partnership held the policy, "and to pay such assessments on the amount of said contingent liability to assessment as should be required by law." It is evident that the suit is not based on any alleged breach of the contract set out in the policy of insurance, nor is it an action to enforce a foreign judgment obtained against the defendants in the state of Ohio. On the contrary, as counsel for the plaintiff very clearly point out in their brief, it is an attempt by the trustee who represents the creditors of an insolvent corporation to subject the defendants to liability for its debts under a statute of the state of Ohio which imposes such a liability upon the policy holders in certain mutual fire insurance associations chartered under the laws of that state. We shall accordingly confine our discussion to the question whether or not the plaintiff's petition discloses with sufficient certainty that the defendants are subject to assessment to meet the demands of creditors of the Union Mutual Fire Insurance Company.

One of the statutory provisions set forth is to the effect that "Every person who effects insurance in a mutual company and continues to be insured * * * shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability," and shall be subject to assessment by the company for his just proportion of such losses and ex-

penses. (The defendants here are not sought to be held liable on any "deposit note," but on a claim of "contingent liability.") Another provision relied on by the plaintiff prescribes under what conditions a "joint-stock fire insurance company," or one organized "on the plan of mutual fire insurance," may be incorporated, and declares that each subscriber must agree, in writing, "to assume a liability to be named in the policy, subject to call by the board of directors, in a sum not less than three nor more than five annual premiums," and that "the same liability shall also be agreed to in writing by each subsequent subscriber or applicant for insurance, who is not a merchant or manufacturer." (There is no allegation in the plaintiff's petition that the "W. B. Farrar Manufacturing Company" was an original subscriber, or did not come under this exception, or ever agreed in writing to assume any such liability.) It is further declared that "mutual fire insurance companies organized under this act" must in their by-laws, and also in their policies, "fix by a uniform rule the contingent mutual liability of its members for the payment of losses and expenses," to be not less than three nor more than five annual cash premiums, "but nothing in this section shall apply to associations for the mutual protection of their members against loss by fire, heretofore or hereafter organized, as provided in section 3686 of the Revised Statutes 1906." The provisions of "section 3686 of the Revised Statutes" of 1906 are not set forth in plaintiff's petition, nor does it contain any affirmative allegation to the effect that "the laws of Ohio in force during the years 1888, 1889, and 1890," which are therein quoted and declared on, were intended to apply to the members of the Union Mutual Fire Insurance Company, which, "was a mutual fire insurance company incorporated under the laws of Ohio, May 27, 1887." This omission we regard as fatal. Unless it was one of the mutual fire insurance companies to which the statutory provisions relied on by the plaintiff applied, it is certain that its members did not, by merely accepting and paying the premiums on policies issued by it, subject themselves to any liability for its losses and expenses. For aught that appears, it was one of the mutual associations expressly excepted by the statute itself from the operation of its provisions creating an individual liability upon policy holders in certain other mutual companies, who, when they subscribed for stock therein or applied for membership, voluntarily undertook and agreed in writing to become chargeable with their just proportion of such losses and expenses as might be incurred in the venture. The necessary conclusion, therefore, is that the plaintiff failed to state a cause of action, which was the view entertained by the court below.

Judgment affirmed. All the Justices concur.

(124 Ga. 948)

FOX v. QUEEN INS. CO. OF AMERICA.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. INSURANCE—INSURABLE INTEREST.

Under the provisions of Civ. Code, 1895, § 2090, a husband or parent has such an insurable interest in the separate property of his wife or child as to authorize him to make a contract of insurance in relation to the same in their behalf, although he have no interest whatever in the property. But such a contract to be valid must be made by the husband or parent in his representative capacity, not as an individual.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 153.]

2. SAME—ACTION ON POLICY—OWNERSHIP OF PROPERTY.

A policy of fire insurance was issued to A. individually, purporting to insure a described building. There was nothing in the policy to indicate that A.'s interest was other than individual. The policy contained a stipulation that it should be void "if the interest of the insured be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." After a loss a suit was brought upon the policy by A. as trustee for his children, the petition alleging that he held title to the property in trust for his children. *Held*, that the petition was properly dismissed on demurrer.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by A. R. Fox, as trustee, suing for the use of William W. Fox and others, against the Queen Insurance Company of America. Judgment for defendant, and plaintiff brings error. Affirmed.

A. R. Fox, as trustee, suing for the use of William W., Mary Jane, Jane E., Lillie Evaline, and John Anderson Fox, brought an action against the Queen Insurance Company of America, and alleged the following facts: On March 18, 1904, in consideration of two dollars and fifty cents, the defendant issued to A. R. Fox a policy of insurance in the sum of \$200, insuring him against loss by fire on a certain dwelling in Dalton, Ga. The property was held by A. R. Fox in trust for his children, for whose use he sues; and it is alleged that the policy was taken out for the benefit of said children, although it was issued to A. R. Fox individually. The property was totally destroyed by fire, and after proofs of loss were furnished to the defendant, the defendant refused to pay any sum upon its policy. By amendment it was alleged, that Lillian Evaline Fox died before reaching the age of 21, leaving one minor child, and that "the remaining cestuis que trustent were of age when the policy was issued." A copy of the policy was attached to the petition as an exhibit, and contained the following stipulation: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than un-

conditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple." When the case was reached for trial the defendant moved to dismiss the petition as amended, for the reason that it set forth no cause of action. The petition was dismissed, and the plaintiff excepted.

R. J. & J. McCarny and W. E. Mann, for plaintiff in error. King, Spalding & Little and Shumate & Maddox, for defendant in error.

COBB, P. J. (after stating the foregoing facts). Under the petition as amended, it appeared that four of the cestuis que trustent for whose benefit A. R. Fox took out the policy of insurance had reached the age of 21 years previously to the issuance of the policy, and the fifth cestui que trust had died. If, therefore, Fox held the legal title to the property as a trustee previously to the issuance of the policy to him, the trust has apparently become executed as to four of the beneficiaries, and it may be that it would appear, if the instrument creating the trust were before us, that he had been divested of the legal title, at least as to a four-fifths interest in the property. But we do not base the decision of the case on the apparent fact. Section 2090 of the Civil Code of 1895, is as follows: "To sustain any contract of insurance, it must appear that the insured has some interest in the property or event insured, and such as he represented himself to have. * * * So a husband or parent may insure the separate property of his wife or child, the recovery being held by him in trust for them," etc. The intent of this section is to make the husband or parent a trustee for the purpose of insuring the property of his wife or child. It gives him no individual insurable interest in the property. He can make a contract of insurance in their behalf, but, when made, it must be in his representative capacity. See *Southern Mutual Ins. Co. v. Turnley*, 100 Ga. 298, 27 S. E. 975. And we think it doubtful if in a representative capacity a parent could take out a policy of insurance for the benefit of his children who are sui juris. Majority of the children, with its attendant capacity to contract, relieves the need which the statute was intended to supply. But in this case, the parent did not take out the policy in his representative capacity, but it was issued to him individually. The children were not, in any sense, parties to the contract. To hold the insurance company liable to them would make it liable on a contract it did not enter into, and give the children the benefit of a contract to which they were strangers. To entitle the plaintiff in this case to a recovery he must prove an individual insurable interest in the property, not one which he may have in a representative capacity. Un-

der the facts, as they appear from the record, the plaintiff could not recover, even in the absence of the stipulation in the policy as to the ownership, because he has no insurable interest in the property, in the capacity in which he took out the policy.

The stipulation as to ownership is one which if untrue would void the policy. See *Palatine Ins. Co. v. Dickenson*, 116 Ga. 794, 43 S. E. 52; *Williamson v. Orient Ins. Co.*, 100 Ga. 791, 28 S. E. 914, and cit. Older cases were cited by the plaintiff which he claimed made the voiding of a policy because of the falsity of a representation dependent upon its materiality. We think they can be distinguished from the present case. In *Southern Ins. & Trust Co. v. Lewis*, 42 Ga. 587, the policy was issued upon a storehouse "owned and occupied by the assured as a store," when in fact the title to the realty was in the agent of the company issuing the policy, who had agreed to convey the property to the insured. It was held that "their title to the store was one in which the courts of equity would have protected them. Bethel [the agent] could neither have recovered the premises in ejectment, nor could he have claimed the building, or removed it, or by any process either in law or equity have interfered with their right, title, and possession thereto." This was such an ownership as would not make the stipulation untrue that the property was "owned and occupied by the insured." In *Mobile*

Fire Dept. Ins. Co. v. Coleman, 58 Ga. 251, a stipulation in the policy recited that if the interest of the insured was not truly stated the policy would be void. The insured stated his interest to the agent of the company as that of a lessee, the contract did not require such statement to be in writing, and, though the contract did not require that when the interest of the insured was otherwise than sole ownership it should be so expressed in the written part of the policy, it was held to be the duty of the agent to so express such interest, and his failure to do so would not void the policy. In *Phenix Ins. Co. v. Fulton*, 80 Ga. 224, 4 S. E. 866, property of the value of \$8,500 was stated to be without incumbrances, when, in fact, there was a mortgage upon it in the sum of \$500. A stipulation in the policy declared that a false answer to any interrogatory should void the policy. The court charged the jury that the misstatement must be material, to void the policy, and this charge was approved. It will be seen at once that this stipulation is of a different class from the one in the present case. In that case the condition of the property insured was incorrectly stated. In the case under consideration title was claimed by the insured when he had no title to the property, and no insurable interest therein. We think the court below correctly dismissed the petition, and the judgment is accordingly affirmed. All the Justices concur.

(105 Va. 188)

EVERETT WADDEY CO. et al. v. RICHMOND TYPOGRAPHICAL UNION
NO. 90 et al.

(Supreme Court of Appeals of Virginia. March 15, 1906. Rehearing Denied April 19, 1906.)

1. INJUNCTION—QUITTING EMPLOYMENT—INTERFERENCE WITH EMPLOYMENT.

Though members of a typographical union may lawfully combine, and, except as they are bound by contract, quit their employment on refusal to grant their demands, and may by persuasion and argument induce others to join them, they may be restrained by injunction from molesting their former employer by bribery, intimidation, and coercion of its employes.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 172-175.]

2. SAME—BRIBERY—WEEKLY BENEFITS.

The payment by a typographical union of weekly benefits and transportation to employes leaving their employer and joining the union is not bribery, which may be restrained by injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 175.]

3. SAME—EVIDENCE.

Evidence held insufficient to sustain a charge that a printer had been paid a certain sum as a bribe to leave his employer and join a typographical union.

4. SAME—INTIMIDATION—EVIDENCE.

In an action to enjoin the members of a typographical union from interfering with plaintiff's employes, evidence held insufficient to show that the members of the union had used threats or violence towards the employes, justifying an injunction, though they sometimes followed them to their homes and boarding houses, and in one case there was shown to have been a personal difficulty between a union member and an employe.

Appeal from Chancery Court of Richmond.

Action by the Everett Waddey Company and others, against the Richmond Typographical Union No. 90 and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Wyndham R. Meredith, for appellants.
John A. Lamb, for appellees.

CARDWELL, J. This appeal arises out of a litigation between the appellants, complainants below, members of the unincorporated, association known as the Richmond Typothetæ, which is a branch of the United Typothetæ of America, the membership of which are engaged in the business of printing, etc., and the appellees, members of the Richmond Typographical Union No. 90, a branch of the International Typographical Union, also an unincorporated association, composed of a large majority of the employes of the employing printers, etc., of the United States.

The main object of the first-named association is to protect and advance the interests of its members by uniting their strength to prevent a reduction in the number of hours requisite to constitute a day's work, or an increase, against their own will, of the wages received by their employes, and especially to prevent the inauguration of what is commonly known as the "eight-hour day"; while

that of the second-named association, so far as its objects and aims bear upon this controversy, is to compel the employers of journeymen, compositors, or practical printers to employ none but members of the International Typographical Union, and to agree that eight hours a day, instead of nine, with the same scale of wages, shall constitute a day's work.

The International Typographical Union has been for eight years or more insisting that the hours of labor should be reduced from nine to eight hours a day, while the United Typothetæ has insisted that nine hours should continue to constitute a day's work.

In September, 1905, the Typothetæ finally refused to grant the eight-hour day, and thereupon the Typographical Union instructed the local unions in the different cities of the United States (among them the city of Richmond) to declare a "strike" where the eight-hour day was refused; and the appellants, members of the Richmond Typothetæ, the owners and operators of printing establishments in the city of Richmond, still refusing to grant the eight-hour day, Typographical Union No. 90 and employes of appellants, on Sept. 11, 1905, went out on a "strike." After the strike took place the appellants, whose business was thrown into great confusion thereby, undertook to supply the places of their former employes who had joined the "strike" with other and non-union printers, and on October 21, 1905, their bill was filed in this cause against appellees, charging them with certain acts of interference with the business of appellants and their present employes to the great injury of appellants; that, through the officers and members of appellees' union, they have in every way sought to annoy, hound, interfere with, entice away, purchase, and bribe appellants' present employes, so as to get these employes to leave appellants' employment; that at the time appellees made these efforts they well knew that said employes were in the service of appellants; that appellees with intent to cripple and destroy the business of appellants, have illegally conspired and combined to prevent appellants from filling the places of the strikers with other employes; that appellees have laid in wait for appellants' present employes for the purpose of enticing them to leave the service of appellants; that appellees have picketed the business places of appellants, and followed their new employes to their homes and boarding houses, and there accosted them in the effort to entice them away from appellants' employ; that appellees have offered bribes, free transportation, and strike benefits to these employes to induce them to leave appellants' employment, and have threatened said employes that, unless they did leave their employment, they would incur the ill will of all organized labor, and friends of labor. It is further charged that one certain employe (Wilde) has to be pro-

tected against the strikers by an armed escort, and even then cannot escape their threats and abuse; that the keepers of the boarding houses where some of the employes lodge have made complaint that members of the appellees' union come to their houses at all hours, and create a nuisance thereby, and that several of the employes of appellants, as the result of these efforts on the part of appellees, have been enticed away, etc.

A preliminary injunction was awarded in accordance with the prayer of the bill restraining appellees from, in any manner, interfering with the business of appellants, or any of them, or their agents or employes, in the operation of the business conducted by appellants, "until the said court should make other orders to the contrary"; and on November 23, 1905, pursuant to notice, a motion was made before the learned judge below to dissolve the said injunction as improvidently awarded, which motion was heard upon the verified bill of complaint and a number of affidavits taken and read in support thereof, the verified answer of appellees to said bill, and a number of affidavits read in support thereof, whereupon the decree from which this case comes before us for review was made, wholly dissolving the injunction, but "without prejudice to such decree as it may appear that the plaintiffs are entitled to upon a final hearing of this cause"; the judge presiding being of opinion that the evidence before him was not sufficient to show that appellees had "in any way molested or annoyed the complainants so as to entitle the latter to the injunction of October 21, 1905."

It seems to be conceded, in accordance with a long line of decisions, that if the allegations of the bill in this case are sustained by the proof, it is a case for equity jurisdiction, and the remedy is by injunction, since appellants' remedy at law would be inadequate. *Beck v. Ry. Teamsters' Protective Union* (Mich.) 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421, and authorities cited. *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

The language of the demand made by appellees upon appellants in their written notice of September 11, 1905, is as follows:

"In accordance with the well-known policy of the I. T. U. to put into operation an eight-hour day in all printing offices employing union men on January 1, 1906, Richmond Typographical Union No. 90 announces to you their intention to work on and after that date only eight hours per day.

"They respectfully ask that you indicate in writing by 4 o'clock this afternoon whether you will agree to continue to employ union members in your office after the date named, under the conditions stated.
* * *

The purport of that demand was that unless appellants accepted the conditions and terms stated therein, members of the International Typographical Union, would discon-

tinue their employment with appellants. This was unquestionably the privilege of appellees as of every employe, except as he may be bound by a contract, to abandon the service of his employer, but to what extent the employe may go beyond quitting his employment to compel the employer to accept terms of his employment which the employer is unwilling to concede is the question to be determined in all controversies of the character of the one now before us.

We could not, in an opinion within reasonable length, undertake to review all the numerous authorities to which we have been cited as bearing upon the questions presented.

It is now well settled by the decisions of the courts of the United States and of the highest courts of a majority of the states in the Union that labor may organize, as capital does, for its own protection, and to further the interests of the laboring class. They may "strike" and persuade and induce others to join them, but when they resort to unlawful means to cause injury to others to whom they have no relation, contractual or otherwise, the limit permitted by law is passed and they may be restrained. *Gray v. Trades Council* (Minn.) 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, and cases there cited; *Murdock v. Walker*, 152 Pa. 195, 25 Atl. 492, 34 Am. St. Rep. 678; *Otis Steel Co. v. Local Union No. 218* (C. C.) 110 Fed. 700; *Consol. S. & W. Co. v. Murray* (C. C.) 80 Fed. 811; *Union Pac. R. Co. v. Ruef* (C. C.) 120 Fed. 102; *Allis-Chambers Co. v. Loge* (C. C.) 111 Fed. 264; *Beck v. Ry. Union*, supra; *Plant v. Woods*, 178 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; *Eddy on Comb.*, vol. 2, §§ 1031, 1035; *Beach on Mono. and Indus. Trusts*, §§ 98, 100, 102; *Tiedman on St. & Fed. Control of Persons and Property*, vol. 1, § 114.

In many of the states of the Union there are statutes which provide for the incorporation of trades unions and other labor organizations and in all of them one of the permissible objects of incorporation is declared to be the securing of better terms of employment; while at common law, as interpreted by the English decisions and a few of the earliest decisions of the courts in this country, labor combinations formed for the purpose of controlling the rate of wages were regarded as a criminal conspiracy. But these early decisions of the courts of this country were soon departed from by other cases, notably in Massachusetts, New York, and Pennsylvania, which placed labor combinations upon a plane of legal equality with capitalistic combinations, by holding that it was not a criminal conspiracy for workmen to combine for the purpose of enhancing the rate of wages, or for improving, in any other way, their relations with employers.

In *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, the court said: "Every man has a right to determine what branch of

business he will pursue and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men; and it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work or deal with certain men or classes of men, or work under a certain price or without certain conditions. * * * Freedom is the policy of this country."

It is lawful for workmen to combine to control the terms of their own hiring, and such a combination is easily distinguishable from one in which the purpose is to control the business of the employer in other matters, not affecting the terms of their own hiring; as, for example, the prevention of the employment of nonunion men. *Master Stevedores' Ass'n v. Walsh*, 2 Daly (N. Y.) 1.

In *Gray v. B. T. Council*, supra, the opinion says: "The authorities, as already noted, very generally hold that a strike is not unlawful; that members of the labor unions may singly or in a body quit the service of their employer, and, for the purpose of strengthening their association, may persuade and induce others in the same occupation to join their union, and as a means to that end, refuse to allow their members to work in places where nonunion labor is employed."

In 18 Am. & Eng. Ency. L. (2d Ed.) 87, it is stated to be the law, citing a number of decided cases, that: "It is not unlawful for strikers, by persuasion, to cause employes to leave the service of their employer, or to dissuade other workmen from seeking employment with him."

But, on the other hand, it is fully as well settled that while "strikers" have the right to argue or discuss with new employes who have taken their places the question whether they should work for the employer, and the right to persuade new employes not to do so if they can, in presenting the matter they have no right to use force or violence, nor to terrorize or intimidate the new employes. *Union Pac. R. Co. v. Ruef*, and other authorities, supra.

In *Eddy on Combinations*, § 1031, the author says: "Where there is no sufficient evidence of violence, force, intimidation, or coercion, and the facts simply show that the parties complained of are persuading workmen still employed to quit their employment, and others about to accept employment not to do so, and that the persuasion consisted of arguments, personal appeals, and inducements by way of payment of traveling expenses to other localities, an injunction will not be granted."

To the same effect is *U. S. v. Kane* (C. C.) 23 Fed. 748; *Marx & Haas Co. v. Watson*, 168

Mo. 133, 67 S. W. 391; *Otis Steel Co. v. Local Union*, supra; *H. B. Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622; *Vegelahn v. Gunter*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443.

In the last-cited case a preliminary injunction was granted prohibiting the union from "interfering with plaintiff's business by patrolling the sidewalk, or street in front, or in the vicinity of, the premises occupied by him, for the purpose of preventing any person or persons, who now are, or hereafter may be, in his employment, or desirous of entering the same, from entering it, or continuing in it"; and upon a hearing of the cause upon the bill and answer before a single judge of the Supreme Court of Massachusetts, according to the practice of that court, the judge (Holmes) ruled that the employment of "persuasion and social pressure" to induce employes to leave the service of their employer was not unlawful; but upon a hearing of the cause by a full court a majority of the judges were of opinion that the injunction should be in the form it was originally issued. The facts of that case, however, were very different from the facts of the case we have in hand.

"Picketing" is one of the methods usually adopted by "strikers" in furthering their purposes, and here, as in the matter of argument and persuasion, they have a right to pursue that method, so long as its use does not become unlawful.

In 1 *Eddy on Combinations*, p. 437, the author says: "It is unlawful for workmen to collect in crowds about the establishment of an employer whose employ they have quit; and it is unlawful for them to follow workmen, who have taken their places, to their homes and interfere with them along the public streets, for the purpose of intimidating or coercing them in quitting their employment." And again, at page 439, says: "Pickets may be established about factories and places where nonunion men are employed, providing the number of pickets is not so great as to overawe or intimidate the nonunion workmen, or in any manner obstruct the street or sidewalk, and providing the so-called 'pickets' confine themselves to the use of persuasion or argument with the nonunion employes; but, if the watching or picketing is carried to an extent which causes intimidation or amounts to coercion, compulsion, or molestation in any form of either the nonunion workmen or their employers, it is unlawful, and the combination making use of such unlawful means is a conspiracy." See, also, *Beech on Mono. & Indus. Trs.*, p. 327.

The decided cases uniformly take the same view as to the law stated by the learned authors to which we have just referred.

A combination lawful within itself may become a conspiracy when the purpose in view is to ruin or damage the business of

another, because of his refusal to do some act against his will or judgment; and accordingly it was held in the well-considered case of *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203, that all parties to a conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment are liable for all overt acts illegally done in pursuance of such conspiracy and for the consequent loss, whether they were active participants or not.

In that case, as in the cases we have cited above, it was held that while the members of the labor union have the right to induce others by persuasion and argument to become members of their union, they have no right to insist that another person unite with them or fix his scale of prices as that of the union, and make his refusal a pretext to break up his business by inducing his customers to break their contracts and stop dealing with him. In the opinion it is said:

"No persons, individually, or by combination, have the right to directly or indirectly interfere with or disturb another in his lawful business or occupation, or to threaten to do so for the sake of compelling him to do some act which in his judgment his own interest does not require. * * *

"Every man has a right under the law, as between himself and others, to full freedom in disposing of his own labor or capital, according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong, and if followed by an injury caused in consequence thereof the one whose right is thus invaded has a legal ground of action for such wrong. * * *

"Competition in trade, business, or occupation, though resulting in loss, will not be restricted or discouraged whether concerning property or personal service. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. Malice as here used does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another it is malicious; and an act maliciously done with the intent and purpose of injuring another is not lawful competition."

See, also, *Miller v. Black Rock, etc., Co.*, 99 Va. 747, 40 S. E. 27, where it is held that the owner of percolating water can appropriate the same to his own use when the appropriation is not done from a malicious motive.

In the case at bar, while appellees in their answer practically deny all the material allegations of the bill, they admit that by argument and persuasion only they have attempted to get certain of appellants' employes to become members of their union, but insist that they have not resorted to unlawful methods or to violence or intimidation of such employes. Now when they attempted to get certain of appellants' employes to become members of their union, they well understood that when such employes became members of that union they necessarily would discontinue their employment with appellants, and they also well understood that the law forbade them to carry persuasion and entreaty to the extent of intimidating appellants' employes into becoming members of appellees' union; so that the question here to be determined is, whether the means used by appellees since quitting their employment with the appellants to induce the new employes who have taken their places to quit their employment also, and others to refuse to take employment with appellants were unlawful. If the allegations of appellants' bill are sustained by the proof, appellees have unquestionably molested and annoyed appellants in the conduct of their business, so as to entitle the latter to the injunction restraining them from further use of the means employed.

Says Beach, in his work on *Monopolies and Industrial Trusts*, at page 527: "It may be impossible to lay down a general rule as to what surrounding circumstances will characterize persuasion and entreaty as intimidation. Each case must probably depend upon its own surroundings. But where the evidence presents such a case as to convince the court that the employes are being induced to leave the employer by operating upon their fears rather than upon their judgments, or their sympathy, the court will be quick to lend its strong arm to his protection. Rights guaranteed by law will be enforced by the courts, whether invoked by employer or employé."

The gravamen of the complaint made by appellants is, that by bribery, intimidation, and coercion of their employes by appellees they are being molested, annoyed, and irreparably damaged in their business. They claim that the bribery charged consists of the payment of weekly benefits and transportation to their new employes by appellees' union, and the payment directly to one William Wilde, an employé of one of the appellants, the sum of \$140, to leave not only his employment but the city of Richmond.

Bribery is not only unlawful but criminal, and when resorted to with a malicious purpose to injure a third party in his business, property or personal liberty it would unquestionably afford ground for equitable interposition by injunction, if practiced in such a manner and to such extent that the party injured, or intended to be injured, could not

obtain an adequate remedy at law for his injuries; but we have not been cited to any case, nor have we been able to find a case which holds that the payment of weekly benefits or transportation, etc., to members of a labor union is per se bribery. It is the rule of such unions to pay weekly benefits, transportation, etc., to its members, and that when a person becomes a member of the union he also becomes entitled to these benefits. It seems to have been the rule of the union, as old as the union itself, and was therefore not put in force because of this strike. It is, of course, one of the inducements held out to nonmembers to become members of the union, and is doubtless used as one of the arguments to induce persons to join the union, and it is the rule governing like associations, such as secret orders, beneficial societies, etc., and we have seen it nowhere questioned that such union or society have the right to make and carry out such a rule in the government and control of their union or society. When one becomes a member of such a union he becomes entitled to the benefits given by the union, and if he receives any of them the giving or taking of such benefits clearly could not be characterized as bribery.

But appellants contend that appellees paid to one William Wilde the sum of \$140, as a bribe, with the malicious intent to annoy, molest, and injure one of appellees in whose employ Wilde then was, the bribe being paid as an inducement to quit his employment and leave the city of Richmond. To sustain this charge four affidavits made by Wilde were offered by appellants. These affidavits are not only contradicted and discredited by a number of other affidavits read on behalf of appellees, but they contradict and discredit themselves. In Nos. 1 and 2 he makes various charges against members of the union, the sum and substance of which is that certain members of the union approached him, offering to pay him a money consideration to quit his employment and leave the city of Richmond, and that after much discussion he did receive from the union the sum of \$140 and agreed to leave the city of Richmond; while in his affidavit No. 3 he swears that on the 14th of October, 1905, he made a certain proposition to certain gentlemen of the city of Richmond, members of the union, that if they would advance him a certain sum of money he would leave the city, as it was not his intention to remain in the city and did not have the requisite funds to get away. He further says in that affidavit, "I made the first advancement to said gentlemen without any solicitation on their part. His affidavit No. 4 is of little or no importance, since it merely states that he became uneasy and frightened by reason of what he had seen in the Richmond newspapers touching the receipt by him of the \$140 from the union, which he had not returned, and he visited the office of one of the

attorneys for appellees where the matter was discussed, the result of which was that he determined to leave the city. In his affidavit No. 2 he deliberately states that he and one of appellants entered into an agreement that he was to get as much money out of appellees' union as he could in order to get clear and positive proof of the illegal means used by the union to carry on their business, and that for that reason he consented to take the \$140 and sign a paper to leave Richmond. This plan of Wilde to obtain money from the union is shown to have been known to one or more of appellants, and under these circumstances, and considering the conflicting and contradictory features of the affidavits he has made and the admissions of bad faith he also makes we take the view, as did the learned judge below, that his statements are entitled to little or no consideration in the determination of this controversy.

It would be impossible for us to review in detail the other affidavits in the case, numbering 70 or more. Suffice it to say with reference to the charge of picketing, that the most that has been shown by the affidavits is that by the patrols or pickets of appellees' union seen near the printing establishments of appellants, some of appellants had reason to become vexed; but it cannot be said that the members of the union have by their numbers or by any threats or violence of gesture or language at or near appellants' printing establishments deterred any employé from working, or any person seeking employment with appellants or either of them. On the contrary, from the proof, the members of the union and their patrol or pickets appear to have acted in a quiet and orderly way. It is true that some of the members of the union are shown to have followed some of appellants' employés to their homes or boarding houses in their efforts to induce them to join the union, which was of course to result in their leaving their employment, but the conduct of these members of the union does not appear to have been in any way violent or threatening, and they only solicited interviews at the homes or boarding houses of these employés, which appear to have been usually granted.

It is true that a personal difficulty between one of the appellees, E. W. Blakey, and the William Wilde, of whom we have spoken, is shown to have taken place after the "strike," but when the facts and circumstances out of which the difficulty arose are considered, clearly the union nor its members, other than Blakey himself, were in no way responsible for what then occurred. It seems that \$140 was paid by Blakey to Wilde for the latter's transportation to Canada, to which place he had stated he wished to go, and not having left the city of Richmond, nor returned the money, Blakey demanded of him the return of the money, but Wilde refused to return the money and

demand \$150 more; whereupon Blakey became angry and abused Wilde, but did not strike him. The abuse of Wilde was not because he was a nonunion man, nor because he was in the employ of one of appellants, but because Blakey thought that Wilde's refusal to return the money, under the circumstances, was the equivalent of obtaining money under false pretenses, and in effect so told him. For Blakey's use of abusive language to Wilde on that occasion he was afterwards punished in the police court by a fine, and there the matter seems to have ended.

The evidence, we think, fails to make a case showing that appellees have in any way so molested, annoyed, or damaged the appellants in the conduct of their business as to entitle them to the extraordinary relief by injunction. We are of opinion, however, that while the injunction of October 21, 1905, should, as the record stood, have been dissolved, it was entirely proper to continue the cause on the docket with the right to appellants to move for further injunctions pendente lite, and reserving to them the right to such relief as they might show themselves entitled upon a final hearing.

This being the effect of the decree under review, it will be affirmed.

KEITH, P., absent.

(59 W. Va. 91)

HOARD et al. v. HUNTINGTON & B. S. R. CO. et al.

(Supreme Court of Appeals of West Virginia. Feb. 20, 1906. Dissenting Opinion, April 10, 1906.)

1. DEEDS—DESCRIPTION—CERTAINTY.

A deed granting to a railroad company land for its right of way must contain on its face a description of the land in itself certain, so as to be identified, or, if not in itself so certain, it must give such description as, with the aid of evidence outside the deed, not contradicting it, will identify and locate the land; otherwise, the deed is void for uncertainty.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 65.]

2. VENDOR AND PURCHASER—EXECUTORY CONTRACT—PRICE—INTEREST.

A vendor selling land by executory contract stipulating that he must make a deed, and that the first payment of purchase money shall be made when he shall make a deed, and who delivers to the purchaser possession at the date of the contract, is entitled to interest on the whole purchase money, though the vendor be in default in making the deed, unless the purchaser set apart the purchase money for the vendor, and notify the vendor of his readiness to pay, and do not himself use the money.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 350.]

Sanders, J., dissenting in part.

(Syllabus by the Court.)

Appeal from Circuit Court, Wayne County.

Action by S. Floyd Hoard and Pitt Hoard against the Huntington & Big Sandy Railroad Company and others. Decree for plaintiffs, and defendants appeal. Reversed.

Vinson & Thompson, for appellants. Holt & Duncan, for appellees.

BRANNON, P. S. Floyd Hoard and Pitt Hoard sold to the Huntington & Big Sandy Railroad Company land for right of way for the railroad through the town of Ceredo by the following contract:

"To the Huntington & Big Sandy Railroad Company: We sell you right of way for your road through our property in Ceredo, for the sum of ten thousand dollars, to be paid one-third cash when deed is made, and the residue in one or two years thereafter, with interest on deferred payments, reserving vendor's lien in said deed to secure deferred payments. The lands herein proposed to be sold and conveyed have heretofore been agreed upon by the parties hereto, and as soon as the proper description of said property can be had we will incorporate said descriptions, by metes and bounds, in a deed of general warranty and convey the same to you. * * * We, together with your engineer, to prepare said descriptions at the earliest practicable convenience. You can at once begin the construction of your road over said property as aforesaid, pending the preparation of said descriptions as aforesaid. Pitt and S. Floyd Hoard.

"This proposition is accepted. Huntington & Big Sandy Railroad Co., by Z. T. Vinson, president."

This contract bears no date, but was in March, 1892. The railroad company at once took actual possession and built its road on the land, and has ever since occupied it with its road. The contract says that the engineers of the company and the Hoards should prepare a description of the land for incorporation in the deed from the Hoards to the company. Some time after this contract was made an engineer on the part of the railroad company did furnish to said Hoards a map, giving description, to go into the deed, but the Hoards refused to agree to it. By some arrangement the control of the Huntington & Big Sandy Railroad Company passed to the Ohio River Railroad Company, and then to the Baltimore & Ohio Railroad Company. However, this seems immaterial. The matter rested in unsettled condition until July 28, 1902, when the Hoards brought a suit in chancery in the circuit court of Wayne county against the said three railroad companies, to enforce the specific performance of said contract of sale, to recover the purchase money, and to sell the said land for its payment. November 15, 1901, the Hoards prepared a form or blank deed and tendered it by mail to the Ohio River Railroad Company. Whether the Huntington & Big Sandy acted on it we do not know, but we will say that it was not accepted by that company. No response to the tender was made to the Hoards. With the bill there was tendered a deed by the Hoards to the Huntington & Big Sandy Railroad Company for the land. The Hun-

tington & Big Sandy Company, and also the other companies, filed answers objecting to the deed tendered with the bill, on the ground that, as to one of the tracts, it conveyed with only special warranty, whereas the said contract demanded general warranty; and objected to being compelled to accept the proposed deed because of its want of description of the seven parcels of land specified in it sufficiently certain and definite for the identification of the land. The court entered a decree enforcing the contract against the Huntington & Big Sandy Railroad Company, giving a decree for the purchase money, \$10,000, with interest from November 15, 1901, the date when the Hoards sent the deed to the Ohio River Railroad Company. From this decree the Huntington & Big Sandy Railroad Company appeals.

Much law is cited to show that before equity will enforce performance of a contract that contract must be definite and certain, not only in its terms, but the contract must be certain, in a legal point of view, as to the property conveyed. *Ensminger v. Peterson*, 53 W. Va. 324, 44 S. E. 218. This is sound law; but the question before us is whether the deed tendered is certain. We are not inquiring whether the contract is sufficiently definite. No point is made as to that. But the question which we have to deal with is whether the deed which the court forced upon the railroad company contains that definite description to which the purchaser is entitled. If there is any difference between the contract up for enforcement, and a deed of conveyance, in respect to certainty of description, the deed requires the fuller and better description. I think there is such difference. I think that the grantee has a right to a description fuller, more precise and definite, than is required in a preliminary contract. I will add that this right of way land runs through a growing town, and along and near the Chesapeake & Ohio Railroad, and near a trolley line. Under this situation, that is to last for all time, I think the railroad company is quite reasonable in demanding clearness and accuracy in its deed, because conflict between the town as to the streets, or between the railroad companies as to true location of rights of way, may readily arise. A railroad company having tracks running through a town, near to other railroads, has a need, greater than in ordinary cases, for accurate boundary of its right of way—different from farms. Here are no boundary trees, the whole surface of the ground occupied for this, that and the other use. The railroad is to exist forever. The men who laid it out will soon pass away. And in a few years they forget place. The evidence to show location existing at the date of the location will in a few years pass away. Then what are the parties interested either way to do? The muniment of title should be so definite that the right of way can be identified 50 or 100 years

hence. In all cases, but especially in this, there should be certainty. "The description of the premises conveyed must be sufficiently definite and certain to enable the land to be identified; otherwise it will be void for uncertainty." 2 Devlin on Deeds, § 1010. "The description should contain all the particulars necessary to clearly and accurately identify the property, such as its situation in the town and county, its boundaries, etc." 1 Jones on Conveyancing, § 320. A very essential thing in a description is the initial point, the beginning. In the deed which the decree compels the defendant to accept we find, as to tract No. 7, the following description: "Beginning at a point in the west line of First street west of Main street, the center of which street is located by two stone monuments with brass or copper wire set in same, one of said monuments being in the intersection of the center lines of said First street west of Main and B streets, the other being in the center of said First street west of Main street and distant about 2,184 feet southerly of the one above mentioned in center of First street west of Main street and B street, both monuments recently located by Chas. Silliman, C. E., and the first parties hereto. Said beginning point is distant thirty feet northerly from said center line of railroad, measured at right angles from said center line; thence westerly and parallel to, and thirty feet distant from said center line of railroad," etc.

The grave question at once arises: Where is the beginning of tract No. 7? It is on the west line of First street. At what point on that line? If the deed had located that point at a certain distance from those stone monuments, it would have been sufficient. We must not take the words "about 2,184 feet" as descriptive of the beginning point of the right of way on the line of First street, because that is the distance between the two stone monuments. There is no point of beginning designated on the west line of First street; no guide to it. The description says, "said beginning point is distant 30 feet northerly from said center line of railroad"; but where is the center line? It does not mean the center line between the railroad rails; for the right of way extends 30 feet out from the center line each side. Now, the center line, like a tree or a rock, must have a point of location, so that it can be found to start from. This center line has no location. One place will suit it as well as another. One place on the west line of First street will suit for that beginning corner as well as another. There is no certainty here, no means to definitely locate either the beginning point or the center line. If a stone had been planted under the surface, for instance, we could appeal to it in years to come; but we have not that recourse. A civil engineer swears that he cannot locate the right of way of the company under this deed. It seems to us uncertain. The description of

tract No. 6 seems to be infected with the same uncertainty, if not other tracts. A plat referred to in the deed does not remove the objection. Besides, several stations, one the beginning of tract No. 2, are left blank as to number in the deed. I am aware that Jones on Conveyancing, § 323, says that: "The office of a description is not to identify the land, but to furnish the means of identification," and that it is only when it remains "a matter of conjecture what property is intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels. If the description is sufficient to allow of identification by actual survey, it will be upheld, however indefinite it may seem to be. But if the description is so vague that the parcel cannot be located under it, it is void for uncertainty. If the starting point of a boundary line cannot be identified, the deed is necessarily void." This court has said that where a deed or other instrument contains enough to enable identification by applicable extrinsic evidence, it will do. *Thorn v. Phares*, 35 W. Va. 771, 14 S. E. 399; *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361; *Warren v. Syme*, 7 W. Va. 474. The description, however, must be such in the deed as is susceptible of being made definite by evidence outside of it. 88 Am. St. Rep. 710. The deed must refer to something of such certainty as will enable identification. *Westfall v. Cottrills*, 24 W. Va. 763. Now, there is nothing in this deed that will allow the application of oral evidence. What evidence will show the place of that beginning on First street that will answer for all time to come? So as to the center line. In the deed it is said that the land is "supposed to bind upon and follow the northerly line of the adjoining right of way now occupied by the Chesapeake & Ohio Railroad Company"; but there is no instrument or showing in the record of the definite location of the right of way of that company. The answer of the Huntington & Big Sandy Railroad Company asks the court to make a survey of the land sold to it by the Hoards. As the parties to the contract had never fixed the description under the contract—as the contract contemplates a description satisfactory to both parties, and they had not agreed upon a description, this request for a judicial ascertainment of such boundary was reasonable, and should have been granted. An order of survey would have given certainty. We think there was error in enforcing that deed upon the company.

The railroad company complains that the court compelled it to pay interest from November 15, 1901, the date when the Hoards mailed the blank deed to the Ohio River Railroad Company. The claim of the appellant is that by the contract the first payment was not to be made until delivery of a

proper deed, and a proper deed has never been delivered. The court properly held that the deed filed with the bill was a non-compliance with the contract, in that it contained a special warranty as to one of the tracts. This defect, as also uncertainty of description, constitutes the argument by the appellant against the allowance of interest from said date. On the other hand, the plaintiff filed a cross-assignment of error, claiming that the court gave them too little interest; that it should have given them interest from the date of the contract, March 9, 1892, because the Huntington & Big Sandy Railroad Company then took possession. Under the authorities, we must say that the company is liable from the date when it took possession under the contract—the date of the contract, because that contract gave the company immediate possession. Reflect that the company had the use of this land and also the use of the money. It never set apart the money to the use of the Hoards. It never notified them that it was ready to pay. Money is worth its interest. The clause in the contract saying that the first payment should be made on delivery of the deed was intended only to fix the date of the first payment, and had not intent actual as to interest. I know that it is a general rule that a debt does not bear interest until maturity, in the absence of express provision otherwise; but there is a peculiar rule applicable in this case, and that is that the vendee cannot keep both land and purchase money without paying interest. If the vendee desires to escape interest on the purchase money, even when the delay in payment is caused by default of the vendor, he must actually set aside the money for the vendor, and he must not himself take its benefit, and must notify the vendor of these facts, and that the money is lying idle. *Steenrod's Adm'r v. Railroad*, 27 W. Va. 1. Say that the plaintiffs were negligent or blameful in not making a deed soon. That would not excuse the appellant from interest, because it had the use of both money and land. It did not deposit the money to the credit of the vendor in a bank, or in any way set it aside, but used it. It did not offer to pay. It did not request a deed. When the deed form which the Hoards proposed to make was sent to the Ohio River Company, the lessee of the road, whose vice president and manager was also president of the Huntington & Big Sandy Company, the deed was retained; no objection made; no response was made. The Hoards wrote to the Ohio River and Baltimore & Ohio Companies, and tried to settle the matter. So the evidence shows, and so is the probability, as we presume they wanted the large debt. When the description sent by the engineer was not accepted and the Hoards requested a change, it was the duty of the companies to confer with Hoards and settle description, because the con-

tract made it equally the duty of both sides "to prepare said description at the earliest practicable convenience." There is no evidence that the companies offered to pay and demanded a deed, or made effort to settle description. It was just as much the duty of the railroad company to furnish proper boundaries and to confer with the Hoards as it was incumbent upon the Hoards to do the like. Under many decisions in the Virginias, as I think elsewhere generally, the company must pay interest from the time of the contract. *Brockenbrough v. Blythe's Ex'rs*, 3 Leigh (Va.) 619; *Oliver's Ex'r v. Hallam's Adm'r*, 1 Grat. (Va.) 298; *Bailey v. James*, 11 Grat. (Va.) 468, 62 Am. Dec. 659. The company had as full enjoyment of the land as if a deed had been made, and must pay interest.

Therefore we reverse the decree, and remand the case to the circuit court, with directions to cause a survey to be made, or in some way to fix proper and sufficient description of the said land, and to enforce a specific performance of the contract, after providing for a proper deed from the Hoards to the appellant company, containing proper description.

On Rehearing.

A rehearing of this case only confirms the conclusion expressed in the above opinion. The theory of the company is that it was first the duty of the Hoards to make a deed, and, not doing so, they were in fault, and that until the deed was made there could be no interest. But was it any more the duty of the Hoards to come forward in reasonable time with a deed and ask payment than it was the duty of the company to come forward with the money and ask a deed? One took one obligation on itself, as well as the other took another obligation. *Gas Co. v. Elder*, 54 W. Va. 235, 48 S. E. 357; *Page on Contracts*, vol. 3, § 1470, says: "Concurrent covenants are those which, by the terms of the contract, are to be performed at the same time by each of the parties bound to perform them. Either party must be ready to perform to put the other in default. Thus, under a contract for a sale of realty, if no stipulation is made as to the order of time at which the deed is to be delivered and payment made, these acts are concurrent. Neither party can treat the other as being in default either for the purpose of considering the contract as discharged, or for bringing an action for damages." *Waterman on Specific Performance*, § 444, says: "When one is to pay money, and the other is to give a conveyance, no time fixed, and no provision that either shall be done first, the covenants being mutual and dependant, one is not bound to pay without receiving his conveyance, nor the other to part with his land without receiving his money." In section 448: "In this country, the prevailing practice is that the vendor shall prepare the deed, and have it ready

when called for. This would seem to be the obvious meaning of the parties when the seller covenants that he will convey the title to the purchaser." In that great friend of the lawyer, *American and English Encyclopedia of Law* (2d Ed.) vol. 29, p. 689, the law is thus stated: "Dependent unless contrary intention appears. The general rule is to consider all covenants dependent, in the absence of a contrary intention, for this is the way most men make their bargains; neither party intending to perform unless the other at the same time performs on his part. And the same is held when no time is fixed for performance by either. When it appears that the acts are to be performed at the same time, the covenants are considered mutual and dependent. Ever since the time of the famous note of *Sergeant Williams* to the case of *Pordage v. Cole*, it has been very generally held that when a time is fixed for performance on one side, and the performance on the other side is to, or may, happen after such time, the covenants are independent." Now, how are the Hoards more in default than the company? In fact, this position is fortified by adding that the contract made it the duty of the company to participate in the preparation of the deed by meeting the Hoards and agreeing upon a material part of the deed, the specification of the boundaries. And as the Hoards expressed dissent in the description by the engineer, it was then the company's duty to confer with the Hoards; but it did not do so; made no effort to agree, year after year. So the company was in default. But say that neither side was in default. A court of equity finds that the parties contemplated interest after a reasonable time, as they must be taken to have contemplated completion of the contract in a reasonable time; but, owing to mutual neglect, it was not so completed. The long delay was not in the contemplation of either side. The railroad company is in just as full and beneficial possession as if a deed had been made the next day after the contract, and it has the use of the money justly belonging to the Hoards.

What shall a court of equity do in this state of things? If it lets the purchaser through so many years keep both the land and money without interest, it participates in that which is unjust and against good conscience. The *Steenrod Case*, 27 W. Va. 1, makes this a case of dependent and mutual covenants, and compels us to make the railroad company pay interest. In *Oliver's Ex'r v. Hallman's Adm'r*, 1 Grat. (Va.) 298, the receipt for part payment for the land said: "Which I bind myself, my heirs to make to said Wade a good and lawful title to before I call on him for any further payment," and yet the decision made the purchaser pay interest from the date of purchase. Why? Because the purchaser had the use of both land and money. The cases

there cited will sustain that decision. Pomerooy on Contracts, § 428, says: "If the vendor is in fault and delays to convey legal title, the vendee does not generally lose anything substantial by delay; he has the possession all the time, and the rents and profits, and it is right and fair that he should pay interest on the purchase money until the whole is paid up." In section 429: "The general rule is well settled that, where the contract is not completed until after the time stipulated for that purpose, but the court nevertheless decrees a specific performance, it will adjust the equities of the parties by placing them as far as possible in the same position which they would have occupied had the agreement been completed at the prescribed day, and to that end it will allow to the purchaser the rents and profits, and to the vendor interest upon the purchase price from and after that date." Law found in 29 Am. & Eng. Ency. L. (2d Ed.) 709, will speak the same. Here it happened that the contract was not executed as it meant, or within the time, and, on principles of equity and law, it is just to charge interest from the date of contract. I say again, the contract contemplated interest. The parties did not complete the contract as they expected. We cannot rescind. Neither side asks it, and rescission would be disastrous to the railroad company. A court of equity must take things as it finds them, and do equity, which is, upon a great volume of authority, nowhere stronger than in the two Virginias, to call upon the railroad company to pay interest for the use of money justly belonging to the Hoards.

We therefore repeat the decree heretofore made, reversing the decree and remanding the cause for further proceedings, in accordance with principles stated in the former and this opinion.

SANDERS, J. (dissenting in part). I concur in the decision of this cause, in so far as it reverses the decree of the circuit court and remands the cause, on the ground that the description in the deed tendered is insufficient, but I cannot agree to that part of the decision which requires the company to pay interest on the purchase money from the time it entered into possession of the property under the contract. I might almost say that, for the reason I am willing that the decree shall be reversed on account of the insufficiency of description, for the same reason I am unwilling to concur in the other point decided, for it seems to me anomalous to say that under the circumstances of this cause, the grantors, although they have not shown themselves entitled to a decree for the purchase money because they have not tendered a proper deed, yet that they are entitled to interest on the purchase money from the date of the contract, because at that time the company took possession. I realize full well the force of

the position taken in the opinion of the court, that the general rule is that a vendee is entitled to interest from the time possession is taken of the premises by the vendor, but this rule is subject to exceptions, which are as firmly imbedded in the law as the rule itself, and from an examination of the authorities relied upon to support it, it will be seen that in no case in which this doctrine is announced has the court had before it a contract such as is here presented. In none of them had the parties stipulated as to the payment of interest, but the vendor had been in default as to the payment of the principal, and the court attached interest, as a matter of equity, in the absence of such stipulation. This differentiation runs through all the cases. The contract, in this respect, is as follows: "We [the plaintiffs] sell you right of way for your road through our property in Ceredo for the sum of ten thousand dollars, to be paid one-third cash when deed is made, and the residue in one and two years thereafter, with interest on deferred payments. * * * We will incorporate said description by metes and bounds in a deed of general warranty and convey the same to you." Here the contract is express. From its terms it is clear that no payment was due until the deed was made. The balance of the purchase money was then to be paid in one and two years, and interest was payable upon the deferred installments. Hence it seems to me it cannot be contended (the parties having thus stipulated as to when interest should be payable) that the plaintiffs should not be required to comply with their contract before being placed in a position to demand interest. The making of the deed and performance of the contract is made a condition precedent to the right to demand the cash payment.

Nor does the case of *Steenrod's Adm'r v. R. R. Co.*, 27 W. Va. 1, when applied to the circumstances here, support the position taken. The fifth point of the syllabus is: "The general rule in ordinary contracts for the sale of land, which contain no stipulation for interest and do not specify any day for completion, is that the purchaser is liable for interest on the purchase money from the time he takes possession, especially if he has received rents and profits." And the court says, showing that it was in that case the duty of the vendee to tender the money before being entitled to a deed: "Referring to the agreement, we find that it provides that, on payment of the damages, the vendor agrees to convey the land on reasonable demand." The court also says: "The contract is that the payment is to precede the conveyance, and the latter is to be made only upon reasonable demand after the payment." Very different is this case. The rule is well stated in *Jourolman v. Ewing*, 80 Fed. 608, 26 C. C. A. 23: "But the question of interest in case of suit brought upon a contract wherein the pay-

ment of interest is made the subject of express stipulation, and is thereby made a part of the obligation, stands upon a different ground. In such case it is made a matter of agreement between the parties. They are supposed to have considered all the circumstances bearing upon the propriety of their stipulation, and this term of the contract is as binding as any other. The courts have no right or authority to annul the agreement which the parties have, in contemplation of the circumstances in which they were dealing, seen fit to make. * * * The court has no more right to disregard the agreement upon the subject of interest than it would have to abate a part of the principal debt if the facts had been proven which showed that the price paid for the land was improvident."

In *Mayo v. Purcell*, 3 Munf. (Va.) 243, the court held that a purchaser of land, being thoroughly informed of defects in a vendor's title, and agreeing, nevertheless, to pay interest on the purchase money from a certain day, would not be relieved from paying such interest on the ground that he could not get possession of a part of the land, which he knew at the time of entering into the agreement was held by another person. In *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179, 4 L. Ed. 65, the vendor was indebted to the vendee, and the sale was made to pay the debt. This was in 1799, but a good title was not made to the vendee till 1809. The court held that the vendor must pay interest on the debt till that time; in other words, the purchaser paid no interest till he got a good title. In *Lofland v. Maull*, 1 Del. Ch. 359, 12 Am. Dec. 106, by a contract for the sale of land, the purchase money was made payable in future installments, and there was no stipulation in the contract as to the time for the delivery of the possession of the land. After the sale, and before all the installments had become due, the purchaser, with the vendor's consent, entered into possession. It was held that he did not thereby become chargeable with interest on the unpaid purchase money from the date of such possession, in the absence of a stipulation to that effect in the contract of sale. In *Birdsall v. Waldron*, 2 Edw. Ch. (N. Y.) 315, the Vice Chancellor decided that the seller, although in possession, would not be bound to pay his money into court before obtaining a title, where he went into possession with the understanding that he was not to pay it until he had a title. And it was also said that if there had been delay in the performance, without the default of the purchaser, he would not, although in possession, be obliged to pay the purchase money. In *Blount v. Blount*, 3 Atk. 636, it is said that neither in the purchase of an estate in possession or in reversion, whether purchased under a private agreement or purchased under a decree of sale, can it be laid down for certain that, from the time of possession, a purchaser shall pay interest; that the court, in award-

ing interest, never regards the execution of articles for a purchase, but the time of the execution of the conveyance, and even then the purchaser shall pay interest only from the time possession is delivered. "The law creates an obligation to pay interest, only where the debtor is put in default for the payment of the principal; and in such a case it runs only from the default." *Reid v. Duncan*, 1 La. Ann. 265. See, also, *Whitworth v. Hart*, 22 Ala. 343; *Gay v. Gardiner*, 54 Me. 477; *Hubbard v. Charleston*, etc., R. R., 11 Metc. (Mass.) 124. Except where the parties themselves have failed to provide for the payment of interest in the contract, no court has pretended to fix an interest charge. And in the cases in which a purchaser has been held to pay interest, there was either no contract, or the purchase money had become due. Here the purchase money did not become due until title was made. The parties expressly stipulated that only the deferred payments should bear interest.

The second point of the syllabus of the opinion makes no reference to that part of the contract which provides that interest shall be paid upon the deferred installments of purchase money. This provision is a material one, and cannot be done away with by ignoring and not considering it. But in the opinion it is said: "That clause of the contract saying that the first payment should be made on delivery of the deed was intended to define the date of the first payment, and had not intent actual as to the interest." This might be so if nothing else was said, but if it had not such intent, why add, after providing that the first payment should be made on execution of the deed, "residue in one and two years, with interest on the deferred payments?" If it was not the intention that only the deferred installments should bear interest, and then only after the delivery of the deed and making of the first payment, why say so in language that is unmistakable? The same clause that fixes the time of the first payment as of the delivery of the deed expressly says that the deferred payments shall bear interest. Certainly it cannot be said that the parties have not the right to agree as to the date from which interest shall be computed; yet the court, in its opinion, conveniently gets rid of the provision in regard to interest by ignoring it.

While I do not concede the correctness of the theory advanced in the opinion filed on rehearing, that the covenants were dependent, and that it was as much the duty of the company to demand a deed as it was the duty of the Hoards to make and tender it, yet, on February 16, 1893, the engineer of the company prepared a map and forwarded it to S. Floyd Hoard, with the following letter of transmittal: "Enclosed find map with right of way put on and colored. This will give sufficient data for description I think. I hope you will prepare it and send to Vinson to

incorporate in deed as soon as possible." After receiving this map, was it not the duty of the Hoards to prepare and forward description, as requested? Had not the railroad company done all that could be required of it under the terms of the contract, granting that it was its duty to prepare description? Not having complied with the request of the engineer, and not having made any pretense of tendering a deed until the lapse of so long a time, the plaintiffs are not in a position to make the demand they are now making. By thus early complying with the provision of the contract, requiring them to co-operate in the preparation of the deed, even if it could be so construed as to make it the duty of the company to co-operate, the duty to complete the transaction was cast upon the Hoards. This they never did, nor pretended to do, until 1901, when they tendered a deed which contained a description of their own making, to which the engineer of the company refused to agree, and which he had no hand in preparing, and expressly testifies that the description offered by the plaintiffs is such that it is impossible to locate the land conveyed upon the ground under it, and the court, in its opinion, finds that this is so, and that the land cannot be sufficiently identified. It is said that the delay was not contemplated by the parties. Possibly so. But who must suffer for the delay? Certainly the railroad company should not be made to do so, after having prepared and forwarded description, with the request that it be mailed to its attorney.

Viewed in the light of all the circumstances surrounding this case, I cannot agree that the plaintiffs are entitled to interest, until they have, by the tender of a proper deed, placed themselves in a position to demand payment of the purchase money.

(78 S. C. 281)

MOSS et al. v. SMITH et al.

(Supreme Court of South Carolina. Feb. 15, 1906.)

1. TRIAL—INSTRUCTIONS—CHARGE ON FACTS.

Where, in an action for partition, the issue is the delivery of a deed, an instruction that "it may not be a manual delivery" is not subject to objection as a violation of Const. art. 5, § 28, prohibiting judges from charging on the facts.

2. TRIAL—INSTRUCTIONS—MISLEADING JURY.

An instruction, in partition, where the issue was the delivery of a deed, that "it may not be a manual delivery, and that is a very strong evidence of delivery," was not reasonably calculated to mislead the jury.

Appeal from Common Pleas Circuit Court of Oconee County; Jas. A. McCullough, Judge.

Action by Lem A. B. Moss and others against Fannie Smith and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Stribling & Hendon, for appellants. Jaynes & Shelor, for respondents.

GARY, A. J. This is an action for partition. The complaint alleges that Miles Moss died in January, 1901, leaving of force and effect his last will and testament; that the plaintiffs and defendants are his heirs at law; that during the lifetime of Miles Moss the defendants Miles A. Moss and Kay Moss by undue influence prevailed upon him to make to them deeds of conveyance to certain tracts of land while he was in feeble mind; but that the deeds were never delivered. The complaint prays that said deeds be delivered up and canceled. The defendant Miles A. Moss in his answer alleges that Miles Moss, on the 25th of January, 1900, executed and delivered to him the deed of conveyance mentioned in his answer upon the consideration in part that he would render any assistance necessary in the support of said Miles Moss. The defendant Kay Moss, by his guardian ad litem, answered formally. The jury returned a verdict in favor of the defendants.

The sole question presented by the exceptions is whether his honor, the presiding judge, violated section 26, art. 5, of the Constitution, prohibiting judges from charging on the facts, when he said to the jury: "It may not be a manual delivery, and that is a very strong evidence of delivery." The other portion of the charge relating to this question is as follows: "The main inquiry is as to the delivery of those deeds. Were those deeds delivered by the grantor, old man Moss? Now, the law cannot deal with an undisclosed intention. You may make a deed with all the formalities of a deed, properly witnessed, and otherwise executed; the grantee may be named therein; but unless there is some act indicating your intention to vest the property, the law cannot look into your mind and see what you intend to do with that deed. But where a deed is signed, sealed, and delivered, and the grantee is named in the deed, the law seizes upon any act or word which expresses the intention of that party to vest the title in the grantee. It may not be a manual delivery, and that is a very strong evidence of delivery; but it is not necessary that one should take the deed and hand it into the hands of the other party. Any act or word, which at the time indicated his intentions—that that man's intentions were to part with the title, and to vest it absolutely and forever in the other party—is sufficient; and the title is therefore complete at that moment. It is completed at that moment. And if it is completed in the other party, it makes no difference what may subsequently become of the deed, the title is good in the grantee."

When there is an appeal assigning error in the trial of a case, it must appear (1) that there was error; and (2) that it was prejudicial to the rights of the appellant. The principle is thus stated in *Turner v. Lyles*, 68 S. C. 392, 48 S. E. 301: "Since

the Constitution of 1895, judges are not permitted to state the testimony to the jury, but it is not every statement of the testimony that will entitle the appellant to a new trial. The statement must be of a fact in issue, and there must be reasonable ground for supposing that the jury may have been influenced by such statement, in a manner prejudicial to the rights of the appellant." In 2 Graham & Waterman on New Trials (2d Ed.) 633, it is said: "In the progress of a warmly contested suit, exceptional testimony will occasionally slip in, despite the greatest care of the court and counsel. If, therefore, the bare circumstance that such evidence had gone to the jury vitiated all the proceedings, scarcely a verdict in any case of importance would stand. So that it is, on the whole, the part of wisdom for courts, on motions for new trials, to regard not so much the fact that improper evidence has been admitted, as the influence it may have had on the result. We may then lay it down as a settled rule that if the verdict is undeniably correct a new trial will not be granted, notwithstanding the admission of improper evidence." This language is quoted with approval in State v. James, 34 S. C. 49, 12 S. E. 657. It is undoubtedly true that it is not essential to the complete execution of a deed that there should be a manual delivery. Therefore the charge that "it may not be a manual delivery" afforded no reasonable ground for supposing that the jury may have been thereby unduly influenced.

We will next consider the charge that it "is a very strong evidence of delivery." The ordinary and usual mode of completing the execution of a deed is by manual delivery, and when the grantor seals and signs the deed, and then makes a manual delivery of it to the grantee, it unquestionably furnishes strong evidence that he intended to convey the title. It is in the nature of a presumption, based upon the doctrine that a person must be regarded as intending the reasonable and natural consequences of his act. This passing remark of the presiding judge, when construed in connection with the other portion of his exceedingly clear charge, was not reasonably calculated to mislead the jury.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(73 S. C. 374)

HAWES v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Feb. 20, 1906.)

1. CARRIERS — LOSS OF FREIGHT — DAMAGES — PENALTY.

Any form of statement which shows the nature of a claim against a carrier for loss of freight, the amount of the loss, and in whose behalf presented, is sufficient, without proof of its validity, in an action to recover a penalty under 24 St. at Large, p. 81, for failure of car-

rier to pay or refuse to pay damages for loss of freight in a specified time.

2. SAME — CLAIM.

In proceedings under 24 St. at Large, p. 81, to recover penalty of carrier failing to pay for damages to freight within a specified time, claimant need not attach to his claim the freight bill, or receipt and bill of lading.

Appeal from Common Pleas Circuit Court of Fairfield County; Gage, Judge.

Action by John L. Hawes against the Southern Railway Company. From a judgment of the circuit court affirming the judgment of the magistrate for plaintiff, defendant appeals. Affirmed.

J. E. McDonald, for appellant. Ragsdale & Dixon, for respondent.

JONES, J. This appeal is from the judgment of the circuit court, affirming the judgment of a magistrate's court in favor of plaintiff against defendant for the sum of \$52.86, including \$2.86, the value of the goods lost in shipment, and \$50, the statutory penalty for failure to adjust and pay said claim within 90 days, as prescribed in the Acts of 1908, 24 St. at Large, p. 81. The exceptions before this court raise two questions: (1) Whether as matter of law the statement of the claim as filed with the defendant sufficiently complied with the requirement of the statute so as to entitle claimant to the statutory penalty for failure to adjust and pay the same. (2) Whether as matter of law the defendant had the right to demand the surrender of the freight bill and bill of lading before paying the claim.

The claim was filed with defendant company in this form: "Winnsboro, S. C., Nov. 1, '04. Southern Railway Co. To J. L. Hawes, Dr. Act. 7BX L. Shells 38 \$2.86." When this claim was filed with defendant's agent at Winnsboro, S. C., he wrote to the claimant this note: "Attach freight bill and bill of lading and I will pay you." The plaintiff refused to comply with that request and the claim was not paid. The agent testified that the practice of the railway company was to demand the freight bill, invoice, and original bill of lading before payment of the claim, to protect against bogus claims.

The judgment of the circuit court concludes any inquiry as to the justness and correctness of the claim. We merely consider whether the claim as presented complied with the requirement of the statute. It is contended that the claim (1) should have been signed or attested by the claimant; (2) should have stated whether it was for loss of property or damage to property; (3) should have been accompanied by affidavit or other proof of its validity. The statute does not prescribe the form in which the claim shall be presented, nor that it shall be duly attested, nor that it shall be accompanied with proof of its validity, and this court will not venture to interpolate words into the statute. In the absence of specific regulation of the form in which such claims are to be presented, we

must hold it a sufficient compliance with the statute to present a claim in the form adopted in this case, as it shows the nature and the amount of the claim, and in whose behalf it is presented.

We are also of the opinion that it was not essential for a claimant presenting a claim under this statute to attach thereto the freight bill or receipt and the bill of lading, as demanded. The statute does not so require. It is undoubtedly true, that a carrier has the right to demand the production of the bill of lading before it can be required to deliver the goods covered thereby, but this principle is not involved in this case. All the goods covered by the bill of lading, except the seven packages of gun shells, had been delivered by the defendant to the plaintiff without a demand for the bill of lading, and on the freight receipt defendant's agent had, over his signature, acknowledged that the shipment was seven packages short. A carrier has not (in the absence of a valid contract or statute to that effect) the right to demand a surrender of the bill of lading upon a partial delivery of the goods covered thereby. In this case there was neither tender of the goods, lost nor of their value. A bill of lading is evidence of the consignee's right to a delivery of the goods covered thereby, and the consignee has the right to retain possession thereof until the carrier has performed its obligation. It would be valuable evidence in behalf of the claimant, in the event of a suit to recover for loss of or damage to goods. So likewise the freight receipt, containing defendant's admission of the shortage in the shipment, was evidence valuable to the claimant in the event of a suit. Moreover, the carrier ordinarily has ready means of ascertaining whether it is justly liable to pay the claim as presented, without the presentation of the freight receipt and the bill of lading. These were probably some of the reasons why the Legislature did not see fit to require that such evidences of the claim should be presented therewith. At any rate, it is sufficient to know that the statute makes no such requirement.

The judgment of the circuit court is affirmed.

(73 S. C. 234)

STATE v. SIMMONS et al.

(Supreme Court of South Carolina. Feb. 15, 1906.)

1. CRIMINAL LAW—APPEAL—REVIEW—MOTION FOR NEW TRIAL.

Where the grounds of a motion for new trial after conviction are not set out in the record, an appeal from the order refusing a new trial will not be reviewed.

2. SAME—EXCEPTIONS TO INSTRUCTIONS.

An exception to an instruction, failing to point out in what respect it was prejudicial to defendants, is too general for consideration.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2671.]

Appeal from Common Pleas Circuit Court of Colleton County; Klugh, Judge.

Sarah Simmons and others were convicted of larceny, and appeal. Affirmed.

W. J. Fishburne and C. C. Tracy, for appellants. Solicitor Davis, for the State.

GARY, A. J. The defendants were indicted for larceny of live stock, and were convicted upon their second trial. When they were first put upon trial, one of the jurors died after his honor, the presiding judge, had commenced his charge. The defendants' attorneys refused to consent to proceed with the trial, whereupon the circuit judge discharged the jury and ordered a mistrial.

1. The first exception, which raised the question of former jeopardy, has been abandoned.

The second and third exceptions are as follows: "(2) Because his honor erred in refusing to grant a new trial on the ground that a conspiracy had been shown in the testimony for the state as existing between the witness H. T. Spell and the prosecutor to urge the defendants to commit the crime alleged. (3) Because his honor erred in not holding and deciding that such conspiracy, if proven, was good ground for granting a new trial." The record recites that after the verdict of the jury, motion was made by defendants' counsel for a new trial and for arrest of judgment, which was refused, but the grounds of the motion are not set out in the record. The questions presented by these exceptions are, therefore, not properly before this court for consideration.

2. The fourth exception is as follows: "(4) Because it is respectfully submitted that there is error in the charge of the presiding judge in this, viz.: 'The Legislature found it necessary to impose severe penalties for larceny of live stock, because it is generally such an easy thing for people to take, carry or drive away live stock and convert it to their own use, and feloniously deprive the owner of the use thereof, then it is made a crime, a theft, to drive a horse out of a stable, or to lead, or drive it away, from the owner, with the purpose and intention of depriving the owner of the use thereof, and feloniously converting the same to his own use, and the Legislature has fixed a heavy penalty for the larceny of live stock, so the question for you to determine is whether these parties stole this stock, or not; inasmuch as the same is discursive and irrelevant, and when as in the charge, applied to the case at bar, is in prejudice of the facts and wrongful of the defendants.'" This exception fails to point out in what respect it was prejudicial to the defendants and is, therefore, too general for consideration.

It is the judgment of this court that the appeal be dismissed.

(140 N. C. 475)

TANNER v. HITCH et al.

(Supreme Court of North Carolina. March 6, 1906.)

1. APPEAL—RECORD—QUESTIONS PRESENTED—MASTER AND SERVANT—INJURIES TO SERVANT.

Fellow Servant Act (Revisal 1905, § 2646), applies only to "any railroad company operating in this state." In an action for injuries to plaintiff, received while being transported on defendant's log train, defendant lumber company specifically denied that it owned or operated the logging railroad mentioned in the complaint. The answer of the other defendant stated that he personally owned and operated the road himself. No appropriate issues were tendered by plaintiff or submitted by the court. The name of defendant lumber company gave no indication that it was a railroad company within the meaning of said statute, and the record was silent, except the testimony of plaintiff that some of the cars were labeled with the name of defendant company. *Held*, that it could not be determined on the face of the record whether the fellow servant act was applicab

2. MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—INSTRUCTIONS—ASSUMPTION OF RISK.

Where a master undertook to furnish his laborers transportation on his log train to and from their lodgings, and a servant, while so riding, was injured by reason of a defective car, an instruction, in an action for such injury, that when plaintiff went on the car for the purpose of riding, he assumed the risk of all the dangers incident to riding on a log train, was misleading, and should have further stated that plaintiff assumed no risk, which was incurred by reason of a defective car.

3. SAME—DEFECTIVE CARS.

Where a master undertook to furnish his laborers transportation on his log train to and from the lodgings, it was his further duty to see that such transportation was rendered as reasonably safe as the character of it would admit.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 215.]

4. SAME—RISKS ASSUMED—DEFECTIVE CARS.

Where a master undertakes to furnish his laborers transportation on his log train, a servant going on a loaded car for the purpose of riding assumes only the risks incident to riding on loaded log cars, and not risks resulting from a defective car, if the defects were not obvious.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 554.]

5. SAME—FELLOW SERVANTS—DELEGATION OF DUTY.

Where a master undertook to transport his laborers to and from their quarters on his loaded log cars, care in loading the cars was one of the prime elements of safety, and the duty of properly loading the cars being intrusted to a servant of defendant, the negligent act of such servant in loading the cars, resulting in injury to another servant rendered the employer liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 175.]

Appeal from Superior Court, Edgecombe County; Webb, Judge.

Action by David Tanner against Frank Hitch and another. From a judgment for defendants, plaintiff appeals. New trial ordered.

Action to recover damages for personal injuries tried before Webb, J., and a jury at Fall term, 1905, of Edgecombe superior court. The plaintiff was employed by the day to haul logs for the defendant. His lodgings provided by the defendant were at Speed some five miles from the scene of the logging operations. The defendant transported the plaintiff to and fro daily on his log train, which went to the woods empty in the morning, and returned loaded in the evening. On the last return trip in the evening, the plaintiff and other daily laborers rode on top of the loaded log cars back to their lodgings. There were no other cars on the train. There was evidence tending to prove that one of the standards for holding the logs in place on one of the cars was gone, and its place supplied with a knot or shoulder insufficient for the purpose. The plaintiff had taken his place as usual on this car to return to his lodgings, and the logs tumbled off because of the absence of the corner standard, and threw the plaintiff in front of the car and crushed his leg. There was evidence tending to prove that one Armstrong was general superintendent of all the logging operations, and that one Richardson had charge of the train and its crew, and loaded it with a logging machine, and whose duty it was to see that the cars were safely loaded. The plaintiff had no connection with the operations of the train or loading it. The following issues were submitted: (1) Was the plaintiff injured by the negligence of either defendant? If so injured, by which defendant? (2) Was the plaintiff guilty of contributory negligence? (3) If the plaintiff was so injured, what damage has he sustained? From the judgment rendered the plaintiff appealed.

W. O. Howard, for appellant. J. L. Bridges, for appellees.

BROWN, J. (after stating the case). 1. The contention that the fellow servant act (Revisal 1905, § 2646) applies to the defendant the Frank Hitch Lumber Company cannot be determined upon the face of the record. The two defendants filed separate answers, and that of the lumber company specifically denies that it owned or operated the logging railroad mentioned in the complaint. The answer of Frank Hitch states that he personally owned and operated the road himself. No appropriate issues were tendered by the plaintiff or submitted by the court, and consequently this necessary fact is left undetermined. The act referred to applies only to "any railroad company operating in this state." In order to pass upon this important question, so far as the defendant company is concerned, it is essential to ascertain the truth of this contested fact, and further that its charter should be in evidence to the end that the court may see whether it is a "railroad company"

within the meaning of the statute. The name gives no indication, and the record is silent, except the testimony of the plaintiff that some of the cars were labeled "Frank Hiltch Lumber Company." It does not necessarily follow from the label on the car that the defendant company was operating this road, although, unexplained, it is some evidence of that fact.

2. His honor instructed the jury that when the plaintiff went on the log car for the purpose of riding he assumed the risk of all the dangers incident to riding on a log train. As a general statement of the law this proposition is correct, but it does not go far enough, and was liable to mislead the jury. The judge should have further stated that the plaintiff assumed no risk which was incurred by reason of a defective car. There was evidence tending to prove that one of the standards used to hold the logs securely in place was gone, and there was no evidence that the plaintiff was apprised of the danger, liable to result, when he mounted the loaded car. Inasmuch as it was the master's duty (he having undertaken it according to the plaintiff's contention) to furnish his laborers transportation on his log train to and from the "quarters," it was his further duty to see that such transportation was rendered as reasonably safe as the character of it would admit. While the plaintiff assumed the risks incident to riding on loaded log cars, he did not assume any risk resulting from a defective car. *Hicks v. Manufacturing Co.*, 138 N. C. 319, 50 S. E. 703; *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69. If the plaintiff knew that the standard was gone when he mounted the loaded log car, and if, in consequence thereof, the danger to himself was so obvious that no man of ordinary prudence would have ridden on it, then the plaintiff did assume the risk, and would be guilty of such contributory negligence as would bar a recovery. *Id.*

3. Was Richardson a fellow servant with the plaintiff so as to bar a recovery? The plaintiff contends that Richardson was delegated by Hiltch, the master, to load the cars securely, and that, for this purpose, Richardson was in command of the loading machine and train crew; that the plaintiff was a daily hireling to saw logs in the woods, and had no connection with Richardson's force; that the master assumed the duty to furnish him transportation to and from the "quarters"; that it was therefore the master's duty to see that this transportation was as reasonably safe as the nature of it permitted; that it was the master's duty to see that the logs were secured with reasonable safety on the cars, so that the laborers employed in the woods could ride on them without imminent danger of being thrown off; that this duty was delegated by the master to Richardson to perform, and that the master is liable for Richardson's negligence

in loading a car with one corner standard gone. If such be the facts, we fully sustain the plaintiff's contention. The rigorous rule that once obtained has been greatly modified. The true rule now is more humane, and holds the master liable for negligence in respect to such acts and duties as he is required or assumed to perform without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the master, and he is liable for the manner in which they are performed. *Flike v. Railroad*, 53 N. Y. 549, 13 Am. Rep. 545; *Crispin v. Babbitt*, 81 N. Y. 521, 37 Am. Rep. 521. If the negligent act of one servant is done in the discharge of some positive duty, which the master owed to another servant, then, negligence in the act upon the part of the servant is the negligence of the master. This principle of the law of master and servant is laid down in many adjudications. *Railroad v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad v. Seeley*, 54 Kan. 21, 37 Pac. 104; *Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344; *Coal & Coke Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7, 43 Am. St. Rep. 327; *Justice v. Pa. Co.*, 130 Ind. 321, 30 N. E. 303; *Hough v. Railroad*, 100 U. S. 213, 25 L. Ed. 612. The Supreme Court of Pennsylvania thus expresses it: "Whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be first considered is whether the negligence complained of relates to anything which it was the duty of the master to do. If it does, then the master is liable, for he must see at his peril that his obligations to the workmen are properly discharged." *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159, 23 Am. St. Rep. 160; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 270, 44 Am. Rep. 573.

It follows, therefore, from all the modern authorities that Hiltch's liability for Richardson's alleged negligence is not to be determined by the latter's authority to hire and discharge hands, or to purchase and change machinery, and the like. The true test is whether Richardson was intrusted by Hiltch with the performance of any duty that Hiltch owed the plaintiff. If he was, and failed to perform it, the defendant is liable. This principle applies alike to individuals and corporations. The defendant undertook to transport his laborers to and from their quarters on his loaded log cars. He permitted them to ride on them, and knew it was their only means of transportation. The uncontradicted evidence shows this. It, therefore, became the defendant's duty, of which he could not relieve himself, to make such transportation as reasonably safe as the nature of it permitted. Care in loading the cars was one of the prime elements of safety, as the laborers sat on top of the logs. The duty of properly loading the cars was intrusted to Richardson. If he negligently loaded a log car with logs when one of the corner

standards was gone, with no proper and sufficient substitute in its place, it was a negligent act, for which the master is responsible. If, by reason of such negligence the plaintiff was thrown off and injured, the defendant is plainly liable, unless he can establish such contributory negligence as will bar a recovery.

New trial.

(140 N. C. 472)

NORCUM et al. v. SAVAGE.

(Supreme Court of North Carolina. March 6, 1906.)

1. TRUSTS—CONVEYANCE OF LAND—IMPLIED TRUSTS.

A deed conveying land to complainant's mother having been stolen or lost without registration, another deed was procured by the father, after the mother's death, to be executed to himself by the heirs at law of the grantor. *Held*, that by such conveyance the father held the land under an implied trust for the benefit of complainants, subject to the father's life estate as tenant by the curtesy.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 83, 95.]

2. EVIDENCE—JUDICIAL ADMISSIONS—PLEADINGS.

Where defendants had been permitted to file an amended answer, their original answer containing admissions was admissible against them.

3. SAME—ADMISSIONS AGAINST INTEREST.

A declaration of P., then in possession of the land in controversy, that a deed executed to his wife, then deceased, had been lost or stolen, and that he did not know how he could get another, was admissible as a declaration against interest in disparagement of his title, and competent as against defendants, who claimed under a deed to P. by the heirs of the grantor of P.'s wife.

4. EXECUTION—ESTATE CONVEYED.

Where, at the time of a sale of land under execution against P., his only estate in the land was a curtesy interest, such interest alone passed to the purchaser in case P.'s marriage was prior to the act of 1848, relating to the sale of such interests on execution, so that a reconveyance of the property by the purchaser to P. conveyed nothing more than the same interest.

5. ADVERSE POSSESSION—COLOR OF TITLE—LIMITATIONS—OPERATION OF STATUTE.

Where the father of both complainants and defendants had a curtesy interest in certain land, which was the greatest estate transferred by a deed to the father, the statute of limitations did not begin to run against complainants' interest in the land until the father's death, though the deed operated as color of title.

6. SAME—COVERTURE—DISABILITY—STATUTES—REPEAL.

The repeal of the disability of coverture by Act 1899 was not retroactive, but, by its terms (Revisal 1905, § 363), no adverse possession prior to February 13, 1899, could be counted against a married woman.

7. TRUSTS—ENFORCEMENT—LIMITATIONS.

An action, in so far as it seeks to have a trust declared and a conveyance by the defendants, can be barred only after the lapse of 10 years.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 568-573.]

53 S.E.—19

Appeal from Superior Court, Gates County; Ward, Judge.

Action by Clara Norcum and others against R. T. Savage, administrator, and others. From a judgment in favor of plaintiffs, defendant Savage appeals. Affirmed.

George Cowper, for appellant. W. M. Bond, L. L. Smith, and H. S. Ward, for appellees.

CLARK, C. J. The feme plaintiffs are the children of J. H. Parker by his first wife, Frances. The defendants are his children by his second wife. The jury found that the deed to Frances, who bought and paid for the land, was stolen or lost without registration. It was not controverted that after her death J. H. Parker procured another deed for the land to be executed to himself by the heirs at law of the grantor. By such conveyance J. H. Parker held the land, by implication of law, as trustee for the plaintiffs, subject to his life estate as tenant by the curtesy. *Flanner v. Butler*, 131 N. C. 157, 42 S. E. 547.

Exceptions 1 and 2 are to the admission against the defendants of certain sections in their original answer, they having been allowed to file an amended answer; but the exceptions cannot be sustained. *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33; *Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170; *Guy v. Manuel*, 89 N. C. 83; *Adams v. Utley*, 87 N. C. 356.

The third exception is to the testimony of a disinterested witness that he heard J. H. Parker say that the aforesaid deed to Frances had been stolen or lost, and that he did not know how he could get another. This was a declaration against interest made by a party in possession in disparagement of his title, and the defendants claim under him. It is competent against them. *Shaffer v. Gaynor*, 117 N. C. 17, 23 S. E. 154.

Execution against J. H. Parker in 1869 and sale thereunder, and a subsequent conveyance back by purchaser to him, were shown; but the seven-year statute of adverse possession would not begin to run against the plaintiffs till his death, for at such execution sale only his tenancy by the curtesy passed (and not even that if his marriage was subsequent to the act of 1848), and, of course, the deed by the purchaser back to him could convey no more. If the latter was color of title, still the statute could not begin to run against the plaintiffs till his death, since they could have no claim to recover possession till then. *Everett v. Newton*, 118 N. C. 919, 23 S. E. 961. At the time of their father's death, both plaintiffs were married. The repeal of the disability of coverture by the act of 1899 was not retroactive. By its terms no adverse possession, prior to 13th February, 1899, should be counted against a married woman. Revisal 1905, § 363.

The action, so far as it seeks to have the trust declared and a conveyance by the de-

fendants, would be barred only by the lapse of 10 years (Norton v. McDevit, 122 N. C. 759, 80 S. E. 24), which time began to run against the plaintiffs by the above statute on 18th February, 1899.

No error.

(141 N. C. 736)

STATE v. ATLANTIC & N. C. R. CO.
(Supreme Court of North Carolina. March 6, 1906.)

1. RAILROADS—RIGHTS IN STREETS—LICENSE.

In the absence of an express power in the charter of a city to grant a permanent easement in a street, a license granted to a railroad company to lay tracks and operate trains in a street cannot be construed as a grant of a permanent easement.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 195.]

2. MUNICIPAL CORPORATIONS—ORDINANCES—POLICE POWER—RAILROADS—OPERATION IN STREET—REGULATION.

Where a contract between a city and a railroad company amounted merely to a license granted to the railroad company to lay tracks and run its cars on a city street, the city was not thereby restricted in the exercise of its police power to pass a subsequent ordinance regulating the operation of trains on the street and providing that no engine or train shall be stopped on the street, except at the foot of the same for the reception and delivery of freight.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1486.]

3. RAILROADS—OPERATION—ORDINANCES—VIOLATION.

The shifting of railroad cars in a city street for the making up of a train constituted a violation of an ordinance providing that no engine or train shall be stopped on any street, except at the foot of the same for the reception and delivery of freight.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 198, 199, 778.]

Appeal from Superior Court, Craven County; E. B. Jones, Judge.

The Atlantic & North Carolina Railroad Company was convicted of violating a city ordinance, and it appeals. Affirmed.

The defendant corporation is charged with violating an ordinance of the city of Newbern which provides "that it shall be unlawful for any corporation or person or employé to operate any engine, train, or railroad cars upon any railroad track upon the streets of the city of Newbern, in any manner in violation of the terms of the contract subsisting between the said city of Newbern and the railroad company or corporation, between whom and the city a contract was made, now remaining in force, under which the said railroad company was permitted to lay its tracks upon the said streets of the city of Newbern, * * * and for each violation of said terms the person or corporation * * * shall be fined for each offense the sum of \$50." By section 98 of the ordinance of said city it is provided "that no engine, locomotive or car or cars shall be stopped on any railroad or on any street in the city of Newbern south of Johnson

street and south of Queen street, from its intersection with Johnson street westwardly to the limits of the city, except at a depot for the purpose of receiving and delivering freight at such depot." For a violation of the ordinance a fine of \$50 is imposed. The case was carried by appeal to the superior court, and from an adverse verdict and judgment the defendant appealed to this court.

Simmons & Ward, for appellant. The Attorney General, for the State.

CONNOR, J. It was not denied that defendant, at the time charged in the complaint, was engaged in shifting cars on its track and sidings, on the streets of the city, within the prohibited limits. Defendant contended that in doing so it was exercising a right secured to it by a contract entered into between the city and itself on the 12th day of April, 1856. The contract was introduced in evidence. It appears from an examination of its provisions that the city granted to the defendant a right of way in and through Hancock street from the north side of Queen street to the channel of Trent river. It was provided "that there shall be only one track of road except such branch or branches as may be required for the discharge of freight at the river Trent and for connecting with the several lines near the depot at the head of Hancock street." Following several other provisions, not material to the decision of this appeal, is the following: "Nor shall said engine or train be stopped on said streets, except at the foot of the same for the reception or delivery of freight." The state introduced testimony tending to show a violation of the ordinance. Mr. Whitford, who was in charge of the engine at the time of the alleged violation, was introduced by defendant, and, after describing the manner in which he was handling the train, said: "We were shifting cars, not unloading them. We were locating loaded cars in the train that was going to Morehead City. We were not receiving or delivering freight." Mr. Davis, who was the agent at the freight warehouse at foot of Hancock street, testifying for defendant, said that on the day of the conduct of which complaint is made "they were making up freight on train for Morehead City." His honor, at the request of the defendant, instructed the jury that "the contract and ordinance authorize such sidings and such stopping of engines and cars as is reasonably necessary in receiving and delivering freight at the warehouse at the foot of Hancock street, either in whole car loads or less than car loads, and if the defendant has used the street only for this purpose the jury shall find the defendant not guilty," to which he added the words, "Provided, if you find that the defendant could shift somewhere else, you should still find the defendant guilty." To this defendant excepted.

The case was tried below and argued in this court upon the assumption that the contract of April, 1856, restricted the power of the city of Newbern to make and enforce ordinances controlling, by reasonable limitation, the manner in which the defendant should operate its trains on Hancock street. It is exceedingly doubtful whether such is a correct view of the law in that respect. Without bringing into question the power of the commissioners of a town to grant a license to a railroad company to lay a track upon and to that extent use the streets, we think it clear that, in the absence of an express power in the charter to do so, such license cannot be construed into a grant of a permanent easement. As the contract appears to us, a license to lay the track and run the cars thereon is given. The corporation in consideration thereof makes certain stipulations with the city, one of which is that "no engine or train shall be stopped on said street, except at the foot of the same for the reception and delivery of freight." We do not think that either the language by which the license is given, or the stipulation in regard to its use, affects the right of power of the city to regulate the movement of trains on the street. This right is inherent in the city, as a portion of the police power, conferred by the state, and cannot be sold or bartered away. Any and all franchises or privileges conferred upon persons or corporations respecting the use of the streets, wharves, parks, or other public property of the city are conferred and accepted subject to the police power vested in the city. For instance, the defendant company stipulates that it will not run its trains through said streets at a higher rate of speed than three miles an hour. Can it be doubted that, even if the language be construed into the grant of the privileges of running its trains at that rate of speed, the governing body of the city could, if in their judgment such speed was dangerous, restrict it to some other reasonable rate.

The law is thus laid down by Judge Elliott: "The grant of a right to use a street does not by any means imply that the municipality surrenders the right to make needful police regulations, nor does it authorize the company to unnecessarily obstruct the street or to negligently operate its road. The right to make necessary rules for the safety of the public is a legislative power, and is not surrendered, if, indeed, it can be capable of surrender." *Roads & Streets*, § 479. Mr. Justice Brown, in *Wabash R. R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87, says: "Indeed, the general principle that the legislative power of a city may control and improve its streets, and that such power, when duly exercised by ordinances, will override any license previously given by which the

control of a certain street has been surrendered to any individual or corporation, is so well established, both by the cases in this court and in the courts of the several states, that a reference to the leading authorities upon the subject is sufficient." In *Baltimore v. Baltimore Trust Co.*, 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160, it appeared that the city council in 1891 passed an ordinance authorizing the North Avenue Railway Company to lay a double track on Lexington street. Thereafter an ordinance was passed revoking the first and restricting the road to one track. Peckham, J., says that it is unnecessary to discuss the question whether the council had the power to grant the license, and, if so, whether the ordinance constituted a contract. Concluding he says: "It is sufficient for the decision of this case to hold that the direction to lay but one track through Lexington street, between the points mentioned, did not substantially change the terms of the contract, and was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of that street by the railroad company, and that the original contract (assuming that one existed) was entered into subject to the right of the city to adopt such a regulation." In *Smith on Mun. Corp.* § 1288, it is said: "The powers of a municipal corporation in respect to opening, improving, and controlling its streets are held in trust for the benefit of the public and cannot be surrendered by contract to private persons, or to a corporation, by resolution of the common council, or in any other manner." The general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions. *Railroad v. Defiance*, supra.

In the light of these and many other authorities of uniform import, we hold that in no aspect of the testimony could the judge below have held that the defendant was not guilty. Treating the license given by the instrument of April, 1856, as a contract, only for the purpose of argument, we do not think that it in any degree restricted the power of the city to make such rules and regulations controlling the use of the streets by the defendant as the safety and comfort of the citizens of Newbern demanded. *Glenn v. Commissioners*, 139 N. C. 412, 52 S. E. 58. The defendant's witnesses showed clearly that the train was not unloading or receiving freight, but shifting cars in making up a train for Morehead City. His honor's charge was more favorable than the testimony warranted.

The judgment must be: No error.

(140 N. C. 485)

ALSTON et al. v. CONNELL et al.
(Supreme Court of North Carolina. March 6, 1906.)

1. VENDOR AND PURCHASER — CONTRACT OF SALE—CONSTRUCTION—OPTIONS.

The beneficiary in a deed of trust purchased the property on foreclosure, and immediately thereafter executed an instrument certifying that he had purchased the property on that day, and thereby bound himself, his heirs, and assigns, at any time prior to December 1, 1899, to sell the property to whom complainant should direct. *Held*, that such instrument amounted only to an option, under which complainant was entitled to purchase the farm in case he exercised the same prior to the date specified.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 23.]

2. FRAUDS, STATUTE OF—ESTOPPEL.

The purchaser of land on foreclosure of a deed of trust executed to complainant an option under which complainant was entitled to purchase the land for a specified price at any time prior to December 1, 1899. Complainant had arranged or was arranging to raise the money within the time required, when he was requested by defendant to postpone his tender for a year, or until January 1, 1901, to which plaintiff agreed, and within the time fixed by the postponement plaintiff tendered the amount required to complete the purchase, which was refused. *Held*, that defendant by requesting a postponement of the tender thereby impliedly recognized the validity of his contract to sell, and was estopped thereafter to claim that the agreement was unenforceable under the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 351.]

3. ESTOPPEL—PLEADING.

Where all the facts sufficient to establish an estoppel were pleaded, it was immaterial that the complaint did not claim an estoppel in terms.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 302.]

Appeal from Superior Court, Warren County; Jones, Judge.

Action by P. G. Alston and others against W. A. Connell and others. From a judgment in favor of complainants, defendants appeal. *Affirmed*.

The facts pertinent to an understanding of the case, admitted and established by the verdict, are as follows: Prior to March 7, 1892, Mrs. Ruina Alston, having become indebted to Thomas Connell in the sum of \$2,440, executed a mortgage to him to secure said indebtedness on her plantation, known as "Tusculum," containing about 600 acres. Being unable to pay, on March 7, 1892, she conveyed the property to her son, R. W. Alston, for \$500, to be paid to herself, and the assumption by R. W. Alston of the indebtedness to Thomas Connell. This was assented to by Thomas Connell, and thereupon R. W. Alston, grantee in the deed, executed a mortgage in the form of a deed of trust to Thomas Connell, Jr., to secure the debt due to his father, Thomas Connell. After the execution of this deed of trust, to wit, on April 17, 1897, R. W. Alston, finding he could not pay this debt, conveyed the property, charged with this indebtedness,

to Mrs. B. C. Alston, wife of his brother, T. G. Alston. The grantee undertook to pay off the indebtedness—Thomas Connell, the creditor assenting to the arrangement—and thereupon the grantee, her husband, P. G. Alston, and Thomas Connell entered into a contract as follows: "This agreement, made and entered into this 17th day of April, 1897, between P. G. Alston and wife, Bettie Alston, of Franklin county, N. C., parties of the first part, and Thomas Connell, of Warren county, N. C., witnesseth: (1) That the parties of the first part have this day put said Connell in possession of Mrs. R. T. Alston's 600-acre home place in Fishing Creek township, in Warren county, the same being the tract of land which said Connell now holds a deed of trust mortgage against, which was made by R. W. Alston and wife, Pattie; and they being unable to repair the dwelling house, pay insurance and taxes, build tenant houses, etc., they hereby agree that said Connell proceed at once to reroof the back wing of dwelling and repair windows and have dwelling insured in favor of said Connell, to further secure the interest of the amount due him on said land, interest, unpaid taxes, and aforesaid house repairs, insurance fees, etc. (2) That said Connell's term of possession begins April 20, 1897, and ends January 1, 1901, in which time he shall have full landlord's power as to renting and collecting, and that he shall pay all rents coming into his hands on the above-mentioned claim which he holds against said estate, at the time he receives said rents. It is further understood that the rents of 1897 are all, or nearly all, spent by P. G. Alston prior to Connell's becoming landlord. (3) That parties of the first part agree to build and fully complete the two double tenant houses, with rock or brick chimneys, by December 1, 1897. But, should they fail to do so, they hereby empower said Connell to build them and charge the estate with the amount they cost to complete. Parties of the first part do further agree that on or before January 1, 1898, they will reduce the whole amount of indebtedness due to said Connell to \$2,500. (4) That should said P. G. Alston and Bettie Alston fail to fully comply as agreed, then they hereby authorize said Thomas Connell, without further objection or complaint, to have said land and premises sold under the trust deed securing said indebtedness on said land and premises, at any time said Connell sees proper to do so. By which said Connell is hereby authorized. Witness our hands and seals this 20th April, 1897. P. G. Alston, Jr. [Seal.] B. C. Alston. [Seal.]"

In pursuance of this agreement Thomas Connell entered into possession of the property and lived there under the agreement till December 1, 1898, when, under an allegation that default had been made in the conditions of the above agreement, he caused the trustee to advertise the property for sale,

and on the day of sale, December 5, 1898, agreed with P. G. Alston that if the sale were allowed to proceed he would buy in the land, take title thereto, and convey to P. G. Alston on the payment to him of \$3,502, the amount of the mortgage debt and interest, and including, in addition thereto, \$250 for repairs on the place. Thereupon the sale took place, and Thomas Connell bought in the farm of 600 acres for \$2,000, took a deed therefor from Thomas Connell, Jr., the trustee, and entered into possession of the property. After this agreement and sale, permitted to proceed by reason thereof, the parties drew up a paper writing, and Thomas Connell, in pursuance of this arrangement, executed and delivered to P. G. Alston a paper writing as follows:

"This is to certify that I, Thomas Connell, did on this the 5th day of December, 1898, purchase the 600-acre tract known as the 'Tusculum Farm,' and doth thereby bind himself, heirs, and assigns, at any time previous to December 1, 1899, to sell the same to whom P. G. Alston may direct for \$3,502. Witness, etc. Thomas Connell. [Seal.]

"Two hundred and fifty dollars of which is for improvements for 1899, which, if not used, or any part thereof, is to be returned to the said P. G. Alston. [Signed] Thomas Connell."

Prior to the time limited in this contract P. G. Alston had arranged or was arranging to procure and pay the sum stipulated, when the defendant Thomas Connell requested that the time for payment of the same be extended to January 1, 1901. This was assented to by P. G. Alston, and before the time fixed the plaintiff, having the amount of money in hand, went to Thomas Connell and offered him the full amount due. This was refused. Thomas Connell afterwards died, and P. G. Alston instituted this action to enforce the obligation of the contract against his heirs and personal representatives on the facts here stated. Pending the action, B. C. Alston, wife of P. G. Alston, having died, her children and heirs at law were made parties plaintiff and adopted the complaint already filed. There was an answer admitting some and denying other allegations of the complaint, and on issue joined there was a verdict as follows: "(1) Was Ruina T. Alston, prior to March 7, 1892, the owner of the land in controversy, and did she convey the same to R. W. Alston as alleged in the complaint? Yes. (2) Did R. W. Alston and wife, on March 7, 1892, execute to Thomas Connell, Jr., the deed of trust mentioned in paragraph 5 of the complaint? Yes. (3) Did the plaintiffs and those under whom they claim acquire the equity of redemption of R. W. Alston and wife for consideration prior to the sale made by the trustee as alleged in the complaint? Yes. (4) Did Thomas Connell, Sr., buy in the land in controversy at the sale made by the trustee on December 5, 1898, in pursuance

of an arrangement entered into with P. G. Alston, Jr., before the sale, agreeably to the terms of the instrument set out in the complaint and referred to in the evidence as 'Exhibit A'? Yes. (5) Did P. G. Alston, Jr., prior to December 1, 1899, offer to pay to Thomas Connell the said \$3,502 in accordance with the terms of said contract and agreement? * * * (6) Was there any written renewal or extension of said paper writing before December 1, 1899? No. (7) Did Thomas Connell, at his own request, prior to December 1, 1899, verbally extend the time for the payment of the \$3,502 to January 1, 1901? Yes. (8) If said time was extended to January 1, 1901, verbally by Thomas Connell, was there any consideration for it? Yes. (9) Did P. G. Alston, being ready and able to do so, on the 31st day of December, 1900, offer to pay to Thomas Connell, Sr., the said \$3,502, and did said Connell refuse to accept the same? Yes." Upon the verdict there was judgment for the plaintiffs, and the defendants excepted and appealed.

Walter A. Montgomery and T. T. Hicks, for appellants. F. S. Sprull and T. W. Bickett, for appellees.

HOKE, J. (after stating the case). The heirs at law and personal representatives of B. C. Alston, wife of P. G. Alston, the original plaintiff, having been made parties plaintiff, it may be, on the facts set out in the complaint and indicated in the testimony, that these heirs might successfully assert a right to redeem the property, either on the idea of a parol trust or more simply by holding that, under all the facts and circumstances suggested, the relationship of mortgagor and mortgagee had never terminated between them and Thomas Connell, the ancestor of the defendants and under whom they claim. This position, however, is not open to the plaintiffs in the present condition of the record, for the reason that the suit was originally instituted by P. G. Alston, and complaint filed, seeking to enforce his rights under his written agreement of date December 5, 1898, and under which Thomas Connell obligates himself to convey the property. The heirs at law of B. C. Alston make themselves parties plaintiff and seek the same relief, and while the pleadings set forth the entire facts, and some evidence is offered tending to sustain a claim in behalf of these heirs, the issues framed and passed upon are not decisive of those rights, but are addressed to the question of this written agreement and the facts especially bearing thereon, and are only determinative of the interest arising thereunder. The rights of the parties, therefore, are considered as they may arise upon this written paper, and the issues determined in reference to the same. On that question the court is of opinion that this paper amounts only to an option by which Thomas Connell on December 5, 1898, bound himself to P. G. Alston to convey the

600-acre "Tusculum Farm" on the payment to him of \$3,502 at any time previous to December 1, 1899. P. G. Alston had never taken the place of debtor to Thomas Connell, and neither in this nor any other paper, so far as we can discover, has P. G. Alston ever obligated himself to pay this or any other sum. There is consideration for the agreement in permitting Thomas Connell to proceed with the sale and buy the property at \$2,000, in apparent violation of the agreement between himself and P. G. and Bettie Alston, and other considerations might be suggested; but, P. G. Alston not having promised to pay, we agree with the defendants that this was a unilateral contract, commonly called "an option," a proposition to sell, binding and irrevocable by the owner till the stipulated time expired, but in which time was of the essence under ordinary circumstances, and in cases like the present requiring payment of the price as a condition precedent. 21 Am. & Eng. Enc. (2d Ed.) 931, and authorities cited.

We do not conclude, however, with the defendants, that the plaintiffs are barred of relief by reason of the statute of frauds; for, if it be conceded that this statute under ordinary conditions would avail the defendants, the court is of opinion that on this paper, and the facts established by the verdict, the defendants are estopped from pleading the statute and from denying their obligation under the contract on that ground. These facts, so established, declare that the plaintiff had arranged or was arranging to raise the money within the time required by the option, when he was notified and requested by the defendant that a postponement was desired for a year, till January 1, 1901, and the plaintiff agreed to the proposition. Within the time fixed by the postponement the plaintiff went to the defendant with the money, tendering the amount required by the agreement, and the same was refused. The plaintiff, having consented to the delay at the request of Thomas Connell, will be taken to have been ready and willing to perform at the time stipulated in the written agreement. Having tendered the amount due within the period fixed by the postponement, he is in no default, and the extension having been given at Thomas Connell's request and for his convenience, when the extended agreement itself and all the circumstances clearly implied that he regarded it as a valid and binding contract and that he intended to live up to its terms, the law will not permit him now to repudiate its obligations, invoke for his protection the statute of frauds, and defeat the plaintiff's recovery, who has forborne a timely performance by reason of Thomas Connell's request and in reasonable reliance on his assurance.

This position is in accord with sound principles of justice and is well sustained by authority. In *Hickman v. Haines*, Law Reports 10 C. P., at page 603, it is said: "The proposition that one party to a contract

should thus discharge himself from his own obligations by inducing the other party to give him time for their performance is, to say the least, very startling, and, if well founded, will enable the defendants in this case to make use of the statute of frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the court to countenance such a doctrine." Again, at page 605: "The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to do by the statute of frauds. But, so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery, in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it." And at page 607: "In conclusion, we think that, although the plaintiff assented to the defendant's request not to deliver the 25 tons of iron in question in June, he was in truth ready and willing then to deliver them, and that the defendants are at all events estopped from averring the contrary." In *Clarno v. Grayson*, 30 Or. 111, 46 Pac. 423, it is said "that an owner of land, who would insist upon strict performance by a prospective purchaser as a condition precedent to an action by the latter for the specific performance of an option to purchase, must not himself be the cause of the breach"; and in the opinion of the court by Wolverton, J., at page 127 of 30 Or., page 431 of 46 Pac., it is said: "Another proposition insisted upon, which is sound in law and based on good morals, is that he who would insist on strict performance must himself not be the cause of the breach. His own wrong can never operate under the sanction of law to his advantage. This may be regarded as fundamental, and no authorities are necessary to support it." In *Barton v. Gray*, 57 Mich. 630, 24 N. W. 633, it is held that "the defense urged is not open to defendant for another reason: No person can be heard to complain of an injury caused by the act or conduct of a party to which he has consented, and no one who causes or sanctions the breach of an agreement can recover damages for its nonperformance or interpose it as a defense to an action upon the contract." In *Thomson v. Poor*, 147 N. Y., at page 409, 42 N. E., at page 15, Andrews, J., says: "It makes no difference, as we contend, what the character of the original contract may be, whether one within or without the statute of frauds, the rule is well understood that, if there is forbearance at the request of a party, the latter is precluded from insisting on a performance at the time originally fixed by the contract as

a period for action." The case of *Sheridan v. Nation*, 159 Mo. 27, 59 S. W. 972, is very similar in principle to the one before us, and the opinion also finds support in *Swain v. Seamens*, 76 U. S. 254, 19 L. Ed. 554.

A line of cases in our own state in reference to renewing a contract obligation barred by the statute of limitations, has strong analogy to the decision we now make. The statute provides that such an obligation can only be renewed by a writing signed by the party charged. In *Haymore v. Commissioners*, 85 N. C. 268, it is held that "the defendants will not be allowed to set up the statute of limitations in bar of the plaintiff's claim, when the delay, which would otherwise give operation to the statute, has been induced by the request of the defendants expressing or implying their engagement not to plead it." There are many other authorities with us to like effect. We hold that on principle and authority the defendants are estopped from pleading the statute of frauds in this case or from denying their obligation under the contract, and the plaintiffs are entitled to the decree and specific performance as prayed for in the complaint.

It has been suggested that the estoppel is not pleaded, but this suggestion is without force. There is some doubt if a plaintiff is required to plead an estoppel, in order to avail himself of it, except in reply to a counterclaim. *Stancill v. James*, 126 N. C. 190, 35 S. E. 245. But the more complete answer is that all the facts which go to make out the estoppel are set out. Everything does appear in the pleading which goes to make out this position, except simply claiming it as an estoppel in terms; and this is not of the substance.

There is no reversible error in the record, and the judgment below is affirmed.

CLARK, C. J., did not sit on the hearing of this appeal.

(140 N. C. 459)

SLEDGE v. WELDON LUMBER CO.
(Supreme Court of North Carolina. March 6, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where, in an action for injuries to a servant by being thrown from a logging train on which he was riding, defendant claimed that the injury was the result of plaintiff's contributory negligence in falling asleep, an instruction that if plaintiff was asleep, and was thrown off the car by a sudden jerk caused by the negligence of the engineer or by the pulling out of the slack, and the slack was the result of having no brakes on the cars, the jury should answer that plaintiff was not guilty of contributory negligence, was erroneous, since plaintiff would be guilty of contributory negligence if his act of going to sleep on a moving car concurred with the negligence of defendant as the proximate cause, or one of the proximate causes, of the injury.

2. EVIDENCE—EXPECTANCY OF LIFE—MORTUARY TABLES—CONCLUSIVENESS.

Mortality tables being only prima facie evidence of life expectancy, under Revision of 1905, § 1628, providing that such tables shall be received "as evidence, with other evidence, as to the health, constitution, and habits" of a person whose expectancy is in issue, it was error to charge that in determining the decreased earning capacity of a person injured the jury, having determined his decreased earning capacity for a year, should multiply the same by his expectancy as fixed by the tables, thereby making the tables conclusive as to plaintiff's expectancy of life.

Appeal from Superior Court, Northampton County; Peebles, Judge.

Action by W. Sledge against the Weldon Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff alleged that, being an employé of defendant company, working on a logging train in September, 1904, he was permanently injured by the actionable negligence of the defendant company, and demands damage for his injuries; the negligence imputed to defendant being negligent conduct of the engineer, who was also conductor of the train and who stood towards the plaintiff in the position of vice principal, and, further, by the defective condition of the cars and make-up of the train, for that there were no brakes on the logging cars, which resulted in allowing "slack" in the train to such an extent that it greatly enhanced the danger of employes. The defendant denied all negligence, and claimed there was contributory negligence in that, the plaintiff, who was placed on one of the cars, charged with certain duties, went to sleep while the train was in motion, and that his negligence in this respect was the proximate cause of the injury. Issues were submitted to the jury on the question of the defendant's negligence, contributory negligence on the part of the plaintiff, and as to damage. There was evidence of the plaintiff tending to support the allegations of the complaint and also evidence tending to support the defense. On a verdict for the plaintiff, there was a motion for a new trial for exceptions noted during the progress of the cause, which was overruled. Judgment for the plaintiff. The defendant excepted and appealed.

E. L. Travis and W. E. Daniel, for appellant. Gay & Midyette and Peebles & Harris, for appellee.

HOKE, J. (after stating the case). Without adverting to the exceptions noted in determining the first issue, and which may not arise on a second trial, the court is of the opinion that the defendant is entitled to a new trial for errors in the charge on the issue as to contributory negligence and on the issue as to damages.

On the second issue the court charged the jury as follows: "If the plaintiff was asleep, and was thrown off the car by a sudden jerk caused by the negligence of the en-

gineer, or by pulling out the slack, and that said slack was the result of having no brakes on the cars, then you should answer the second issue 'No.' If the negligence of the plaintiff in going to sleep on a moving train concurred with the defendant's negligence as the proximate cause of the injury, or one of them, this would be an instance within the very definition of contributory negligence, and in such case the issue addressed to that question should be answered "Yes." Beach, Cont. Neg. § 7; 7 Am. & Eng. Enc. 373. This error would seem to have been an inadvertence on the part of the judge below; but it appears as an exception in the record, and is material, and necessitates a new trial of the issue. There was an issue framed on the question whether, notwithstanding the negligence of the plaintiff in going to sleep, the defendant could not then have avoided the result, and there is evidence tending to support such a claim. The jury, however, were not required to respond to this issue, and the part of the charge here referred to was confined to the issue of contributory negligence, and the error is not cured by any explanation.

Again, on the issue as to damages, the court told the jury that, having determined the decreased earning capacity for a year, they must multiply that sum by $41\frac{1}{2}$, the expectancy of the plaintiff as fixed by the mortuary tables. The error here consists in making the mortuary tables conclusive as to the plaintiff's expectancy, whereas, by the very language of the statute, they are only evidential, to be considered with all other testimony relevant to the issue. Revisal 1906, § 1626, says that these tables shall be received "as evidence, with other evidence, as to the health, constitution and habits of such person, of such expectancy. * * *

There will be a new trial on all the issues, and it is so ordered.

New trial.

(140 N. C. 446)

DAUGHERTY et ux v. TAYLOR et ux.

(Supreme Court of North Carolina. March 6, 1906.)

EVIDENCE—DECLARATIONS.

Where D. at the time he made certain declarations with reference to land in controversy, and at the time of the trial, had no interest in the land, and was joined as a party merely because his wife was plaintiff in the action, and neither his wife nor defendant derived their title from him, his declarations with reference to the title, not authorized by his wife, were inadmissible against her.

Appeal from Superior Court, Craven County; Bryan, Judge.

Action by H. P. Daugherty and wife against B. R. Taylor and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. W. Clark, for appellants. D. L. Ward and Simmons & Ward, for appellees.

CLARK, C. J. In 1870 the plaintiff H. P. Daugherty bought a tract of land containing 200 acres, built a house upon it, and has lived there ever since. In 1878 this tract was sold under execution, and was bought by George A. Richardson, under an agreement to reconvey to said Daugherty whenever he repaid him. It does not appear whether the money or any part of it has ever been repaid. In 1894 Richardson conveyed about 160 acres of this land to Elizabeth Daugherty, wife of H. P. Daugherty. Two years later Richardson executed a deed of gift of the remaining 40 acres to his daughter, the defendant Beulah Taylor. The controversy is as to the location of the "mouth of Lot's Branch," a material call in both of said deeds.

The sole exception is to this instruction, given at request of plaintiff: "The jury should not consider any declaration made by H. P. Daugherty after the deed from the sheriff to Richardson, unless they further find that such declarations were authorized by Elizabeth Daugherty." In this there was no error. H. P. Daugherty had then and had at the trial no interest in the land, and is only joined because his wife is plaintiff in the action; and his declarations, unauthorized by her, cannot be evidence against her. It is true that there is evidence that H. P. Daugherty made such declarations (denied by him on the trial) in 1893, after a deed had been executed by said Richardson and H. P. Daugherty and his wife for the timber on such tract, and before the land was conveyed to Daugherty's wife by Richardson, and the defendant contends that his declaration was competent against him as a cestui que trust, in possession. But neither the plaintiff Betty Daugherty nor the defendant Beulah Taylor derive their title under H. P. Daugherty, nor is he setting up any title to himself in this action. His declarations are not competent against his wife unless he was acting by her authority, and, indeed, at that time she had no title herself. If H. P. Daugherty held under a parol agreement from Richardson to reconvey upon repayment of the purchase money, there is no evidence that the money had been repaid, and his wife does not hold under any title derived from him, nor is she in privity with such title.

No error.

(140 N. C. 480)

PINCUS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. March 6, 1906.)

1. CARRIERS — PASSENGERS — WHAT CONSTITUTES THE RELATION.

One having a mileage book good on a railroad and undertaking to board a train by passing along the platform of a freight warehouse where he had been to check his trunks by the invitation of the railroad, was a passenger.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 984-989.]

2. SAME — STATIONS AND GROUNDS — DEFECTIVE PLATFORM.

A carrier owed one attempting to board a train the duty of providing a safe platform, though the station was not a regular one, but merely a flag station.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1142-1151.]

Appeal from Superior Court, Edgecombe County; Webb, Judge.

Action by H. Pincus against the Atlantic Coast Line Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Thorne, Gilliam & Gilliam, for appellant. John L. Bridgers, for appellee.

BROWN, J. The testimony most favorable to plaintiff tends to prove that he arrived at Sharpsburg on defendant's railroad, with his trunks, which were placed with checks on them in defendant's warehouse by direction of Dawes, defendant's agent, and they remained in custody of defendant while plaintiff was at Sharpsburg, which was from one train to the next south-bound train. The warehouse was on defendant's right of way, and used by defendant for freight purposes. Defendant's agent testified that passengers' baggage was stored and handled in the warehouse on this platform. Plaintiff's baggage had been previously stored there, and he had gotten on and off the train there. Shortly before arrival of the next train, defendant's agent sent his clerk with plaintiff to this warehouse for the purpose of rechecking the trunks to Elm City. After rechecking the trunks, plaintiff started to take the approaching train. It was at night; there was no light on the platform, and it was incumbered with cotton. Plaintiff stepped into a hole in the platform, and was injured. Plaintiff had a mileage book good on defendant's road.

If these facts are true plaintiff was a passenger when injured. He had a right to seek his baggage and recheck it. It matters not whether Sharpsburg was a regular or a flag station, the defendant owed plaintiff the duty to provide a safe platform, especially as plaintiff entered on it at invitation of defendant's agent for a legitimate purpose. *Daniel v. Railroad*, 117 N. C. 592, 23 S. E. 327. The duty of a railroad company in respect to keeping safe station premises extends to all who rightfully come upon the

premises in pursuance of the invitation which it holds out to the public, and embraces all who come there on legitimate business to be transacted with its agent. *Wood on Railways*, pp. 310, 1341, 1349; *Beard v. Railroad*, 48 Vt. 101; 6 Cyc. 605, 610. There was, in our opinion, sufficient evidence of negligence to be submitted to the jury under appropriate issues.

It is contended that there is a variance between the allegations of the complaint and the proof. We do not think the alleged variance sufficient to justify a nonsuit. It may be well to amend the complaint, although we do not decide that it is insufficient as it is. The nonsuit is set aside.

New trial.

(140 N. C. 480)

FULLER v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. March 6, 1906.)

CARRIERS—CARRIAGE OF LIVE STOCK—NEGLECT—ACTION—INSTRUCTIONS.

In an action for injuries to a horse alleged to have taken cold during a night that it was kept in a car, an instruction that if the carrier had stables and knew that it would not be able to forward the horse, and kept it in a car all night, it was negligence, was erroneous as invading the province of the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 961, 962.]

Appeal from Superior Court, Franklin County; Webb, Judge.

Action by R. F. Fuller against the Atlantic Coast Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Civil action tried before Webb, J., and a jury at October term, 1905, of Franklin superior court. The evidence tended to show that on Monday, November 14, 1904, there was delivered to the Atlantic & North Carolina Railroad Company at Newbern a brown mare for shipment to the plaintiff at Springhope. In the course of the transit, she was received by the defendant company at Goldsboro, the junction of the two roads, on the morning of November 15th at 9:30 o'clock, and at 12 o'clock of the same day she was watered, fed, and exercised by one of the employees of the defendant, and was forwarded by the next train to South Rocky Mount, the junction of the main line and the Springhope branch of the defendant's road, where the train arrived at 5:15 o'clock p. m. the same day. There the car in which the mare was shipped from Newbern was placed on the Springhope track, and remained there until 6 o'clock the next morning, when it was taken to Springhope by the first train out from the junction after its arrival. There was no delay in the transportation of the mare after she left Newbern; she having been carried forward by regular trains in due course and delivered to the agent of the

plaintiff at 11 o'clock on Wednesday, November 16th. The car in which the mare was shipped was one of the best felt-lined and ventilated cars in use on the line of the defendant, such as are used for transporting tropical fruits, and she had the car all to herself. There was evidence tending to show that the mare was in good condition when turned over to the plaintiff's agent, and other evidence tending to show the contrary. There was no evidence as to the actual state of the weather during the night of November 15th, when the mare was on the car at South Rocky Mount, where, it is alleged by the plaintiff, she contracted cold which developed into pneumonia, but from which she recovered. This action is brought to recover damages for the injury to the mare alleged to have been caused by the defendant's negligence. The court, among other instructions, gave the following at the request of the plaintiff: "If the jury find that the mare arrived at South Rocky Mount at 5:15 p. m. on November 14th, and that the railroad company had stables at that point, and the company knew that it would not be able to forward the mare to Springhope till the next morning, and kept the horse in its car on the track at South Rocky Mount all night without other food or attention than has been testified to, the company was guilty of negligence; and, if you find that the mare was damaged in consequence of such negligence, you will answer the first issue 'Yes.'" To this instruction the defendant excepted. It is not necessary to refer to the other parts of the charge or to the other exceptions. There was a verdict for the plaintiff, a motion by the defendant for a new trial, which was denied, and a judgment upon the verdict. The defendant excepted and appealed.

F. S. Spruill, for appellant. W. E. Person, for appellee.

WALKER, J. (after stating the case). The instruction given to the jury at the request of the plaintiff was erroneous, as by it the court undertook to decide as matter of law what really was a composite question of law and fact. Whether the animal should have been kept in the car or put in the stable, if the defendant had one at South Rocky Mount, and what food and attention she should have received under the circumstances, were evidently questions of fact for the jury, to be considered by them in passing upon the question of negligence; they being guided in arriving at their conclusion, as to the ultimate fact of negligence, by the charge of the court as to the measure of the defendant's duty. The evidence was not clear as to whether the defendant had a stable at that place; the witness Gordon having been asked the question, "Has the defendant any stock pen or stable in South Rocky Mount?" and answered in the affirmative, but we have treated the instruction as if the ques-

tion had been expressed conjunctively, instead of disjunctively, and have assumed that the defendant had a stable there. The instruction distinctly implies that the mare should have been stabled for the night, otherwise there would have been no use in referring to the stable at all. Whether it was better to have kept her in the car or to have put her in the stable was also a question for the jury, to be considered by them in making up their verdict upon the question of negligence. The facts recited in the instruction did not in law constitute negligence per se, but were no more than evidentiary facts. The jury might have decided that the acts and conduct of the defendant did not cause the sickness of the animal, but that the cold was contracted before she was received by the defendant, or was an unavoidable incident of the journey, and was not attributable to any negligent act or omission of the defendant. Notwithstanding the facts recited, the defendant may have been free from blame. It is true the judge told the jury they must find that the mare was injured in consequence of the negligent acts of the defendant, which he recited in the instruction; but the fault in the charge is that the jury had already been told that certain facts constituted negligence, which the law did not so regard, and which the jury, if properly instructed, may have found did not make out a case of negligence under the circumstances. It is not difficult to see how the jury may have been induced to find that the alleged acts of the defendant recited in the instruction caused the injury when they had been told that the law characterized them as negligent. They might, in such a case, readily impute the injury to the defendant's alleged wrongful acts.

It may be admitted as an axiom that what is negligence is a question of law, and in this case it is the failure to exercise that degree of care which the nature of the situation and the circumstances suggested and required. The approved meaning of the term is the omission to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The duty, thus imposed, is dictated and measured by the particular exigencies of the occasion. The essence of the fault is either in omission or commission; negligence being either active or passive. *Railroad v. Jones*, 95 U. S. 439, 24 L. Ed. 506; *Blythe v. Water Co.*, 11 Exch. 784; *Carter v. Cape Fear Lumber Co.*, 129 N. C. 203, 39 S. E. 823. This embodies what is known as the rule of the prudent man, which we have adopted and we believe most of the courts of this country have recognized and accepted as the best and the true standard by which to gauge responsibility in actions for negligence, and by which to determine whether or not there has been actionable negligence,

If the injury was the natural and proximate consequence of the act complained of. Negligence is defined as the juridical cause of an injury, and therefore actionable or followed by liability to another, when it consists of such an act or omission on the part of a responsible person as in ordinary natural sequence immediately results in such injury. *Basnight v. Railroad*, 111 N. C. 592, 16 S. E. 323; *Wharton*, Neg. § 73. And it should be added, the party complained of must, by the exercise of ordinary care, have been able to foresee that harm or injury would result. *Carter v. Lumber Co.*, 129 N. C. 203, 39 S. E. 828; *Ralford v. Railroad*, 130 N. C. 597, 41 S. E. 806; *Frazier v. Wilkes*, 132 N. C. 487, 43 S. E. 1004; *Railroad v. McEwen*, 49 La. Ann. 1184, 22 South. 675, 38 L. R. A. 134. It is not intended to say that there may not be such facts which, if admitted, established, or proved, will constitute negligence as matter of law. We are not dealing with any such question. It is sufficient in this case to hold that the court should have submitted the case to the jury upon the evidence, and with proper instructions as to what would in law constitute negligence, leaving the jury to find whether there was negligence or not, and, if there was, whether it proximately caused the injury.

New trial.

(140 N. C. 444)

ELLIS v. HARRISON et al.

(Supreme Court of North Carolina. March 6, 1906.)

DESCENT AND DISTRIBUTION — TAKING PER STIRPES OR PER CAPITA.

Revisal 1905, § 132, relating to the distribution of estates of intestates, and providing that if there be neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and those who legally represent them, requires that personalty left by an intestate shall be distributed per capita, when the claimants are in equal degree.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 121, 122.]

Appeal from Superior Court, Franklin County; Webb, Judge.

Action by O. L. Ellis, administrator of the estate of Alexander Harrison, deceased, against W. Harrison and others, to determine the respective interests of defendants to the property of said deceased. From a judgment determining the mode of distribution, defendants Harrison appeal. Affirmed.

Civil action to determine the respective interests of certain claimants to a fund held by the plaintiff as administrator of Alexander Harrison for distribution among his next of kin. The facts material to a determination

of the questions involved, and which are admitted, show that Alexander Harrison died intestate on August 2, 1903, having his domicile in the state of North Carolina, leaving personal estate amounting to several thousand dollars. There was dispute between the parties as to whether the intestate died domiciled in Arkansas or North Carolina, and it was admitted that the law of Arkansas required the distribution to be per capita. The demurrer, however, filed by the children of Mrs. Brown, admits the domicile to have been in North Carolina, and this will be taken as true pro hac vice. The said Alexander Harrison left, him surviving, as his next of kin, Willie and Mary Burt Harrison, two children of a brother who had died before the intestate, and Alexander Brown and five other children of a sister who had also died before the intestate. The two children of the deceased brother claimed that the distribution of the estate should be per stirpes, and the six children of the deceased sister contended that such distribution should be per capita, and this was the single question presented and decided by the court. The court below gave judgment that the distribution be per capita, and the defendants Willie and Mary Burt Harrison excepted and appealed.

W. H. Ruffin, for appellants. T. W. Bickett and W. H. Yarborough, Jr., for appellee.

HOKE, J. (after stating the case). It will be noted that the fund consists solely of personalty, and that the claimants at the time of the intestate's death were, and are now, all in equal degree, the next of kin of said intestate. In such case our statute of distributions (Revisal 1905, § 132) and the uniform construction put upon it by our court require that the fund shall be distributed per capita. *Skinner v. Wynne*, 55 N. C. 41. Representation in this kind of property, when allowed, is only resorted to when it is necessary to bring the claimants to equality of position as next of kin. It is otherwise as to realty. *Clement v. Caudle*, 55 N. C. 82; *Cromartie v. Kemp*, 66 N. C. 382. The decisions cited in support of the distribution per stirpes are all cases involving the division of real estate. The case of *Crump v. Faucett*, 70 N. C. 346, is in apparent conflict with our present decision; but an examination of the record discloses that the subject-matter of litigation in that case was real estate, and the opinion throughout shows that the learned judge was construing, and only intended to construe, the statute of descents.

There is no error, and the judgment below is affirmed.

(140 N. C. 463)

DENNIS SIMMONS LUMBER CO. v. COREY et ux.

(Supreme Court of North Carolina. March 6, 1908.)

1. LOGS AND LOGGING—SALE OF TIMBER—CONTRACT—CONSTRUCTION.

An instrument reciting the receipt of part payment for all pine timber of certain sizes on land described which the signers had sold to plaintiff for a specified price, together with the right to plaintiff of entering on the land and removing the timber during a period of ten years, and binding the signers to execute "a lease for said timber for the term of ten years and the privileges above named," though signed only by the grantors, was not a mere option, but constituted a conveyance of a present estate in the timber, defeasible as to all timber not cut within the time limited.

2. FRAUDS, STATUTE OF—PARTY TO BE CHARGED.

Where defendants were the parties sought to be charged by a contract for the sale of timber, a memorandum signed by them alone was sufficient to satisfy the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 244, 245.]

3. SAME—WAIVER.

Where plaintiffs brought suit to compel performance of a contract for the sale of timber, it was immaterial that the memorandum of the contract was not signed by plaintiffs, as it waived the benefit of the statute of frauds by suing on the contract.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 246, 351.]

4. LOGS AND LOGGING—CONTRACTS—CONSTRUCTION.

A contract for the sale of "all the pine timber that will measure 12 inches at the stump 18 inches above the ground when cut" should be construed as a conveyance of all the pine timber that would measure 12 inches "or more" at the stump when reached in the process of cutting.

Appeal from Superior Court, Martin County; Cooke, Judge.

Consolidated actions by the Dennis Simmons Lumber Company against Joseph Corey and wife to compel specific performance of a contract for the conveyance of certain timber, and by said Corey and wife against the lumber company to restrain the latter from cutting trees on certain land in controversy measuring more than 12 inches in diameter at the stump 18 inches from the ground. From a judgment in favor of the lumber company in both actions, Corey and wife appeal. Affirmed.

The facts, which in nearly all respects are substantially those stated in the brief of the defendants' counsel, where they are well summarized, are as follows: On the 8th of November, 1899, the plaintiff and defendants entered into the following written agreement: "Received this 8th day of November, 1899, of the Dennis Simmons Lumber Co., \$90 in part payment for all pine timber that will measure 12 inches at the stump 18 inches above the ground when cut that is or may be on the following land, viz: [Here follows the description of the tract of land on which the timber stood,

said to contain 150 acres, more or less]—which we have sold them for \$2,000, \$410 to be paid in cash within ten days from this date, the balance (\$1,500) to be paid within five years from this date—together with the right and privilege of entering upon the said land and the building of tramroads only, and the use of undergrowth for building same over said land only, for the period of ten years from this date. When the Dennis Simmons Lumber Co. shall have paid the entire amount of the purchase money, we bind ourselves and our heirs to execute to them or their assigns a lease for said timber for the term of ten years and the privileges before named." The plaintiff paid \$410 within 10 days after the date of the contract, making with the amount (\$90) formerly paid the sum of \$500 paid in all, and leaving a balance of \$1,500 to be paid within the five years. Within the said time the plaintiff tendered to the defendants the said balance (\$1,500), but accompanied the tender of the money with a demand that defendants execute to the plaintiff a conveyance of the timber, which the plaintiff had caused to be prepared and then offered to the defendants for execution, and which agreed in its terms with the contract, except that it described the timber conveyed or leased as measuring "12 inches or more" at the stump 18 inches above the ground when cut, whereas in the contract only the words "12 inches" are used; the words "or more" having been inserted in consequence of information received by the plaintiff that the defendants had insisted that it could not cut under the contract any timber measuring more than 12 inches. The defendants refused to receive the money and execute the conveyance, because it was not drawn according to the exact terms of the agreement. Some time thereafter and within the five years the defendants prepared and executed a deed in accordance with the terms of the contract; that is, by describing the measurement of the trees sold as "12 inches at the stump 18 inches above the ground when cut." This deed was tendered to the plaintiff and the payment of the balance of the purchase money demanded. Plaintiff refused to execute the deed or to pay the balance of the purchase money unless the defendant would execute the deed it had tendered, as the defendants still insisted that plaintiff had no right, under the contract, to cut timber measuring more than 12 inches. About four months after the expiration of the five years, the plaintiff brought this suit to compel the defendants to specifically perform the contract. It also alleged in its complaint that the oral agreement between the parties was that it should have the right to cut all trees measuring 12 inches or more at the stump, and prayed that, if the contract did not so express the agreement, it be reformed. Pending this action, the plaintiff notified the defendants that it would cut the timber measuring 12 inches or

more. Defendants then commenced an action to enjoin the alleged trespass and obtained a restraining order. The two actions, by consent of the parties and the order of the court, were consolidated and heard as one upon the pleadings, admissions, and exhibits, from which the foregoing facts are taken. The court adjudged that the plaintiff, the Dennis Simmons Lumber Company, acquired an interest in the lands described in the pleadings under the contract of November 8, 1899, to the extent of all the pine timber that will measure 12 inches at the stump 18 inches from the ground when cut, together with the other rights and privileges mentioned in the same, for a period of 10 years from the said date, and that said plaintiff is entitled to have a deed therefor, and the defendants were thereupon ordered to execute such a deed, and, in default of their doing so, that the decree or judgment of the court should have the effect of conveying and transferring the said title and rights, as though the conveyance had been duly executed, in accordance with the provisions of the statute. The court then in its judgment dissolved the restraining order and refused to grant an injunction, and it further adjudged that the plaintiff, the lumber company, was entitled, under the contract and the deed ordered to be made in pursuance thereof, to cut all timber on the said land measuring 12 inches or more in diameter at the stump 18 inches from the ground when cut during the said period of 10 years. Defendants Joseph Corey and wife excepted and appealed.

Ward & Grimes, S. A. Newell, and F. D. Winston, for appellants. Stubbs, Gilliam & Martin, for appellee.

WALKER, J. (after stating the case). The real, and indeed the vital, question in this case is to be found in the ruling of the court that by the contract between the parties the plaintiff acquired such an estate in the land as entitled it to cut all the pine timber measuring 12 inches and upwards in diameter at the stump 18 inches above the ground when cut, and in furtherance thereof to enjoy the rights and privileges given by the contract, such as entering upon the land, building tramways, and using the undergrowth for the purpose of construction, provided the right to cut and the other rights and privileges shall not last beyond 10 years from the date of the contract. There was another question raised by the defendants, namely, that the instrument of November 8, 1899, contained only an option to buy, and that the plaintiff had lost all right thereunder to call for the title or to cut the timber and exercise the rights and privileges mentioned therein by not paying the balance of the purchase money within 5 years from the date thereof. These propositions we will consider, though not in the order stated.

This court has so recently and so fully considered the question as to the true con-

struction of contracts substantially like the one now under review that it would seem almost useless for us to add anything to what has already been said. We have decided that such contracts, which should be treated as in effect conveyances, pass a present estate in the timber, defeasible as to all timber not cut within the limit of time fixed by the parties in their agreement. That this is the true construction, as settled by the best-considered cases, was clearly indicated in *Bunch v. Lumber Co.*, 134 N. C. 116, 46 S. E. 24, though it was not thought necessary in that case to finally and conclusively adopt it, or to determine what is the exact nature of such contracts, as we were able to dispose of the case upon other grounds without deciding that matter. After reviewing some of the authorities in the other states, which were arrayed on opposite sides of the question, and stating the two conflicting views held by the different courts, we distinctly intimated which of the two we thought was more in accordance with the intention of the parties and better supported by the rules of interpretation, by the use of the following language: "While some of the cases in this and other states liken a contract of the kind we are construing to a lease, it may be true that it should not be technically so construed, but that it should be regarded as a conveyance of the timber, or an interest or estate in the timber, upon condition that if it is not cut and removed within a given time, the interest or estate so conveyed shall revert in or revert to the grantor. While we are inclined to adopt this as the better interpretation, and the one more perhaps in consonance with the intention of the parties as disclosed by the language employed by them, yet we think that, however the contract may be considered with reference to the interest or estate of the defendant's assignor, the result in this case must be the same." 134 N. C., at page 118, 46 S. E., at page 25. And in another part of the opinion it was said: "At the expiration of the time the estate in so much of the timber as had [not] been cut and removed would revert to the vendor, or at least the timber would become his absolute property." 134 N. C., at page 120, 46 S. E., at page 26. (The word "not" in the passage quoted from the opinion was inadvertently omitted by the printer.) We were inclined to take this view of the matter because of what we considered to be the strong trend of our former decisions *Moring v. Ward*, 50 N. C. 272; *Dunkart v. Rineheart*, 89 N. C. 354; *Carpenter v. Medford*, 99 N. C. 495, 6 S. E. 785, 6 Am. St. Rep. 535. In *Dunkart v. Rineheart*, the contract for the sale of "walnut trees" was executory in form; the defendant merely agreeing to sell them. Referring to this feature of the instrument, the court said: "We are disposed to think that the property in the trees passed under the contract, and that the intent and under-

standing of the parties that it should so operate, appear upon its face." 89 N. C., at page 358. With much greater reason can it be said that in our case the contract passes the property in the "pine timber," as in it the defendants acknowledged the receipt of a part of the purchase money "for all the pine timber" of the indicated measurement, and, after describing where it is situated, they refer to the timber as being that "which we have sold to them [the plaintiff] for \$2,000," and then appoint the time for the payment of the other installments. The contract in *Carpenter v. Medford*, in the form of a receipt, was substantially identical with the one given by the defendants to the plaintiff, and it was construed as having the legal effect to pass the property in the trees, the same as if it had been in the form of a deed. It is not necessary to prolong the discussion, as the very question is fully considered in the recent case of *Hawkins v. Lumber Co.*, 139 N. C. 160, 51 S. E. 852, and the conclusion therein reached was that an estate in the timber passed by the contract.

The fact that the plaintiff did not sign the contract, so as to become in law bound for the payment of the purchase money, does not prevent the contract from being a bilateral one instead of a mere option. The defendants' counsel contended that it was unilateral, as the plaintiffs are not bound because they did not sign the contract, and are therefore protected by the statute of frauds. He argued from this proposition that time was of the essence of the contract, and that, as the plaintiff had not tendered the money within five years, it could not now ask the court to enforce the performance of the contract by the defendants against their consent. There are two answers to this contention, either of which is fatal to it. The plaintiff is seeking to enforce the contract and agrees to pay the balance of the money, thereby waiving the benefit of the statute of frauds. The defendants are the persons sought to be charged, and they are the only ones required to sign the memorandum in order to meet the requirement of the statute. It is "the party sought to be charged" who must have signed. *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104. The matter is so clearly discussed and aptly illustrated by Pearson, J., for the court, in *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744, which involved a contract for the sale of trees, that we will content ourselves with reproducing here the material portion of the opinion in that case relating to the question: "We are of the opinion, with his honor, that to make a contract to sell growing trees binding on the vendor it is sufficient that the contract be signed by him, and it is not necessary that it should be signed by the vendee. The statute provides that the contract shall be signed by the 'party to be charged therewith.' This answers the purpose, which is to exclude perjury in an action to enforce the contract. In reference

to the other party the statute is silent, and there is consequently nothing to justify the construction that he is also required to sign. If the vendor binds himself in writing, and is content to take the verbal promise of the purchaser to pay the price, it is his own fault, and he must blame himself for the folly of getting into a situation where he is bound; but the other party cannot be charged if he chooses to insist upon the statute. Common justice and the general principles of law require that there shall be a mutuality in contracts; that is, if one party is bound, the other ought to be. But there may be exceptions. Although it is a maxim that a contract is never binding unless there be a consideration, yet there is a distinction between a consideration and the mutuality of contracts in reference to the obligation thereof, and the fact that by some other principle of law or the provisions of a statute one party has it in his power to avoid the obligation, although it suggests a very forcible reason for not entering into a one-sided contract, does not necessarily have the effect of making such a contract void as to both parties. One agrees to deliver at a future day a certain article to an infant, in consideration of his promise to pay the price. The contract is not void, although the infant may avoid the obligation on his part, if he chooses to protect himself on the ground of infancy. So, if one agrees in writing to convey land in consideration of a verbal promise of the other party to pay the price, the contract is binding on the vendor, although the vendee may avoid the obligation on his part if he chooses to protect himself under the provisions of the statute. It is not considered in either case that the contract is nudum pactum and void for the want of consideration. This is the result of the English decisions in reference to the statute of frauds, and although our statute is not precisely in the same words, yet the substance is the same, the purpose is the same, and the difference in the wording is not such as to justify a difference in the construction"—citing *Laythorp v. Bryant*, 29 E. C. L. 469; *Allen v. Bennett*, 3 Taunt. 170. That decision seems to cover entirely the point now being considered. To the same effect is *Green v. Railroad*, 77 N. C. 96. The recital in the contract that there had been a sale implies or presupposes a promise of the plaintiff to pay the price which is itself the consideration of the defendant's agreement to sell and convey, though strict mutuality may be lacking, as by reason of the statute of frauds, plaintiff's promise cannot be enforced. His present willingness to perform removes this objection. Besides, the very statement in the contract that they had sold the timber, and in the deed they tendered to the plaintiff that they had "bargained and sold" it, fully meets and refutes any suggestion that it was intended merely as an option, so as to

require a strict performance by the plaintiff within the time limited.

The other answer to defendant's contention is that the plaintiff tendered performance within the time limited, and this incidentally involves the other question raised in the case, and the decision of his honor thereon, as to what timber was acquired by the plaintiff under the contract. If the deed which accompanied plaintiff's tender of the purchase money was drawn substantially in accordance with the terms of the contract in regard to the dimension of the trees to be cut, the other parts of it not being objectionable, the tender was, of course, a good one, and the plaintiff has complied with his part of the contract, even if it be treated as an option. We are of the opinion that while, perhaps, it may have been better for the plaintiff to have tendered a deed expressed in the words of the contract, so far as the provision as to the size of the timber to be cut is concerned, and left the construction of those words to the courts in the event of any controversy with his vendor, yet we do not see how he has forfeited any right under the contract by putting a correct interpretation upon its language; nor do we understand why he should be prejudiced for thus attempting to provide against any possible litigation in the future.

Nothing remains now to be determined but the true meaning of the words of the contract, "all the pine timber that will measure 12 inches at the stump 18 inches above the ground when cut." There can be no well-founded doubt, we think, that the vendor intended by the contract to sell, and the vendee to buy, all timber standing on the land which was found to be not less in diameter than 12 inches, by measurement to be made 18 inches from the ground, at the time the trees are reached in the process of cutting. If the contract is read in the manner we have suggested, its effect, of course, will be to pass to the plaintiff the property in timber which is of the dimensions stated in its demand upon the defendant, when it tendered payment of the money and also the deed for execution; the terms we have used being but the converse of those we find in the deed, and having, of course, the same meaning. This must be the true construction of the contract, as we cannot for a moment suppose that the plaintiff, under the circumstances, would enter into a contract to cut trees exactly 12 inches in diameter for \$2,000 payable within 5 years, with the privilege of 10 years to cut them. Such a contract, to say the least of it, would be anomalous, and we agree with his honor that the defendant was not authorized to put such a construction upon it. The parties surely did not contemplate that so uncertain an interest in the trees should pass. The plaintiff could not well know that there were any trees of that exact dimension in this forest, and, if any, how many were there, or that any would attain that growth within

the period named; nor can it be imagined for what purpose trees of that particular size would be needed, or why the time for cutting them was extended throughout so long a period. The evident purpose was to preserve the small standing trees until they had grown to sufficient size to be valuable as timber and to prevent the forest from being unnecessarily denuded. These and other considerations lead us to reject the defendant's construction of the contract, as contrary to the real meaning of the parties. We have been able to find but one case in which the contract was worded like this one, and in that case it was tacitly conceded that the indicated dimension at the stump was intended as the minimum, as no exception was taken to the ruling of the court in that respect, but the case was strenuously contested on the point as to whether the measurement should include the bark of the tree. *Alcutt v. Lakin*, 33 N. H. 507, 66 Am. Dec. 739. It was taken for granted that the other ruling was correct.

It follows from what we have said, that the contract transferred an estate to the lumber company; that it was bilateral, the plaintiff's promise to pay the purchase money, whether express or implied, being a sufficient consideration to support it, even though there may not have been a strict mutuality, because the plaintiff did not sign it; and, lastly, that if it was unilateral, or merely an option, the plaintiff made a sufficient tender within the time fixed for its election. We conclude that the case has been fairly tried upon its merits, and that there was no error committed by the court. No error.

(140 N. C. 495)

WITHERINGTON v. HERRING et al.

(Supreme Court of North Carolina. March 6, 1906.)

1. TRUSTS — PERSONAL PROPERTY — DECLARATION.

The declaration of a trust in personality need not be in writing, but, if in writing, may be contained in letters or other informal instruments.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 17, 25-28.]

2. SAME.

Testator wrote defendant, his brother, to retain means of the writer which defendant had on hand until testator was able to think and act further, and, if he never did, to use the same as defendant should see proper as "in the first arrangements made," which were contained in a letter by which testator gave to defendant the care and custody of a natural child, and directed that until testator gave further instructions defendant should hold \$1,000 and what was left of another fund for the support of the child, in case of testator's death, for such time as it would hold out. *Held*, that such writings were sufficient to constitute a trust of the fund for the benefit of the child.

3. SAME — POWER OF REVOCATION.

Where a power of revocation reserved at the time of the creation of a trust was never exercised during the life of the donor, the trust was not affected thereby.

Appeal from Superior Court, Wilson County; Cooke, Judge.

Action by M. S. Witherington against N. B. Herring and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Mark Squires, Shepherd & Shepherd, and Aycock & Daniels, for appellant. H. G. Connor, Jr., F. A. Woodard, and C. E. McCullen, for appellee.

CLARK, C. J. W. A. Herring, resident in Mississippi, assumed the care, education, and support of his natural child, which through his brother, the defendant, Dr. N. B. Herring, he placed in the custody of a lady in this state. There came into the hands of said defendant the sum of \$1,500, which he had collected for W. A. Herring, in regard to which the latter wrote Dr. Herring, 19th April, 1902: "Retain what means of mine you have on hand until I am able to think and act further, and, if I never do, use as you see proper as in the first arrangements made." Again on 13th September 1902, W. A. Herring wrote Dr. N. B. Herring in regard to the care and custody of the child, and added: "In the meantime, until I give further instructions, hold the sum, \$1,000, and what of the first fund is left, for the support of the child, in case of my death, for such a time as it may hold out." In January, 1903, W. A. Herring died without having given any further instructions, and, N. B. Herring having already disposed of part of this fund, according to his instructions, in the support and care of the child, there was in his hands at the death of W. A. Herring \$868.97 unimpaired. In the first item of his will the latter mentions this child, and states that he has supported her from her birth, and will continue to do so if he lives; but, if he should die first, he turns over the care and custody of the child to his wife, and requests her to carry out his wishes in regard to the child, and after bequeathing and devising certain property to his wife there is a residuary clause in the will in favor of his nieces, but there is no provision for the child beyond the above request to his wife. There is no instruction or reference in the will to this fund, and none was sent by W. A. Herring to Dr. N. B. Herring subsequent to the above letter of 13th September, 1902.

This action is by the personal representatives of W. A. Herring to recover the fund in hands of N. B. Herring. There is no allegation that it is needed for the payment of debts, and the only question is whether N. B. Herring held the fund as trustee, or as an agent, whose agency would expire with the death of his principal. The words, "Until I give further instructions, hold the sum, \$1,000, and what of the first fund is left, for the support of the child, in case of my death, for such a time as it may hold out," clearly indicates a trust. There were no further instructions, and there is no provision for the

child in the will. The relationship and the attitude of the father as to the custody, care, and education of the little girl, both in his correspondence with his brother and by the request made of his wife in his will, strengthen our view that he had no intention to revoke the trust by implication, and there is no express revocation. The declaration of a trust in personalty is not required to be in writing, and, if in writing, it may be contained in letters or other writings. 28 A. & E. Enc. (2d Ed.) 880. Indeed, section 7 of the statute of frauds has not been re-enacted in this state. *Id.* 876. No technical terms need be used. It is sufficient if the language used shows the intention to create a trust and clearly points out the property, the disposition to be made of it, and the beneficiary. 1 Bispham, Eq. § 71; 28 A. & E. Enc. 910.

A power of revocation may, however, be reserved, and is perfectly consistent with the creation of a valid trust. If never exercised during the lifetime of the donor and according to the terms in which it is reserved, the validity of the trust remains unaffected." 28 A. & E. Enc. (2d Ed.) 900, 950; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Kelley v. Shaw*, 185 Mass. 288, 70 N. E. 89; 1 Beach, Trusts, § 81, and cases cited. The trust was not revoked, and the defendant should proceed to execute it.

No error.

(140 N. C. 448)

McAFEE'S ESTATE v. GREGG et ux.
(Supreme Court of North Carolina. March 6, 1906.)

1. JUSTICES OF THE PEACE—JURISDICTION—ACTION AGAINST MARRIED WOMAN.

A married woman may be sued in a justice's court for a debt due by her, or on a contract made by her, before marriage, or for a debt contracted by her after marriage as a free trader.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 141.]

2. SAME—JUDGMENT—VALIDITY.

A justice's judgment against a married woman is not invalid, unless the record shows that the cause of action was one on which she could not be sued before a justice.

3. JUDGMENT—DEFECT OF PARTIES—COLLATERAL ATTACK.

That an action was brought in the name of "McAfee's Estate, by Cora McAfee, Agent," does not avoid the judgment rendered; Cora McAfee being the plaintiff of record, and the other words being rejected as surplusage.

Appeal from Superior Court, Buncombe County; Moore, Judge.

Action by McAfee's Estate, by Cora McAfee, against W. A. Gregg and wife. From an order dismissing supplemental proceedings and dissolving an injunction order, the plaintiff appeals. Reversed.

Julius C. Martin, for appellant. Merrimon & Merrimon, for appellee.

BROWN, J. The supplemental proceedings were instituted to enforce the payment

of two judgments rendered by a justice of the peace, entitled as above and docketed upon the judgment docket of the superior court of Buncombe county.

1. The judgments are not void because of the alleged defect as to parties plaintiff. Such objection, if taken properly at the time of the trial before the justice, would have been good. The apparent irregularity in the title does not avoid the judgments rendered. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241; *Hicks v. Beam*, 112 N. C. 642, 17 S. E. 490, 34 Am. St. Rep. 521. *Cora McAfee* is plaintiff of record. The other words may be rejected as surplusage.

2. The judgments are not void, because it appears in the summons that at the time they were filled out the defendant Addie was then married. It is not true that the justice's court has no jurisdiction in any case of a married woman. She may be sued in that court for a debt due by her, or on a contract made by her, before marriage, or for a debt contracted by her after marriage as a free trader. *Neville v. Pope*, 95 N. C. 346. If the feme defendant desired to interpose her coverture as a bar to the prosecution of the suits, she should have entered her pleas. *Vick v. Pope*, 81 N. C. 22. It does not appear upon the records of the justice's proceedings but that the causes of action were such that a feme covert could properly have been sued on them in that court. On the contrary, for aught that appears, the debts may have been contracted by the feme defendant before marriage or as a free trader after marriage. There is nothing appearing in the record to the contrary.

To render the judgment of the justice of the peace void, it must appear on the record, not only that the defendant is at the time a married woman, but it must also appear on the face of the proceedings, in that court that the cause of action as to her is one over which that court has no jurisdiction. His honor erred in holding the judgments void, and in dismissing the proceedings and dissolving the injunction. The cause is remanded, to be proceeded with before the clerk or judge according to law.

Reversed.

(141 N. C. 700)

STATE v. PINER.

(Supreme Court of North Carolina. March 13, 1906.)

1. INTOXICATING LIQUORS—STATUTES.

Acts 1901, p. 502, c. 350, § 1, making it unlawful to sell intoxicating liquor in Pender county, is not affected by Code, § 8110, providing for a sale of wine in bottles not to be drunk on the premises.

2. SAME.

Nor is such act affected by Acts 1903, pp. 288, 290, c. 233, §§ 1, 6, allowing the sale of wine in certain circumstances; section 19 (page 293) of such act providing that it shall not be construed to repeal, alter, or amend any special act prohibiting the sale of liquors in any county.

3. SAME—UNLAWFUL SALE—INTENT.

That defendant did not intend to do wrong is no defense to a prosecution for unlawfully selling liquor.

4. SAME—FINDINGS.

In a prosecution under Acts 1901, p. 502, c. 350, § 1, making it unlawful to sell in Pender county any spirituous, vinous, malt, or fermented liquors, it is not necessary for the jury to find that the wine sold was intoxicating.

5. CRIMINAL LAW—EVIDENCE—JUDICIAL NOTICE—PUBLIC ACT.

An act of a public local nature need not be specially averred in the indictment, as the court will take judicial notice of it.

6. INDICTMENT—SURPLUSAGE.

Under Code, § 1183, providing that an indictment shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, useless matter in an indictment should be rejected as not affecting the substance of the charge.

Appeal from Superior Court, Pender County; Webb, Judge.

Thomas Piner was convicted of unlawfully selling liquor, and appeals. Affirmed.

Indictment for unlawfully selling liquor. The jury returned a special verdict, and found that the defendant sold a gallon of wine of his own manufacture, on his own premises, which was made from the products of his own vineyard, none of which was drunk on his premises. It was put in a jug, which was corked and carried away by the purchaser without being opened. Upon the facts so found, the court held that the defendant was guilty. He was adjudged to pay a fine and the costs, and appealed.

Stevens, Beasley & Weeks, for appellant. The Attorney General, for the State.

WALKER, J. (after stating the case). The defendant contends that he was authorized to sell the wine by the general statute (Code, § 3110), which provides that all wines made in this state from grapes, etc., raised therein, may be sold in bottles, which are corked or sealed up, in quantities greater or less than a quart, but must not be drunk on the premises; and he also justifies under Acts 1903, pp. 288, 290, c. 233 (Watts Law) §§ 1, 6, which permits a person to sell, by the gallon or in larger quantities, wine made from fruit or grapes grown by himself, provided it is not drunk on the premises when sold. But that act further provides (section 19) that it shall not be construed to repeal, alter, or amend any special act prohibiting or regulating the manufacture and sale of liquors in any county or other locality, and this brings us to the consideration of the special act which the state insists that the defendant has violated. Acts 1901, p. 502, c. 350, § 1. It provides, among other things, that it shall be unlawful to sell in Pender county any spirituous, vinous, malt, or fermented liquors, "or any liquor of any name or kind which is intoxicating."

The Legislature may pass laws prohibiting the sale of liquor within any designated locality. This is settled beyond question.

State v. Joyner, 81 N. C. 534; State v. Bar-ringer, 110 N. C. 525, 14 S. E. 781; State v. Snow, 117 N. C. 774, 23 S. E. 322. We think it clear that the defendant was indictable under the act of 1901, which is not affected by Code, § 3110, if that section is now in force and he complied with it, which it is not necessary now to decide. The two provisions are not in conflict. One is of general application, and the other local in its operation. State v. Joyner, *supra*. Nor is it repealed by Acts 1903, p. 288, c. 233. On the contrary, the proviso to that act expressly withdraws all such local acts from its operation. State v. Joyner, *supra*. So that, if all the acts are construed together as relating to the same subject-matter, and the defendants' counsel argues that they should be so regarded and construed, the conclusion is inevitable that the court correctly adjudged the defendant to be guilty upon the special verdict, unless he can succeed in some of his other contentions.

The defendant says he did not intend to do wrong. His motive in selling, however good or praiseworthy, does not shield him from the consequences of his acts. No intent appears in this case, except that which the law infers. This is one of the kind of offenses in which the law implies the unlawful intent from the doing of the act, which is prohibited, and it can make no difference that he did not in fact intend to violate the law. State v. Downs, 116 N. C. 1064, 21 S. E. 689. That case is directly in point and fully answers this contention. It would not do to permit a defendant to exculpate himself by showing that he did not intend to do that which he did and which is in itself unlawful. He is presumed, in such case, to intend the consequences of his act. State v. Gibson, 121 N. C. 680, 28 S. E. 487.

The defendant's next contention is that the jury did not find that the liquor was intoxicating. If that is necessary to be done under this act, which mentions vinous and fermented liquors by name, we yet think

that wine is of the general class of liquors known to all men to be intoxicating if taken freely or in a sufficient quantity. Not only is it a familiar fact that wine is intoxicating, but the law writers have so treated it in discussing questions similar to the one now under consideration. "The decided weight of authority is that wine is an intoxicating liquor and that the courts will take judicial notice of the fact." 17 Am. & Eng. Enc. of Law (2d Ed.) 199. There is said to be only one case to the contrary. *Id.* "A sale of wine made from grapes or blackberries is within a statute making it unlawful to sell 'vinous or alcoholic' liquors." *Id.* It would seem that the Legislature intended thus to classify it in Acts 1901, p. 502, c. 350, though it is not required that we should so decide at this time, as the cases in this court are decisive upon the question that wine is an intoxicating liquor. State v. Packer, 80 N. C. 439, decides the very question; and of like import are the following cases: State v. Giersch, 98 N. C. 720, 4 S. E. 196; State v. Scott, 116 N. C. 1012, 21 S. E. 194; State v. Parker, 189 N. C. 586, 51 S. E. 1028. It seems that the Legislature has by numerous acts recognized wine as an intoxicating liquor. But, as we have said, by the act in question the sale in Pender county of vinous or fermented liquors is prohibited, and that is sufficient to sustain the verdict. This disposes of the two assignments of error, which, indeed, are substantially the same.

The act of 1901, is of a public local nature, and need not be specially averred in the indictment, as the court will take judicial notice of it. State v. Chambers, 93 N. C. 600; State v. Wallace, 94 N. C. 827. The offense appears to be sufficiently alleged in the indictment; useless matter being rejected as not affecting the substance of the charge. Code, § 1183. An examination of the entire record discloses no error in the judgment and proceedings below.

No error.

(140 N. C. 514)

GRIFFIN et al. v. ROANOKE R. & LUMBER CO.

(Supreme Court of North Carolina. March 13, 1906.)

1. FRAUD—FALSE REPRESENTATIONS—PROCURING EXECUTION OF WRITTEN INSTRUMENT—REMEDIES.

Where plaintiffs sold timber on their land, reserving all of a certain kind, and were thereafter induced to sign a deed for the timber, drawn up by defendant's agent, who assured them that it was drawn in accordance with the agreement for sale, and reserved the timber in question, a right of action for the fraud accrued to plaintiffs on discovery thereof.

2. SAME.

Plaintiffs' right of action was not dependent on the removal of the timber by defendant's vendee prior to the commencement of the action.

3. SAME—FRAUD IN FACTUM—FRAUD IN TREATY.

Where plaintiffs, by a parol agreement for the sale of certain timber, reserved a part thereof, and were thereafter fraudulently induced by defendant's agent to sign a deed for the timber under the assurance that the reservation stipulated for was contained therein, the fraud was in the representation or treaty, and not in the factum; and hence the deed was not absolutely void, precluding an action against defendant for the fraud.

4. SAME—NEGLIGENCE—FAILURE TO READ DEED—EFFECT.

Where plaintiffs were induced to sign a deed of timber by fraudulent representations of defendant's agent, who prepared the deed, that a reservation of a part of the timber stipulated for by plaintiffs, was contained in the deed, the defense of plaintiffs' negligence in failing to read the deed was not open to defendant in an action by plaintiffs for the fraud.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 19-23.]

5. SAME—DAMAGES—MEASURE OF DAMAGES—VALUE—MARKET VALUE.

Where plaintiffs were induced to sign a deed to certain timber by fraudulent representations of defendant's agent, who prepared the deed, that the same contained a reservation of a proportion of the timber as stipulated for, an instruction that plaintiffs' measure of recovery was the value of the timber at the date of the deed, and that while the market value should be considered as evidence of value, it was not controlling, was correct.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 60.]

6. SAME.

In an action by plaintiffs to recover for fraud practiced on them by defendant in procuring the execution of a deed of timber, an instruction that the burden was on plaintiffs to show the alleged fraud by testimony, clear, cogent and convincing, was not rendered misleading by a concluding clause to the effect that "the burden of all these issues is on the plaintiffs, and the jury cannot find any one in their favor unless on the greater weight of the testimony."

Appeal from Superior Court, Martin County; Cooke, Judge.

Action by John D. Griffin and others against the Roanoke Railroad & Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Plaintiffs alleged: That on the 1st day of November, 1899, they made a parol agree-

ment with defendant company to sell to it all of the timber on their land measuring 12 inches at the stump when cut, except the long-leaf pine, which was expressly reserved. Defendant's agent, with whom the agreement was made, proposed that he would prepare the deed, to which plaintiffs assented. Thereafter, said agent presented to them for execution a deed which he stated was drawn in accordance with said agreement. Plaintiffs were unable to read the deed, and requested the said agent to do so. After reading a few lines, he said that he did not have time to read the remainder, but assured plaintiffs that it was drawn in accordance with their agreement, and that the long-leaf pine was reserved. Relying upon said representation, plaintiffs executed the deed. Plaintiffs thereafter learned the long-leaf pine timber was not reserved from the operation of the said deed. That the representation made by defendant's agent that said timber was reserved was false and fraudulent. That, thereafter, the defendant sold and conveyed the said timber, including the long-leaf pine, to the Dennis Simmons Lumber Company for value, and without notice of the fraud which had been practiced upon plaintiffs. That by reason of the conveyance of said timber to said lumber company, plaintiffs have no remedy against such purchaser to have correction of said deed. That the value of the long-leaf pine timber was \$221. Defendants denied the material allegations, admitting the sale to the Dennis Simmons Lumber Company. It was conceded that no portion of the timber was cut from the land when the summons in this action was issued. His honor permitted the plaintiffs to amend their complaint by alleging that the timber had been cut since the date of the summons. Defendant excepted. The court submitted issues directed to the inquiry whether there was an agreement that the long-leaf pine was reserved; whether the plaintiffs were induced to execute the deed by the false and fraudulent representations of the defendant's agent and the value of the long-leaf pine timber. The jury responded to the issues affirmatively, and fixed the value of the timber at \$221. Judgment was signed for plaintiffs, to which defendant excepted, and appealed.

A. O. Gaylord, for appellant. H. W. Stubbs, for appellees.

CONNOR, J. (after stating the case). The record discloses a number of exceptions. The substantial merits of the controversy group themselves around three questions, all of which are properly raised upon the record, and argued by counsel, orally, and in his well-considered brief. At the close of the entire evidence, defendant demurred and moved for judgment as of nonsuit, pursuant to the statute. The first cause of demurrer is: "Because no entry had been made by defendant or the Dennis Simmons Lumber

Company, and no timber had been cut by either, nor by any one under their authority when the action was brought." Defendant contends that no action can be maintained for injury to real estate, unless prior to the date of the writ, a trespass has been committed. This is undoubtedly true, and if plaintiffs' action was for trespass, his honor would have granted the motion for judgment of nonsuit. The plaintiffs' cause of action is for deceit, in that they have sustained an actionable wrong by false and fraudulent representation of defendant's agent. The motion to nonsuit being founded upon the admission that the transaction is correctly stated in the complaint, as testified to by plaintiffs, we may examine the proposition maintained by defendant from that point of view. The parties made a contract for the sale of certain timber, reserving a well-defined class of trees. Defendant's agent undertook to reduce the contract to writing, in accordance with its terms. He knowingly included the timber, which was reserved and falsely represented to plaintiffs that said timber was reserved in the deed. By means of this false representation, he procured the execution of the deed. It would seem clear, both upon reason and authority, that by this conduct a right of action accrued to plaintiffs. If the matter had remained in this condition plaintiffs could have brought an action in the nature of a bill in equity for correction of the deed or sued, as in trespass on the case, for deceit. The case of *Pasley v. Freeman*, 3 Term Rep. 51 (2 Smith, L. C. 1300), settled the principle that "a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit." Kent, C. J., in *Upton v. Vall*, 6 Johns. 181, 5 Am. Dec. 210, after expressing his approval of the doctrine announced in *Pasley v. Freeman*, said: "The case went, not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." It has been the accepted law in American jurisprudence, and was discussed and adopted by this court in an opinion containing a "mine of learning," by Judge Battle, in *March v. Wilson*, 44 N. C. 144. After an exhaustive review of the English and American authorities, the learned justice concludes: "The principle upon which they were decided is that where there was fraud by the defendant, either in word or deed, resulting in damage to the plaintiff, he might sustain an action on the case for such damage." Whatever doubt may have existed in regard to the right to maintain an action for deceit relating to contracts for the sale of land respecting acreage, title, etc., is removed by the decision in *Walsh v. Hall*, 66 N. C. 233. Dick,

J., after noting the general rule of caveat emptor, says: "But in cases of positive fraud, a different rule applies. * * * The law does not require a prudent man to deal with every one as a rascal, and demand covenants to guard against the falsehood of every representation, which may be made as to facts which constitute material inducements to a contract. * * * If representations are made by one party to a trade, which may be reasonably relied upon by the other party, and they constitute a material inducement to the contract, and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice. In our courts the injured party may bring a civil action in the nature of an action on the case for deceit, and recover the damages which he has sustained; and if the remedy will not afford adequate relief, he may invoke the equitable jurisdiction of the court to rescind the contract." The learned justice concedes that in saying that the injured party, who had been induced by false and fraudulent representation to take a deed for a tract of land, to which the grantor had no title, could maintain an action for damages "seems to be in conflict with previous decisions of this court," citing *Lytle v. Bird*, 48 N. C. 222; *Credle v. Swindell*, 63 N. C. 305. Bynum, J., in *Hill v. Brower*, 76 N. C. 124, says: "The maxim of caveat emptor does not apply in cases where there is actual fraud." In that case the fraud consisted in a false and fraudulent representation in regard to the number of acres in a tract of land. *Knight v. Houghtalling*, 85 N. C. 17; *Pollock on Torts*, 272; 1 *Jaggard on Torts*, 570. We think it clear that the plaintiffs, upon the facts testified to by them, had a cause of action for the fraud practiced by defendant's agent. This right is not dependent upon the removal of the timber. The plaintiffs' case is very much strengthened by the fact that defendant company had reaped the fruits of the fraud of its agent by selling the timber to the *Dennis Simmons Lumber Company*, without notice of plaintiffs' right to have correction of the deed. Defendant, however, insists that the fraud practiced by its agent in procuring the execution of the deed was in the factum, and not in the treaty. That the deed was absolutely void was not the act and deed of plaintiffs, and its vendee acquired no title to the long-leaf pine. It is true that the courts recognize the distinction between the two classes of fraud. It is possible that if defendants' contention was correct, the measure of damages might be different. We are, however, of the opinion that the fraud practiced upon the plaintiffs is in the representation or treaty; the plaintiffs signed the paper writing which they intended to sign, the fraud consists in the false

representation by which such signatures were obtained. The distinction is pointed out by Battle, J., in *McArthur v. Johnson*, 61 N. C. 317, 93 Am. Dec. 593, in which he says: "An instance of fraud in the factum is when the grantor intends to execute a certain deed, and another is surreptitiously substituted for it." Referring to instances of fraud in the treaty or representation, he says: "In all of them it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty or some fraudulent representation or pretense." Shepherd, C. J., discussing the question in *Medlin v. Buford*, 115 N. C. 270, 20 S. E. 463, says: "A deed made by this species of fraud is said to be void, but it will be found upon examination that this term is indiscriminately used in connection with any deed, which may be avoided either at law or in equity. * * * The distinction between void and voidable deeds becomes highly important in its consequences to third persons, because nothing can be founded upon a deed that is absolutely void; whereas from those which are only voidable, fair titles may flow." The defendant insists that whatever rights or causes of action may have accrued to plaintiffs are forfeited by their failing to require the deed to be read to them; that one of the essential elements of an action for deceit is that the fraud of the defendant was calculated to deceive and reasonably relied upon by plaintiffs. It is elementary learning that common prudence requires that before signing a deed the grantor should read it, or, if unable to do so, should require it to be read to him. His failure to do so, in the absence of any fraud or false representations as to its contents, is negligence for the result of which the law affords no redress. *School Trustees v. Kessler*, 67 N. C. 443. But when fraud or any device is resorted to by the grantee which prevents the reading, or having read, the deed, the rule is different. *Montgomery, J.*, in *Dellinger v. Gillespie*, 119 N. C. 737, 24 S. E. 538, says: "It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it." Judge Bynum, in *Hill v. Brower*, supra, says: "The representation of B., and his exhibit of the map and plat of the land, and his calculation of the quantity, not only caused the defendant to make no survey, but put to sleep any further inquiry as to the quantity of land. An actual survey was thus prevented by the artifice and contrivance of the other party." The present condition of the law upon the subject is well stated in *Pollock on Torts*, 293. "It seems plausible at first sight to contend that a man who does not use obvious means of verifying the representations made to him does not deserve

to be compensated for any loss he may incur by relying on them without enquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant; and it is now settled law that one who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. * * * In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation, or because the alleged fact did not influence his action at all. And the burden of proof is on the person who has been proved guilty of material misrepresentation."

While we think that the conduct of defendant's agent, when requested to read the deed, was well calculated to mislead the plaintiffs, and reasonably induce them to accept his positive assertion that the deed was drawn in accordance with the agreement, we note that recent decisions and text-writers show a strong tendency to hold that the defense of negligence on the part of the plaintiffs is not open to the defendant when sued for his positive fraud. *Jaggard* says: "The law recognizes, in many circumstances, the right of a man to rely upon the statements of another. * * * There is, indeed, a strong inclination on the part of courts to hold, without any qualification, that a person guilty of a fraudulent misrepresentation can not escape the effects of his fault, on the ground of the injured party's negligence." 1 *Torts*, 595. The Supreme Court of Illinois, in *Linington v. Strong*, 107 Ill. 295, says: "The doctrine is well settled that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry 'negligence' as against his own deliberate fraud. Even when parties are dealing at arm's length, if one of them makes to another a positive statement, upon which the other acts (with the knowledge of the party making such statement) in confidence of its truth, and such statement is known to be false by the party making it, such conduct is fraudulent; and from it the party guilty of fraud can take no benefit. While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule; and, as between the original parties to the transaction, we consider that when it appears that one party has been guilty of an intentional and deliberate fraud by which, to his knowledge, the other party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party, whom he de-

ceived, exercised reasonable diligence and care." *Kilmer v. Smith*, 77 N. Y. 226, 83 Am. Rep. 613: "If a bona fide inquiry be made in a proper quarter and a reasonable answer be given, a man may rest satisfied with the information, and need not make further inquiry." *Kerr on Fraud & Mistake*, 256; 1 *Big. on Fraud*, 523; *Fetter's Eq.* 136; *Biddle on Warranty*, § 326.

The defendant has raised and discussed these questions upon a demurrer to the evidence and upon requests to instruct the jury. His honor correctly overruled both motions. The instructions in regard to the essential facts to be found by the jury in answering the issues are in strict accordance with the principles which we find approved by this and other courts. The defendant requested the court to instruct the jury that the extent of its liability, if any, was the market value of the long-leaf pines, at the date of the deed. The word "market" was stricken out, and the instruction given as asked, his honor saying, that while the market value of the pine should be considered as evidence of their value, it should not control; the question was what was the real value of the long-leaf pines as they were standing at the date of the deed. We do not perceive any error in this instruction. There was no evidence that there was any market in which the value was fixed. The

plaintiffs were entitled to the value of their property. His honor instructed the jury that the burden was upon the plaintiffs to show the alleged fraud by testimony, clear, cogent, and convincing. That the rule in that respect was the same as in an action to correct the deed. In concluding the charge he said: "The burden of all these issues is on the plaintiffs, and the jury cannot find any one in their favor, unless upon the greater weight of the testimony." To this defendant excepted. Without discussing the question whether, in an action of this character, the rule laid down by his honor is applicable, we do not think that the last remark, considered in the light of the charge given in the beginning could have misled the jury. He had stated clearly and forcibly the rule most favorable to defendant, and nothing in the slightest degree weakening the force of his language had been said until the conclusion. His honor certainly did not intend to reverse what he had said, and we do not think his language could have been so understood by the jury.

We have examined the entire record with care, and find no error. In the light of the testimony, as set forth, it is difficult to see how the jury could have come to any other conclusion.

The judgment must be affirmed.

(141 N. C. 769)

STATE v. HILL.

(Supreme Court of North Carolina. March 18, 1903.)

1. ASSAULT AND BATTERY — SELF-DEFENSE — QUESTION FOR JURY.

Where the evidence in a prosecution for assault with a deadly weapon showed that defendant drew his knife and cut at his assailant, a stronger man, who was advancing on him with his right hand drawn back as if to strike with his fist, the issue of self-defense should have been submitted to the jury.

2. CRIMINAL LAW—DIRECTION OF VERDICT.

The judge cannot direct a verdict against the defendant in a criminal case.

Appeal from Superior Court, Onslow County; Council, Judge.

W. F. Hill was convicted of assault with a deadly weapon, and appeals. Reversed.

Indictment for assault with a deadly weapon. There was evidence of the state tending to show that the defendant was guilty of an inexcusable assault with a knife on one H. A. Jarman. The defendant in his own behalf testified: "On May 30th I went down in the field after breakfast to finish thinning corn; hadn't been there long before H. A. Jarman came down in the field with a little sack on his shoulder, and when he got in speaking distance of me he said: 'Why in hell didn't you replant this corn like I told you?' I said to him: 'I did replant a lot of it yesterday morning. It was so dry, and didn't rain as I thought; hence I didn't think it necessary to replant it.' He said: 'You thought! Damn it. Why in hell didn't you do like I told you? What do you reckon I want you to tend the land for, and nothing on it?' I said: 'You can plant field peas in the missing places.' Then he said: 'G—d damn it, who is boss, you or I?' I said: 'Mr. Jarman, when you want me to do anything, tell me like somebody. Don't come rearing and cursing.' Jarman set his sack down, and with his right hand drawn back, and his fist doubled up, made at me, saying: 'I have fooled with you as long as I intend to, G—d d—n you.' He is a stronger man than I, as I am weakly and subject to asthma. He advanced on me with his right hand drawn back in a striking position, coming 'kinder' sideways. I did not see anything in his hand, but he had it drawn back as if to strike me with his fist, and in this position he rushed on me, and I drew my knife, and cut at him to keep him from striking me with his fist. When I cut at him, he stumbled and fell. I never did anything else to him." On cross-examination: "When he put his sack down on the ground, he clinched his fist, and threw his hand around behind him in a striking attitude. I could not see his hand at all times. I did not see any weapon in his hand. He advanced on me sideways, with his right hand held out behind him in a striking attitude." At this point in the defendant's testimony, the judge stated in the presence of the jury that he would instruct them that the defend-

ant was guilty upon his own statement. The defendant excepted. The defendant had other material witnesses, but did not introduce them owing the court's intimation. Verdict of guilty as charged in the bill of indictment, and from the judgment pronounced, the defendant appealed.

C. L. Abernethy, for appellant. The Attorney General, for the State.

HOKE, J. (after stating the case). The defendant, by exceptions properly noted, assigns for error, first, that on the testimony he was entitled to have his plea of self-defense passed on by the jury; second, that in any event the court erred in directing a verdict against him.

We are of opinion that both points are well taken. It is true, as a general rule, that the law does not justify or excuse the use of a deadly weapon to repel a simple assault, or under ordinary conditions. This principle does not apply, however, where from the testimony it may be inferred that the use of such a weapon was or appeared to be reasonably necessary to save the person assaulted from great bodily harm; such person having been in no default in bringing on or unlawfully entering into the difficulty. This was held in *Matthews' Case*, 78 N. C. 523. In such case a defendant's right of self-defense is usually a question for the jury, and it is not always necessary to the existence of this right that the first assault should be with a deadly weapon. It may, in exceptional instances, arise when the fierceness of this assault, the position of the parties, and the great difference in their relative sizes or strength show that the danger of bodily harm is imminent. This was held in *Hough's Case*, 138 N. C. 663, 50 S. E. 709. Applying the principle of these two decisions to the case before us, we hold that the defendant's claim of self-defense should have been submitted to a jury. Of course, we express no opinion on the merits. There is evidence of the state, full and ample, if believed, to justify a verdict of guilty, and the jury may reject the defendant's version altogether; but it is for them to decide, and in no event in a criminal case is the judge permitted to direct a verdict against the defendant. When a plea of not guilty has been entered and stands on the record undetermined, it puts in issue not only the guilt, but the credibility of the evidence. As is said in *Riley's Case*, 113 N. C. 651, 18 S. E. 169, "the plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is a presumption of innocence which can only be overcome by the verdict of a jury." And, as said in *Dixon's Case*, 75 N. C. 275: "In this verdict, the jury must not only unanimously concur, but must be left free to act according to the dictates of their own judgment. The final decision on the facts rests with them and any interference by the court tending to influence

them into a verdict against their convictions is irregular and without the warrant of law." And this has been held to be the correct doctrine, though guilt may be inferred from the defendant's own testimony, as in *Green's Case*, 134 N. C. 658, 46 S. E. 761.

Where there is no evidence tending to establish the plea of self-defense, and in any aspect of the testimony the defendant's guilt is manifest, the judge may tell the jury "If they believe the evidence," or, as suggested in *State v. Barrett*, 123 N. C. 753, 31 S. E. 781: "If they find the facts to be as testified," etc., "they will render a verdict," etc. But this verdict must be rendered by them, and in no criminal case can it be directed by the judge. There is error, and a new trial is awarded.

New trial.

(124 Ga. 1008)

WILLIAMS v. BRADFIELD.

(Supreme Court of Georgia. Feb. 19, 1906.)

CERTIORARI—ANSWER—SUFFICIENCY.

As the answer to the writ of certiorari sued out in the present case did not verify the statement in the petition for certiorari, that a verdict had been rendered against the petitioner in the court wherein the case originated, nor disclose what, if any, disposition was made of the case in that court, and as no steps were taken to have the answer perfected, the judge of the superior court, who overruled the petition for certiorari, committed no error of which the petitioner could legally complain. *Garrett v. McIntosh*, 43 S. E. 280, 116 Ga. 911; *Stephens v. Mayor of Macon*, 48 S. E. 152, 120 Ga. 482.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Proceedings between J. F. Williams and E. B. Bradfield. From a judgment for the latter, the former brings error. Affirmed.

E. T. Moon, for plaintiff in error. E. B. Bradfield, Jr., for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(124 Ga. 827)

BELMONT FARM v. DOBBS HARDWARE CO.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. MECHANIC'S LIEN—PAYMENT BY NOTE—EFFECT ON LIEN.

The taking of a promissory note for an amount due on an account, which is the basis of a mechanic's, materialman's, and contractor's lien, in the absence of an express agreement, will not, until the note is paid, accomplish an extinguishment either of the account or the lien. But as a condition precedent to final judgment, either upon the account or lien, the note must be surrendered to the maker or accounted for by showing that it is not in any event enforceable against him.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 387-392.]

2. SAME—EVIDENCE.

The evidence sustains the verdict, and there was no error in overruling the motion for new trial upon the usual general grounds.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by the Dobbs Hardware Company against the Belmont Farm. Judgment for plaintiff, defendant brings error. Affirmed.

The plaintiff instituted suit against the defendant, declaring upon a lien as contractor, mechanic, and materialman, and upon the open account, setting out by items the work done and material used, and the cost of the same, thus showing a total indebtedness of \$613.53, for which he prayed a general judgment, and the establishment of his lien upon the improvements, and as well on the real estate upon which the improvements were situated. It was also alleged, that, a few days after the contract was completed, the defendant gave to the plaintiff, on the account, its note for \$300, the same to fall due at a date beyond the limit of time within which a lien could be filed, and that the same was not paid at maturity and was held by plaintiff unsatisfied at the time of instituting the suit; that the lien was regularly declared and filed and recorded within the time allowed by law, for the full amount of \$613.53, without making any reference to the note. It was further alleged that the debt arose under a parol contract between the parties at interest. No demurrer was filed, but the defendant answered joining issue only as to the terms of the contract and the existence of the lien as claimed, and contending that certain things had not been done which had been contracted for, and that the work which was done was not according to contract, and that certain overcharges had been made. Upon the issue thus raised the defendant submitted its cause, with the prayer that whatever be found in its favor be set off against anything that might be found due the plaintiff. There was no evidence or contention that the note had ever been assigned, and the plaintiff had it before the court at the trial. In other respects, the evidence upon the issues above named was conflicting. The verdict and judgment were in favor of the plaintiff for the full amount sued for, and establishing a lien upon the property. The defendant moved for a new trial upon the general grounds, and the further ground: "Because the verdict sets up a lien of \$613.53 with interest on the realty belonging to the defendant, when plaintiff's petition shows that \$300 of said amount on which lien was taken had been settled by defendant giving its promissory waiver note. Defendant insists that said lien could only be set up as against the balance of said account even if due, which defendant denies." The motion was overruled, and the defendant assigns error.

R. W. Holland, for plaintiff in error. J. Z. Foster, for defendant in error.

ATKINSON, J. The fourth ground of the motion for new trial complains that the giving of the note discharged the lien pro tanto. It is well settled that, in the absence of an express agreement between the parties to the effect that the note shall be an extinguishment of the original debt, that the debt does not become extinguished until the note is actually paid. *Hodges v. Smith*, 118 Ga. 789, 45 S. E. 617; *Brantley Co. v. Lee*, 109 Ga. 478, 34 S. E. 574; *Jackson v. Brown*, 102 Ga. 87, 29 S. E. 149, 66 Am. St. Rep. 156; *Norton v. Paragon Oil Can Co.*, 98 Ga. 468, 25 S. E. 501. There was no such express agreement in this case, and consequently there was no discharge of debt by which a discharge of lien could arise. If the debt remained unextinguished, what else was there to discharge the lien? The note was a mere evidence of debt; it was not the taking of security. The defendant lost nothing by giving it. No payment was ever made. It does not appear ever to have been transferred. The plaintiff held it overdue when the suit was filed, and accounted for it upon the trial by production in court. The evidence fails to disclose an agreement for the discharge or any fact which, in law, would authorize one. *Balkcom v. Empire Lumber Co.*, 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58. It appearing that the note was past due at the time of the institution of the suit and was produced on the trial, the defendant is protected from any possible liability thereon. See, in this connection, *Moultrie Repair Company v. Hill*, 120 Ga. 730, 48 S. E. 143. Upon the questions at issue in the case the evidence is conflicting. There being no exception to the charge of the court, it will be presumed that all of the issues were fully and fairly submitted to the jury; and the evidence as a whole being sufficient to support the finding of the jury, and the verdict having received the approval of the presiding judge, his discretion in refusing a new trial will not be disturbed.

Judgment affirmed. All the Justices concur.

(124 Ga. 357)

WALKER v. HILLYER.

(Supreme Court of Georgia. Feb. 16, 1906.)

1. ESTOPPEL — REPRESENTATIONS — VALIDITY OF NOTE.

The maker of a note tainted with usury, who, after its maturity, induces another to purchase it, representing that there is a stated amount due, and promising to pay that sum at a later date, is, when it appears that the purchaser acted in good faith, and there is no evidence showing that he knew of the usury, estopped from pleading that there was usury in the original transaction.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 222-226; vol. 47, Cent. Dig. Usury, § 259.]

2. CERTIORARI—FORM OF JUDGMENT.

When a judgment is rendered in a justice's court against husband and wife on a joint note, and the case is carried by certiorari to the superior court, and the defendant in certiorari agrees that the judgment against the wife is erroneous for the reason that her contract was one of suretyship, the judge may properly sustain the certiorari as to the wife and overrule it as to the husband.

3. BILLS AND NOTES — EVIDENCE — SUFFICIENCY.

The evidence authorized the verdict against the husband, and there was no error requiring the grant of a new trial as to him.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by J. F. Hillyer against Caleb Walker and another. There was judgment for plaintiff, and defendants bring certiorari, which was sustained as to defendant Lula Walker, and dismissed as to defendant Caleb Walker, who brings error. Affirmed.

Hillyer, transferee, brought suit upon a promissory note for \$18 and interest against Caleb Walker and Lula Walker. The defendants filed separate pleas. Lula Walker set up that she signed the note as surety for her husband and did not receive any of the money obtained on it, and that it was tainted with usury. Caleb Walker pleaded usury, setting up that he obtained \$15 as the principal sum, and paid as interest from July to December, 1901, \$16.60; further, that the plaintiff became the owner of the note seven months after its maturity, and hence was on notice as to any defense the makers might have against the payee. It was admitted that the note was tainted with usury. The amounts paid by Caleb Walker were disputed. Hillyer became the owner of the note under the following circumstances: Caleb Walker requested Hillyer to take up a note, which he and his wife jointly owed, secured by a mortgage on their home, to one Busbin. Walker promised to labor on Hillyer's farm in payment of the note. Hillyer told Walker to find out the exact amount due, and let him know. Walker reported that \$18 was due, and Hillyer told him if the papers were all right he would take up the note. Hillyer paid Busbin \$18, and had the note transferred to him, without recourse. Caleb Walker failed to do any work for Hillyer, as promised, and suit was brought upon the note. The case was tried before a jury in a justice's court, who found for the plaintiff \$17.25 principal, and \$4.18 interest. A petition for certiorari was sued out by both defendants, which set out the foregoing facts. After a hearing the certiorari, by consent of the defendant in certiorari, was sustained as to Lula Walker. As to Caleb Walker it was dismissed, and judgment rendered against him. To this judgment, Caleb Walker excepted.

Henry Walker, for plaintiff in error. J. F. Hillyer, pro se.

COBB, P. J. (after stating the foregoing facts). The plaintiff in the suit upon the note was induced to take up the note by the defendant after its maturity, and, when suit upon the note was brought, the defendant plead usury in the original transaction. It does not appear that the plaintiff knew of the usury when he bought the note. Would the silence of the defendant as to the existence of usury, when the note had been bought by the plaintiff at his solicitation, work an estoppel against the plea of usury? In *Henry v. McAllister*, 99 Ga. 557, 26 S. E. 469, the rule was laid down: "One who makes a usurious note and secures its payment by executing a deed to realty, the usury not appearing upon the face of the papers, is, as against another whom he induces to purchase the note by representing that it and the deed 'are valid and all right' (the purchase being made in good faith and in ignorance of the usury), estopped from setting up the usury in the transaction."

It is true, that in the present case the defendant did not tell the plaintiff in words that the note was valid and all right, but his silence as to anything which would impair its validity amounted, under the circumstances, to such an assurance. The facts in the case of *Campbell v. Morgan*, 111 Ga. 204, 36 S. E. 621, are perhaps more similar to the one under consideration, and in that case it was said: "When the note fell due, plaintiff tried to get Morgan to pay them off, and Morgan's reply was a request that plaintiff pay them off as they matured, and that he would reimburse plaintiff for his expenses in so doing. This conduct on the part of the maker clearly estops him from impeaching the validity of his title on the ground of usury. To allow such a defense would be giving the debtor the privilege of taking advantage of his own fraud perpetrated upon his creditor." The court below was right in overruling the certiorari as to Caleb Walker.

Judgment affirmed. All the Justices concur.

(124 Ga. 832)

GARLAND v. STATE.

(Supreme Court of Georgia. Feb. 16, 1906.)

1. HOMICIDE—INSTRUCTIONS.

Where there is nothing in the evidence to show that the law of voluntary manslaughter is involved in the case, it is proper for the judge to omit it from his charge.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 652, 655.]

2. CRIMINAL LAW—INSTRUCTIONS.

Where, on the trial of one accused of murder, the court erroneously states to the jury that the accused admits that the deceased came to her death by being shot by a pistol in his hands, thereby excluding one theory of defense presented by the prisoner's statement, error is committed requiring the grant of a new trial. And this is true, notwithstanding the fact that the court may have intimated to the jury in other portions of the charge that the defendant

did not admit that the deceased came to her death at his hands.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1994.]

3. SAME—CREDIBILITY OF WITNESSES.

In instructing the jury as to the credibility of witnesses who have willfully sworn falsely in a material particular, it is the better practice for the court to instruct the jury that their testimony is to be entirely rejected, unless corroborated in the legal manner, instead of simply instructing that such testimony is to be rejected unless corroborated.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Gene Garland was convicted of murder, and brings error. Reversed.

Green F. Johnson, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the state.

BECK, J. The evidence for the state was in substance as follows: The defendant came to the house of one Mary Lizzie Jordan, where the deceased was staying, and calling deceased from her room, after a few words with her, shot her down in cold blood. He was standing so close to deceased when he shot that her clothing caught fire and was considerably burned. He shot her again after she had fallen. At this juncture Henry Jordan, a stepson of Mary Lizzie, rushed into the house and was shot in the hand by the defendant. Henry grabbed a pistol from a trunk in the house, and with it chased the defendant away, shooting at him as he ran. There was also evidence tending to prove that the accused and deceased had quarreled, and that on the day before the homicide he had told the deceased's aunt that unless she (deceased) "gave him satisfaction" he would kill her. The defendant's evidence and statement were to the effect that there had been some animosity between him and Henry Jordan, and that Jordan had intimated that he was ready for a combat with the defendant at any time; that the accused went to the house where the killing was done and asked Mary Lizzie for a drink of water, and while she was gone to get it for him, he, being in the act of stooping over an open fireplace, lighting a cigarette, was cursed by Henry Jordan, who then appeared, and his life was threatened. "I jumped and stumbled back in the corner," the defendant said, "and he shot, and I got my pistol out of my belt and shot at him four times, and when I started shooting there was so much smoke between us I could not see [deceased]. If she got hit, she must have been trying to get out of the way and got shot." Witnesses for the state denied that there existed any ill will between Jordan and defendant, while the defendant denied that he had ever threatened to kill the deceased. It is contradicted that the deceased's clothes were burned; that Jordan was shot in the hand, and that Jordan pursued the defendant out of

the house and for some distance, shooting at him the while. Upon being convicted of murder, with a recommendation that he be imprisoned for life, the defendant made a motion for a new trial upon the grounds, as well as upon others which we will take up seriatim.

1. We will first dispose of those grounds of the amended motion which complain of the failure of the court to charge the law of voluntary manslaughter. This was not error. The evidence for the state, if credible, showed that the accused was guilty of murder, while the testimony in his behalf, and his statement made a case of justifiable homicide. It has been repeatedly ruled that, under such state of facts, an omission by the court to include in its charge the law of voluntary manslaughter is proper. See *Greer v. State* (Ga.) 52 S. E. 884; *Waller v. State*, 110 Ga. 250, 34 S. E. 212.

2. It is complained in one of the grounds of the motion that the court erroneously stated the contention of the accused. The court said: "It is the contention of the defendant in this case that what he did on that occasion was justifiable; * * * that while he went to the house where this person was, he was assaulted by one Henry Jordan * * * with a pistol and fired upon without any justification or mitigation, and that acting in self-defense to protect his own life or to prevent a felony that was about to be perpetrated upon him, and * * * acting under the fears of a reasonable man * * * he fired at his assailant, and that this shot took effect upon another person, that woman named in the indictment, and took her life, and that he was justifiable in this act." This charge virtually tells the jury that the accused admits that the deceased came to her death at his hands, and takes from the jury the determination of the question as to whether this was a fact or not. The accused said he did not see the deceased during the duel between Jordan and himself, and that "if she got hit, she must have been trying to get out of the way and got shot." If the jury believed the statement of the defendant, as they had a right to do in preference to all other evidence, they could have believed that in this affray between Jordan and the accused, the woman was shot by Jordan, had the court not instructed them that the defendant admitted that it was his shots that caused her death. And by taking from the consideration of the jury the theory that the deceased came to her death at the hands of Jordan, the court deprived the defendant of a valuable right. It is true that the jury could have rejected this theory; but that does not alter the case. When the court undertook to state to the jury the con-

tention of the defendant, the latter had the right to have it submitted to them correctly, and when the court deprived him of this right, reversible error was committed. Nor is the error corrected by other portions of the charge where the court used such language as: "The defendant says that he did not shoot the deceased (if he shot her at all) with malice." "If you should conclude that the deceased came to her death from a pistol in the hands of the defendant," etc. See *Brush Electric Co. v. Wells*, 108 Ga. 512, 30 S. E. 533; *Western & Atlantic R. Co. v. Clark*, 117 Ga. 548, 44 S. E. 1; *Morris v. Warlick*, 118 Ga. 421, 45 S. E. 407. It may be contended that the instruction complained of was not harmful to the accused, erroneous though it be, for the reason that if the jury believed the defendant's statement, he was justifiable in shooting at Jordan, and if in shooting at Jordan, he killed the deceased, the homicide would have been justifiable. This contention is successfully overcome by calling attention to the fact that the jury may believe any part of a defendant's statement and reject any part. If they believed that the defendant in this case did not see the deceased, and did not believe that he shot at Jordan in self-defense, believing instead that the accused precipitated the duel by making an assault upon Jordan, had the court not instructed them that the accused admitted killing the deceased, they still would have had to determine whether the deceased was shot by Jordan or by the accused. We therefore feel constrained to hold that the court below should not have so stated the defendant's contention, and that a new trial should have been granted upon this ground.

3. Another ground of the motion complains that the court erred in charging the jury as follows: "If a witness swears willfully, knowingly, and absolutely false on a material matter, the testimony ought to be rejected, unless corroborated by facts and circumstances in the case, or other credible evidence"—the error being that it omitted the word "entirely" after the word "rejected," and thus was subject to the construction that only upon the specific matter about which he willfully swears falsely should his testimony not be considered, when under the law his entire testimony should be rejected. While this charge may not constitute reversible error here, it is inaccurate, and the better practice would have been to have included the word "entirely," in order that the instruction might more clearly conform to the statute. Civil Code 1895, § 5295.

Judgment reversed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 825)

BERRY v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

INDICTMENT—MISJOINDER OF OFFENSES.

An indictment which charges one with breaking and entering a railroad car with intent to steal the goods, wares, and freight therein contained, and, after so breaking and entering, stealing therefrom certain articles of value, does not contain a misjoinder of two offenses in one count.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Wade Berry was convicted of breaking and entering a railroad car, and brings error. Affirmed.

Wade Berry was arraigned upon an indictment which charged that he "did break and enter a railroad car of the Central of Georgia Railway Company with the intent to steal the goods, wares, and freight therein contained, and after so breaking and entering did steal therefrom one hand satchel of the value of \$12," etc. The accused filed a special demurrer to the indictment upon the ground that in one and the same count it sought to charge him with two offenses: First, that he broke and entered a railroad car with intent to steal therefrom; and, second, that he did steal therefrom certain named articles. This demurrer was overruled. The accused thereupon filed a written motion to require the state to elect upon which of the two alleged offenses it would proceed against him, and this motion was overruled. To these rulings the accused excepted.

R. S. Wimberly and E. W. Maynard, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

COBB, P. J. (after stating the foregoing facts). The indictment was framed under section 184 of the Penal Code of 1895, which is in the following language: "Any person who shall break and enter any railroad car with intent to steal any goods, wares, freight or other thing of value being therein, or who shall, after breaking, steal therefrom any goods, freight or other thing of value being therein, shall be punished by confinement in the penitentiary for not less than one nor more than five years." This section embraces two offenses. The one is committed where the railroad car is broken and entered with intent to steal, although that intent may not be carried into effect, and the other is where there has been a breaking and entering of the car, and an actual stealing therefrom. The indictment charging the first offense must allege that the breaking and entering was with the intent to steal, and this intent to steal may be alleged by an averment that, after breaking and entering, the accused did steal. Properly construed, the indictment under consideration is of this character. It charges the breaking and entering

of the car, and, after breaking and entering, the stealing therefrom. The averment as to the stealing from the car was evidently not intended by the pleader to charge a distinct offense, but simply to illustrate the intent of the accused at the time of breaking and entering. When the indictment is so construed, it does not charge two offenses. The case is very similar to an indictment for burglary, which charges the breaking and entering with intent to steal, and then, illustrative of the intent, charges that after the breaking and entering a larceny was committed. See, in this connection, *Houser v. State*, 58 Ga. 78; *Stokes v. State*, 84 Ga. 258, 10 S. E. 740. In *Williams v. State*, 60 Ga. 88, the ruling was simply that a misjoinder of counts in an indictment would not be a good ground for a motion in arrest of judgment. It is true that Mr. Chief Justice Warner in that case took occasion to say that the indictment under consideration would have been held bad on special demurrer, but no such question was directly involved in the case, and what was said on the subject is therefore not binding as authority. The indictment is not set out in the report of the case, and it may be the larceny was so charged as to make it a complete offense—not merely an averment as to intent. If, however, the indictment did allege the larceny simply as an averment of intent, the remarks by the learned Chief Justice as to the invalidity of the indictment are in conflict with direct rulings of the court upon the subject of the sufficiency of an indictment for burglary. As the indictment did not charge two offenses, of course there was nothing in the motion to require the state to elect upon which count it would rely. There was no error in either of the rulings complained of.

Judgment affirmed. All the Justices concur.

(124 Ga. 822)

CULVER v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW—GOOD CHARACTER—INSTRUCTIONS.

Upon the trial of one charged with receiving stolen goods from another, knowing them to have been stolen, the character of the defendant, if put in issue by him, is entitled to be considered with all the evidence as tending to cast light upon his guilt or innocence. In this case there is no material dispute as to facts, but the question is one of inference to be drawn from undisputed facts. Accordingly a charge restricting the application of the effect of good character to the question as to whether "the evidence is all false or the witnesses mistaken" is erroneous, because it fails to charge upon the real issue.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1838-1845.]

2. SAME—FAILURE TO INSTRUCT.

In this case it does not appear that any harm was done the defendant by the omission of the court to give in charge to the jury the law relating to the prisoner's statement; and, there being no request to charge upon that subject,

the omission is not sufficient cause for the grant of a new trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1993, 1999; vol. 15, Cent. Dig. Criminal Law, §§ 3164, 3165.]

8. SAME—APPEAL—REVIEW.

A new trial being ordered for the reason stated in the first headnote, the general ground that the verdict is without evidence to support it will not be considered.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Algia Culver was convicted of receiving stolen goods, and brings error. Reversed.

The evidence in this case shows that one Harrison was the keeper of a livery stable and had working for him two servants, Johnnie Pinkston and Dave Hawkins; that a set of harness was stolen from Harrison by Dave Hawkins, and that Hawkins had been convicted of the larceny; that on the day of the larceny the defendant went to the livery stable of Harrison, during Harrison's absence, to buy a set of harness. He offered at first to buy from Pinkston, offering him the price of \$6 for the harness, and Pinkston in turn telephoned to Harrison, reporting the offer and asking for directions. He was advised by Harrison to sell for \$12.50, but nothing less, whereupon the defendant declined to take them at that price. He again offered Pinkston \$6. Pinkston then told him that he had not the authority to sell at less than \$12.50, and that the defendant would have to see Harrison himself, if he wanted it at a less price. Dave Hawkins was present during this conversation. It also appears that soon after this Harrison came to the stable, but that the defendant said nothing to him about the harness. Later during the day, and while Pinkston and Harrison had gone to dinner, the defendant made an offer of \$5 for the harness to the other servant, Dave Hawkins, who at that price delivered it to the defendant; \$2 being payable in cash, and the remaining \$3 at a later date. The defendant then took the harness from the stable, in the daytime, in a bag, and carried it some distance along the street, and harnessed his mule with it, and drove some distance in the country. Dave Hawkins did not have authority to sell the harness, nor did he report the alleged sale to Harrison or account to him for the money, but, on the contrary, concealed the fact from him, and several days afterwards, when the harness was missing, denied any knowledge of its whereabouts. Some days after the harness was missed, Harrison found it in the possession of the defendant, who told him he had bought it from Hawkins on the terms already stated. Among other things, the judge charged the jury as follows: "Gentlemen of the jury, I charge you, further, that whatever may be the testimony, and however it may appear to you, if the character of the accused has

been shown to you to be so good as to create a doubt in your minds and lead you to believe, in view of the improbability that a man of his character would be guilty of the offense charged, that the other evidence in the case is all false, or the witnesses mistaken, it would be your duty in this case to acquit the defendant. If you do not believe that he has been shown to be of such character that it would be improbable or impossible for him to commit that offense, and if you do not believe that the other testimony in the case is false, or that the witnesses are mistaken, and believe that the evidence is sufficient to convict under the rules I have given you, why, then, the rule I have just laid down does not apply"—which charge was objected to for the reason that it was "conflicting, misleading," etc.

R. H. Lewis, for plaintiff in error. R. W. Moore, Sol., for the State.

ATKINSON, J. 1. This case turns upon the question of intent. Between the witnesses and the statement of the accused there is hardly a dispute. The evidence touching the bona fides of the defendant in purchasing from Hawkins is susceptible of two constructions—one in favor of innocence, and the other of guilt. In passing upon this question the good character of the accused is manifestly material. The charge complained of deals with the subject in such way as to avoid the application of the rule to the vital question at issue. The jury is instructed, in effect, that if they believe the character of the accused is sufficiently good to justify them in the belief "that the other evidence in the case is all false or the witnesses mistaken," it will be their duty to acquit. That charge misses the issue. The question is not whether the other evidence is false or the witnesses mistaken, but how should the evidence which is introduced be construed, and what conclusion should the jury draw from those facts? The charge of the court should have dealt with this question, and the jury should have been instructed that it was their duty, in connection with the other evidence in the case, to take into consideration all of the evidence bearing upon the defendant's character, with a view of construing his conduct and ascertaining whether or not, under the facts as proven, his motives were honest, and whether or not he acted in good faith in making the purchase from Hawkins; and, if they thought his character sufficiently good, they could deal with it as a substantive fact, capable either of raising a reasonable doubt as to his guilt or establishing his innocence, and that his acquittal should result from either of those conclusions. This being a close case, and inasmuch as the court restricted the jury in the manner above specified, a new trial should have been granted.

2. The ruling expressed by the second head-

note rests upon the theory that no harm was done to the defendant by the failure of the court to give in charge to the jury the law touching the prisoner's statement. If the omission was harmful, it is well settled that the court should have charged upon the subject, without any written request so to do. If it was not harmful, it is also well settled that, in the absence of a request, the omission to charge would not be good cause for the grant of a new trial. *Doster v. State*, 98 Ga. 43, 18 S. E. 997; *Barfield v. State*, 105 Ga. 491, 30 S. E. 743, and cases therein cited. So it remains only to be determined whether or not the omission of the court complained of was harmful to the defendant. This question is settled in the negative by the language of the statement. By its own terms, the statement is not in material conflict with any evidence offered against the accused, but, on the contrary, in so far as it goes, is almost identical with the facts testified against him, and does not explain anything pointing to his guilt. It follows, therefore, that the court did not err in refusing to grant a new trial upon that ground.

Judgment reversed. All the Justices concur.

(124 Ga. 311)

WINN v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

CRIMINAL LAW — BILL OF EXCEPTIONS — ASSIGNMENT OF ERROR.

A bill of exceptions which contains no assignment of error whatever presents no question for determination, and its dismissal cannot be prevented by a proposed amendment assigning error for the first time in this court.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Pearl Winn was convicted of assault, and brings error. Dismissed.

M. W. Harris and J. F. Urquhart, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

EVANS, J. The bill of exceptions recites that the defendant was tried for the offense of assault and battery in the city court of Macon, and was convicted by the jury; that a motion for a new trial was made, and an approved brief of the evidence was duly filed; and that the motion for a new trial was amended. The bill of exceptions then continues: "Said motion for a new trial was then and there heard and argued, and on said date he [the judge] passed an order denying and overruling said original and amended motion upon each and every ground thereof. Now comes the defendant in said case, Pearl Winn, who was the movant in said motion, and who is now plaintiff in error, and, in order to carry said case to the Supreme Court by bill of exceptions, specifies the

following portions of the record as material in the case to a clear understanding of the errors complained of." Then follow certain specifications of the record, and the bill of exceptions closes with the prayer that it "be approved as true and correct, and be certified to according to law, and that the clerk of the court be required to make out a complete copy of such parts of the record as are in this bill of exceptions specified, and to certify the same as such, and together with this bill of exceptions transmit the same to the present term of the Supreme Court, that the errors alleged to have been committed may be considered and corrected." The plaintiff in error moved in this court to amend the bill of exceptions by assigning error on the overruling of the motion for a new trial, because, as he insists, each and every ground of the original and amended motion should have been sustained for the reasons therein set forth.

The bill of exceptions utterly fails to make any assignment of error. *Williams v. Augusta Southern R. Co.*, 98 Ga. 392, 25 S. E. 557. When a bill of exceptions contains no assignment of error, the uniform practice has been to dismiss the writ of error. *Goneke v. Garrett*, 6 Ga. 119; *Anderson v. Baker*, 58 Ga. 604; *Sewell v. Conkle*, 64 Ga. 436; *Clark v. State*, 68 Ga. 784; *Dismukes v. Bainbridge State Bank*, 99 Ga. 179, 25 S. E. 181; *Case v. Brotherton*, 105 Ga. 510, 31 S. E. 174; *Gunter v. Smith*, 113 Ga. 19, 38 S. E. 374; *Jackson v. Fitzpatrick*, 114 Ga. 364, 40 S. E. 234; *Atlantic R. Co. v. Penny*, 119 Ga. 479, 46 S. E. 665; *Citizens' Banking Co. v. Paris*, 119 Ga. 518, 46 S. E. 638; *Newberry v. Tenant*, 121 Ga. 561, 49 S. E. 621; *Williams v. R. Co.*, supra. Counsel for the plaintiff in error seeks to avoid this effect by offering an amendment, for the first time in this court assigning error, and relies upon section 5570 of the Civil Code, of 1895, which provides that no writ of error shall be dismissed when, "by an amendment to the bill of exceptions, * * * any imperfection or omission of necessary and proper allegations could be corrected from the record in the case." Amendments allowable under this section are, by its own terms, confined to such imperfections or omissions of necessary and proper allegations as can be cured by or supplied from the transcript of the record. *Jones v. Gill*, 121 Ga. 93, 48 S. E. 688. Under this section, a bill of exceptions may be amended by referring to the brief of the evidence, if it be contained in the transcript (*Kelly v. McGehee*, 67 Ga. 364), or by adding additional coplaintiffs in error, if the bill of exceptions be sued out by a party having the right to except (*Orr v. Webb*, 112 Ga. 806, 31 S. E. 98), and the record discloses that they might properly have been joined with him (*Griffith's Case*, 111 Ga. 551, 36 S. E. 859), or by correcting a recital of fact made in the bill of exceptions which the record shows is erroneous (*Parks v. Johnson*, 79 Ga. 567, 5 S. E. 243; *Ramsay*

v. O'Byrne, 121 Ga. 516, 49 S. E. 595). But a bill of exceptions which does not specify any error is not amendable, as was pointed out in *Turner v. Alexander*, 112 Ga. 820, 38 S. E. 85, in which case section 5584 of the Civil Code, of 1895 declaring that this court "shall not decide any question unless it is made by a special assignment of error in the bill of exceptions," was construed in connection with section 5569, which provides that the Supreme Court shall not "dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to that court, where there is enough in the bill of exceptions or transcript of record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein." As was then held, where there has been any bona fide attempt to comply with the statutory requirements of specifically stating in the bill of exceptions the errors of which the losing party wishes to make complaint, the writ of error will not be dismissed, if there be any assignment of error which, viewed in the light of the record, is sufficiently certain and definite to enable this court to ascertain substantially the real question or questions which the excepting party seeks to have decided. But it is obvious that a total disregard of the necessity of excepting to some adverse ruling or judgment is not lightly or flippantly to be termed a mere "want of technical conformity" to a mandatory statute, which requires, not only that the ruling or judgment shall be unequivocally excepted to, but that the real or supposed error committed by the trial court shall be specifically pointed out by a "special assignment of error in the bill of exceptions."

A bill of exceptions in which the complaining party fails to except to anything is an anomaly, if it can be dignified by being classed as anything at all. If life could be breathed into it, after it had been transmitted to this court, by then for the first time inserting an assignment of error, for a much greater reason would it be permissible to add new and distinct assignments of error to those specified in a bill of exceptions which

is such in fact as well as in name. Yet this cannot be done, directly by amendment to the bill of exceptions (*Ganahl v. Shore*, 24 Ga. 17), nor by indirection, under the guise of amending the grounds of a motion for a new trial to the overruling of which exception is taken (*Miller v. State*, 121 Ga. 135, 48 S. E. 904). A bill of exceptions which is "so obviously defective and incomplete that it presents no question which this court can intelligently consider and pass upon" does not in any sense comply with the practice prescribed for bringing cases to this court. *McCandless v. Rodgers*, 99 Ga. 636, 25 S. E. 822. If it contains no exceptions to any judgment, ruling, or decree, it is lacking in that essential which gives to it its very name, and there is nothing to amend by, even were amendment in the Supreme Court otherwise than from the transcript of the record in any case permissible. Total disregard of prescribed rules of procedure amounts to something more than a "want of technical conformity" thereto. The statutory requirement that a judgment must, as a condition precedent to its being brought under review before the Supreme Court, be excepted to by the party dissatisfied therewith, is certainly as important and as imperative as the requirements that a bill of exceptions must be signed by the excepting party or his counsel, be sued out in the name of a party to the case who has an interest in setting aside the judgment, and that an entry be made on the bill of exceptions showing service upon or an acknowledgment of service by all parties interested in sustaining the judgment. Yet a failure to observe any of these requirements is fatal, and a dismissal of the writ of error cannot be evaded by any proffered amendment to the bill of exceptions. See (1) *Sumner v. Sumner*, 116 Ga. 798, 43 S. E. 57; (2) *Swift v. Thomas*, 101 Ga. 89, 28 S. E. 618; (3) *Crow v. State*, 111 Ga. 645, 36 S. E. 858. Nor can any defective bill of exceptions be completed, after it reaches this court, by inserting an omitted specification of a portion of the record (*Pyne v. State*, 113 Ga. 725, 39 S. E. 294), since the law does not so authorize.

Writ of error dismissed. All the Justices concur.

(124 Ga. 798)

TAYLOR v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

MASTER AND SERVANT—LABOR CONTRACT—BREACH—SWINDLING—CRIMINAL PROSECUTION.

The evidence upon which the accused was convicted in the county court failed to sustain the charge made in the accusation, and the judge of the superior court, therefore, erred in not sustaining the certiorari upon the ground that the verdict was contrary to the evidence and to law.

(Syllabus by the Court.)

Error from Superior Court, Wayne County; T. A. Parker, Judge.

E. B. Taylor was convicted of swindling, and brings error. Reversed.

E. B. Taylor was tried by a jury in the county court of Wayne county under an accusation preferred against him by Lucius Clark, charging him with the offense of cheating and swindling, defined by the act of August 15, 1903 (Acts 1903, p. 90). The specific charge in the accusation was that the accused, in the county of Wayne, on the 3d day of September, 1905, did commit the offense of cheating and swindling by contracting with the prosecutor to perform "certain services of labor to work and pull a crop of turpentine boxes during the season of the year 1905, in the county aforesaid, for the sum of ten dollars, with intent to defraud and procure ten dollars in United States money, of the value of \$10, and, after procuring said ten dollars from said Lucius Clark, intentionally to defraud prosecutor, refused to do and perform said labor, to the injury and damage of the said Lucius Clark ten dollars"; and that the accused "refused to perform such services or to pay [Clark] back ten dollars, contrary to the laws of this state," etc. The jury returned a verdict finding the accused guilty. He carried the case by certiorari to the superior court, where the certiorari was dismissed, to which ruling he excepted.

J. R. Thomas, for plaintiff in error. Jno. W. Bennett, Sol. Gen., for the State.

FISH, C. J. (after stating the facts). The certiorari should have been sustained, upon the ground that the verdict was without evidence to support it. The contract shown by the evidence was not the one alleged in the accusation. The accusation was headed: "Georgia, Wayne County. In the County Court of Said County." It charged that, on the 3d day of September, 1905, in Wayne county, the accused did "commit the offense of cheating and swindling, by contracting with the said Lucius Clark * * * to work and pull a crop of turpentine boxes during the season of the year of 1905, in the county aforesaid, for the sum of \$10, with intent to defraud," etc. From the answer of the county judge to the writ of certiorari, it appears that Lucius Clark, the prosecutor, and the only witness as to the

making of the contract, testified: "He was engaged in the turpentine business in Tatnall county, Ga., and * * * on or about the 3d of September, 1905," the accused "contracted with [him] to pull a crop of turpentine boxes." Mr. Durrance was "running" a turpentine business. The accused "was pulling some boxes there at Mr. Durrance's turpentine business at the time he approached witness to advance him ten dollars," and he stated to the witness that Mr. Durrance had refused to advance \$10, and if the witness "would get the money from Mr. Durrance and give it to him, the defendant, to pay his account in Brunswick, which was for rent, * * * he would come back and pull boxes for him until he had paid him for his ten dollars." The witness "did go to Mr. Durrance and borrowed a check" or draft for \$10, and then "went to Jesup, with said defendant, and there in Jesup, Wayne county, * * * collected said check of ten dollars and * * * then and there in Jesup, Wayne county, Georgia, * * * had an understanding, and entered into the contract * * * again with said defendant, upon the condition that he, the defendant, return to Tatnall county and there to pull turpentine boxes for the prosecutor, Lucius Clark, until he paid back the said ten dollars." The defendant was to return back from Brunswick, and then and there to complete his contract of labor in the turpentine season of 1905, at the turpentine business of Mr. Durrance, in Tatnall county."

It will be seen that according to the accusation the contract which the accused entered into with the prosecutor was that the accused would "work and pull a crop of turpentine boxes during the season of the year 1905, in the county aforesaid"—that is, in Wayne county—"for the sum of ten dollars," while, according to the evidence, the contract of the accused was not "to work and pull a crop of turpentine boxes during the season of the year of 1905," in Wayne county, but was "to return to Tatnall county and there to pull turpentine boxes for the prosecutor, Lucius Clark, until he paid back the said ten dollars," which the prosecutor advanced him. In the one case the contract was to be performed by the accused in Wayne county; in the other, it was to be performed by him in Tatnall county. According to the accusation, the duration of the contract was measured by the words "during the season of the year 1905." According to the evidence its duration was to be "until [the accused] had paid back the said ten dollars." It will be perceived that unless the words "during the season of the year 1905," as used in the accusation in stating the contract, be construed to mean "throughout the course, existence, or continuance of the turpentine season of the year 1905," the accusation would be fatally defective, in that the contract alleged therein would be so vague, indefinite, and uncertain,

as to the period of service contracted for, as to be void. For, if these words be construed to mean "at some period in the turpentine season of the year 1905," neither the time when the labor was to begin nor the time for which it was to continue could be determined from the contract. Even if the contract, thus construed, could be held to be valid, the evidence would not show that the accused had violated it at the time when the accusation was preferred against him, for the date of the accusation is October 23, 1905, and the evidence fails to show that the turpentine season of the year 1905 had then expired. Construing these words in the sense first above indicated, which tends to support the accusation, and is, we think, the meaning which should be given them in the connection in which they are used, the alleged undertaking on the part of the accused was "to work and pull a crop of turpentine boxes" during the continuance of the turpentine season of 1905, while his undertaking, as shown by the evidence upon which he was convicted, was "to pull turpentine boxes for the prosecutor, Lucius Clark, until he had paid back the said ten dollars." The contract shown by the evidence is clearly not the same as that alleged in the accusation, and the accused could not be lawfully convicted without showing that he had entered into the contract alleged in the accusation. He could not be charged with having entered into one contract to perform certain services, "with intent to procure money or other thing of value thereby, and not perform the service contracted for," and convicted upon proof that he had entered into a different contract with such intent.

It is to be observed, also, that the contract as stated by the prosecutor in his testimony affords no means by which to determine how much labor, measured either in time or in amount, the accused would have to perform in order to "pay back" to the prosecutor the \$10, and it would therefore seem that, even if the accusation had stated the contract as it was stated in the testimony of the prosecutor, the contract alleged and proved would be too indefinite and uncertain to support a conviction for the offense with which the accused was charged. *Wilson v. State* (Ga.) 52 S. E. 82; *Glenn v. State*, 123 Ga. 585, 51 S. E. 605. Besides, it does not appear from the evidence in the case that the accused, at the time the accusation was preferred against him, had violated the contract (if such it can be called) disclosed by the testimony of the prosecutor. The accusation, as we have stated, was preferred on October 23, 1905, and it does not appear from the testimony that the turpentine season of the year 1905 had then closed, and, for aught that appears to the contrary in the evidence, there might have been still time enough left in such season for the accused to comply with his

agreement to work out the debt "in the turpentine season of 1905."

What we have said renders it unnecessary to discuss the question as to whether the venue alleged in the accusation was established by the evidence. The verdict was without evidence to support it, and the judge of the superior court erred in overruling the certiorari.

Judgment reversed. All the Justices concur.

(124 Ga. 739)

MAYSON v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW — NEW TRIAL — EXCESSIVE SENTENCE.

A complaint that a sentence is excessive cannot properly be made a ground of a motion for a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2292.]

2. SAME—ASSIGNMENTS OF ERROR—WAIVER.

An assignment of error not referred to in the brief of the plaintiff in error will be treated as abandoned.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3012.]

3. SAME—DISCRETION OF COURT—REFUSAL OF NEW TRIAL.

The verdict was supported by the evidence, and the discretion of the trial judge in refusing a new trial will not be disturbed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3067-3071.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Frank Mayson was convicted of crime, and brings error. Affirmed.

Moore & Moore, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

ATKINSON, J. 1. One of the grounds of the motion for a new trial complains that "the sentence of ten years in said case is excessive." This objection is one which goes to the judgment only, and does not extend to the verdict, which the motion for a new trial seeks to set aside. That the error alleged affords no ground for setting aside a verdict and granting a new trial is well established by repeated rulings of this court. *Truitt v. State* (this term) 52 S. E. 890; *Bellinger v. State*, 116 Ga. 545, 42 S. E. 747; *McCollum v. State*, 119 Ga. 808, 46 S. E. 413, 100 Am. St. Rep. 171.

2. Another of the grounds of error complained of relates to a refusal by the court to postpone the trial of the case because of the statement by one of the counsel for the defendant, made when the case was called for trial, "that he was physically unable to go into the trial of the case, and that he was the counsel to whom Frank Mayson was looking for his defense." Whether, under the explanation of this exception, made by the court in the order approving the grounds of the motion for a new trial, there

was any merit in this exception, we do not determine, for the reason that upon the argument in this court the counsel for the plaintiff in error did not, in the briefs filed, refer to or otherwise insist upon this as a reason for the reversal of the judgment. The court, therefore, under the well-established rules of practice prevailing here under such circumstances, will treat as abandoned such assignment of error. *Tarver v. State*, 123 Ga. 494, 51 S. E. 501; *Williams v. State*, 121 Ga. 169, 48 S. E. 906; *Sayer v. Douglas County*, 119 Ga. 550, 46 S. E. 654.

3. The only remaining exception made, being the general complaint that the verdict is contrary to evidence and without evidence to support it, is without merit. A careful review of the testimony shows sufficient evidence upon every contested point to sustain the finding of the jury, and, since the verdict has been approved by the trial judge, his discretion in refusing a new trial upon that ground will not be disturbed.

Judgment affirmed. All the Justices concur.

(124 Ga. 784)

HORSEFORD v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

RAPE—ASSAULT—EVIDENCE.

The evidence did not warrant the verdict, and the court erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Paulding County; A. L. Bartlett, Judge.

Dock Horseford was found guilty of assault, and brings error. Reversed.

F. M. Richards and C. D. McGregor, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

FISH, C. J. Dock Horseford was tried and found guilty of the offense of assault with intent to rape. He moved for a new trial on the general grounds that the verdict was contrary to evidence and without evidence to support it, was contrary to law, etc. A new trial was denied, and he excepted. The substance of the material evidence submitted in behalf of the state was as follows: The female alleged to have been assaulted was 12 years old. At the time of the alleged assault, 3 or 4 o'clock in the afternoon of a day in April, she was at her father's house, which was situated about 25 yards from the road and 250 yards from her father's mill, where the accused knew her father and grandfather were at the time. Her mother had gone to the home of the girl's grandfather, some half a mile away, and the accused also had knowledge of this fact. There were woods extending from near the house where the assault was alleged to have been committed to near the mill, and a path leading through them to the mill. There were

leged to have been assaulted her sister, 11 years old, and her baby brother. The age of the accused was not shown; but it appeared that he wore a number 8 or 9 shoe, and one of the state's witnesses referred to him as a boy under age. The accused lived about a mile from the scene of the alleged assault, and the girl alleged to have been assaulted had known him for five years. A short time before the alleged assault was committed the accused carried a bag of corn to the mill and left it there to be ground. He hitched his mule at the mill, and while waiting for his corn to be ground went to the house where the girl was. She was sitting in front of the house on three planks, the rear ends of which rested just inside the door of one of the rooms of the house, the other ends resting on the ground; the planks, in the absence of steps, being used for the purpose of passing in and out of that door. These planks were 16 feet long, and the rear ends were about 8 feet from the ground. The girl's feet were resting on the ground. The accused approached the house from the rear, crawled under it from the rear, and on under the planks upon which the girl was sitting, until he reached a point directly under her. The girl testified in part: "I jumped off the planks when I saw him. I was playing a harmonica. My sister was sitting in the other door, where she could see me. Horseford was lying under the planks when I saw him—the planks I was sitting on. He was lying on his front. How come me to see him, my sister motioned for me to look under, and I looked under, and saw him. Then he grabbed my leg, my right leg. He caught hold of it pretty tight, and just as I jumped up he jerked loose. I run and grabbed my little brother and run to the mill. My sister went with me. I didn't scream. She cried. I was very much frightened. I hadn't seen him when he grabbed me by the leg. He was lying under the planks when he grabbed me by the leg. He was lying flat on the ground under the planks I was on. * * * He didn't say anything. * * * The first time I saw him my sister called my attention—motioned—pointed for me to look under. He caught me right down there on the leg [indicating to the jury], clear round the leg. * * * I didn't have any trouble in getting loose from him. * * * As soon as I jumped up, he turned loose and ran." She told her father what had occurred as soon as she reached the mill. The sister of the girl assaulted testified in part: "When I first saw Horseford, he was stretched out under the planks. I motioned her to look down. He just grabbed her by the leg, and pulled it from under the planks. She jumped up and ran into the house. She wasn't crying. I wasn't crying. I was frightened. We took our little baby brother and ran to the mill. We told our father about it. Horseford ran around the corner

of the house. * * * He was lying down there, flat on his stomach, on the ground. I knew who he was as soon as I saw him. I recognized him, because I could see his face. His head was towards me. * * * He didn't do anything but just grab Beasie [her sister] by the leg, and hold it there under the planks, and then run around the corner of the house." Immediately after the assault the accused returned to the mill for his meal and mule, and was detained there by the grandfather of the girls, and was soon thereafter arrested. He denied committing the assault, and denied going to the house at all.

While the evidence was, of course, sufficient to have authorized a verdict for assault, or assault and battery, we do not think it warranted a conviction of assault with intent to rape. The essential elements of the last-named offense are (a) an assault; (b) an intent to have carnal knowledge of the female; and (c) a purpose to carry into effect such intent with force and against the consent of the female. *Dorsey v. State*, 108 Ga. 477, 34 S. E. 135. And before a conviction can be legally had there must be no reasonable doubt, from the facts and circumstances proved, of the existence of any one of such necessary ingredients of the crime. *Gaskin v. State*, 105 Ga. 631, 31 S. E. 740; *Dorsey v. State*, supra. When we consider that the assault occurred in broad daylight, in front of a dwelling house which was in close proximity to the road and near the mill, where the accused knew that the father and grandfather of the girl, and, as the evidence shows, a neighbor also, were at the time; that the sister of the girl assaulted was in close proximity to her and must have been seen by the accused; that he lived in the same neighborhood, only about a mile away, and was well known to both of the girls; that he left his corn and mule at the mill, where the girl's father was, and doubtless expected to return there for the meal and the mule; that he merely

caught the girl by one of her legs, and that too, it seems, after he had been discovered under the planks on which she was sitting; that he said nothing at all, and did nothing more, but ran off as soon as she jerked loose, and returned to the mill, where he knew her father and grandfather were, for his meal and mule—we say, when these facts are taken into consideration, a very grave doubt necessarily arises both as to the intent of the accused to have carnal knowledge of the girl and as to his purpose to carry out such an intent, if he had it, forcibly and against her will. What his purpose was we, of course, do not know. Impelled by a lascivious and degraded nature, he may have intended merely to get under the girl and peep at her person, and, when discovered, caught her leg in order to frighten her, or he may have had some other foolish and malicious intent. We cannot say. But, whatever his purpose may have been, we feel safe in saying that the facts and circumstances do not show beyond a reasonable doubt that his intent was to have carnal knowledge of her person, and to do so forcibly and against her will. The former adjudications of this court, as well as many decisions of other courts, as to the sufficiency or want of sufficiency of particular facts and circumstances to show, beyond a reasonable doubt, the specific criminal intent essential to constitute an assault with intent to rape, are collected and commented upon by Mr. Justice Cobb, in the majority opinion rendered in *Dorsey v. State*, supra; and it will appear, we think, that in some of the cases decided by this court, there referred to, the facts and circumstances held to be insufficient to warrant a conviction tended more strongly to indicate the presence of the necessary criminal intent than do the facts and circumstances of the case now under consideration. As the evidence did not warrant the verdict, the court erred in overruling the motion for a new trial.

Judgment reversed. All the Justices concur.

(124 Ga. 760)

MANN v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. HOMICIDE—EVIDENCE—QUESTION FOR JURY—INSTRUCTIONS.

In the trial of one indicted for murder, where the evidence adduced to establish the homicide presents two conflicting theories of fact, one based upon circumstances indicating malice and the other upon warranted inferences which negative its existence, then it becomes a question of fact, to be decided by the jury, as to which one of these inconsistent theories is in accord with the real truth of the occurrence.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 563.]

2. SAME—MALICE.

In such a case it is proper to charge the jury that the law presumes every homicide to be malicious until the contrary appears from circumstances of alleviation, of excuse, or justification, and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they appear from the evidence produced against him.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 586.]

3. SAME—LEGAL MALICE.

Legal malice is the intent unlawfully to take human life in cases where the law neither mitigates nor justifies the killing. Properly construed, this was the meaning of the charge on this subject given by the trial judge.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 15-18.]

4. SAME—VOLUNTARY MANSLAUGHTER.

The charge on voluntary manslaughter submitted to the jury the question of what was "cooling" time.

5. WITNESS—CREDIBILITY.

A witness is not to be discredited because of a discrepancy as to a wholly immaterial matter. The charge on this subject, while not strictly accurate, was not harmful to the defendant.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1079.]

6. CRIMINAL LAW — INSTRUCTIONS — AGREEMENTS OF COUNSEL.

The charge complained of as being too restrictive of the use which the jury might make of the argument of counsel is not open to this criticism. The jury could hardly have understood, from the charge given, that the court intended them to reject any impression of fact made on their minds by a discussion of the evidence by counsel.

7. HOMICIDE—EVIDENCE.

The evidence sustained the verdict, the trial judge approved it, and no error of law was committed which authorizes a vacation of the verdict.

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Amanda Mann was convicted of murder, and brings error. Affirmed.

J. F. Rogers, R. R. Arnold, and H. O. Farr, for plaintiff in error. Wm. Schley Howard, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

EVANS, J. The plaintiff in error was tried upon an indictment charging her with the murder of Lee Pitts, and a verdict of guilty, with a recommendation to mercy, was

returned by the jury. Thereupon the accused made a motion for a new trial, which was overruled by the court, and she excepted. Aside from the complaint that the evidence did not warrant the verdict, the motion for a new trial, as amended before the hearing thereon, contained six assignments of error upon the charge of the court.

1. The court charged the jury: "When the the killing is proved to be the act of the defendant, the presumption of innocence with which he enters upon the trial is removed from him, and the burden is then upon him to justify or mitigate the homicide; but, as before charged, the evidence to do this may be found in the evidence offered by the state to prove the killing, as well as by the evidence offered by the defendant." Plaintiff in error contends that the defendant's statement and some of the circumstances appearing in evidence tended to show that the homicide was accidental, and it was error to charge that, if the killing was proved to be the act of the defendant, malice would be presumed from the factum of the homicide. Before examining the prior decisions of this court bearing on this assignment of error, it may not be unprofitable to briefly advert to the common-law rule on this subject. Lord Hale said: "When one voluntarily kills another without any provocation, it is murder; for the law presumes it to be malicious, and that he is hostes humani generis." 1 Hale, P. O. 455. In 1 Hawkins, P. C. c. 31, § 32, it is declared that: "Whenever it appears that a man killed another, it shall be intended, prima facie, that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation," etc. Sir Wm. Blackstone, in his Commentaries (4 B1 Com. 201), said: "We may take it for a general rule that all homicide is malicious, and, of course, amounts to murder, unless where justified, excused, or alleviated into manslaughter; and all these circumstances of justification, excuse, or alleviation it is incumbent upon the prisoner to make out to the satisfaction of the court and jury—the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former how far they extend to take away or mitigate guilt." And in 1 East, P. C. 224, it is laid down that: "The fact of the killing being first proved, the law presumes it to have been founded in malice, unless the contrary appear. All the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. Upon the truth of these facts, so alleged, the jury alone are to decide; but whether, taking them to be true, the homicide is justified, excused, or alleviated, is matter of law, upon which the jury ought to be guided by direction of the court." Citations of similar import from common-law authorities might be multiplied

ad libitum. These various expressions may be regarded as the statement of a rule of evidence to the effect that if the homicide is proved, and the evidence adduced to establish it shows neither mitigation nor justification, malice will be presumed from the proof of the homicide; but the presumption is a rebuttable one, and may be overcome by evidence of alleviation or justification. If the evidence adduced to establish the homicide presents two conflicting inferences, one of malice, and the other an absence of malice, then it becomes a question of fact, to be decided by the jury, as to which aspect of the evidence is the real truth of the occurrence. As was remarked by Mr. Wharton, the question of proving malice is one of logic, and not of formal law. 2 Whart. Crim. Law, § 314. Text-writers generally deal with the presumption of malice arising from proof of the homicide as a rule of evidence, rather than a principle of substantive law. See 1 Gr. Ev. § 34.

The first discussion of the subject by this court appears in the report of the case of *Hudgins v. State*, 2 Ga. 188. In commenting on the sufficiency of the evidence to support a verdict of murder, Lumpkin, J., said: "The law presumes every homicide to be felonious, until the contrary appears, from circumstances of alleviation, of excuse, or justification; and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him." No question was raised as to what would be an appropriate charge under the facts of that case, and the discussion was limited to the point before the court, viz., the quantum of evidence necessary to support a conviction of murder. The point was up in like manner in the following cases: *Roberts v. State*, 3 Ga. 825; *Choice v. State*, 31 Ga. 424, 464; *Bird v. State*, 14 Ga. 54; *Wortham v. State*, 70 Ga. 336; *Cohron v. State*, 20 Ga. 752. In *Clarke v. State*, 35 Ga. 80, the court held that an instruction that "when a homicide is proved, the presumption is that the killing is murder, and that it was for the evidence to show justification or to reduce the offense to a lower grade," was unobjectionable. A similar instruction was upheld in the following cases: *Dozier v. State*, 26 Ga. 157; *Hill v. State*, 41 Ga. 504; *Wilson v. State*, 69 Ga. 241; *Bell v. State*, 65 Ga. 752; *Marshall v. State*, 74 Ga. 26; *Vann v. State*, 83 Ga. 44, 9 S. E. 945; *Lewis v. State*, 90 Ga. 95, 15 S. E. 697; *Butler v. State*, 92 Ga. 601, 19 S. E. 51; *Dorsey v. State*, 110 Ga. 333, 35 S. E. 651; *Tuggle v. State*, 119 Ga. 969, 47 S. E. 577; *Williford v. State*, 121 Ga. 173, 48 S. E. 962; *Anderson v. State*, 122 Ga. 175, 50 S. E. 51. An examination of the facts of these cases will show that either all or some of the evidence offered to establish the homicide demonstrated an unprovoked killing without extenuation. In the first instance, when the

fact of a voluntary homicide is shown, unaccompanied by any circumstances of excuse or extenuation, malice is presumed, and the court may so charge. Also, where the homicide is established by evidence, some of which excludes any inference of alleviation, while mitigation may be inferred from some of the circumstances, it is proper to instruct the jury that the law presumes malice from the proof of the killing, unless the evidence shows alleviation or justification, and leave it to the jury to decide the issue of fact as to whether the killing was with or without extenuating circumstances. As was said by Simmons, J., in *Vann's Case*, supra: "If the proof that shows the killing itself discloses that it was done without malice, of course, the presumption does not exist; but, if the accompanying proof does not, then the burden is thrown upon the defendant to show that it was done without malice." It is not incumbent on the accused to prove an absence of malice, where the evidence for the prosecution shows facts which will excuse the homicide or reduce its grade; and it has been held to be error to charge the jury that, if the defendant "struck the fatal blow that killed the deceased, then the law imposed upon him the obligation to show he was justified in so doing, and makes the killing murder, and it is on the prisoner to produce evidence of justification to reduce the crime to manslaughter or justifiable homicide if he could by proof." *Crawford v. State*, 12 Ga. 142; *Reid v. State*, 50 Ga. 556; *Perry v. State*, 102 Ga. 366, 30 S. E. 903.

In *Futch's Case*, 90 Ga. 472, 16 S. E. 102, there appears to be a clear recognition of the principle that the presumption arising from the proof or admission of a homicide is a rule of evidence. In that case the accused, in his statement to the jury, admitted that he had killed the deceased, but this admission was accompanied by an explanation which, if true, would negative malice. There was also evidence of an admission of the homicide made by the accused before the trial, without any accompanying explanation which would justify the killing. The trial judge charged that "it is a law of this state that when a person admits a homicide, the law presumes that homicide to be murder, and the burden is cast upon the defendant to show the homicide to be justifiable." This charge, as applied to the statement of the defendant made on the trial, was held to be error; but this court expressly held that the instruction was correct as applied to the admission of the homicide made by the defendant previous to the trial. This decision was followed in *Perkins v. State*, 124 Ga. 6, 52 S. E. 17. There the only admission of the homicide by the accused was in his statement to the jury, and it was accompanied by an explanation negating malice. Accordingly, it was held error to charge that "if, in the progress of the trial, it shall have been shown at any time or admitted

to you that the defendant did kill the deceased, as charged in the bill of indictment, that then the law presumes the killing to be murder, and that presumption remains and exists until, from the evidence in the case, it be shown that a lower grade of homicide, than murders is to be found against him, or that the facts and circumstances show justifiable homicide." The vice in this charge consisted in the instruction that murder would be presumed from the admission of the homicide, made by the defendant in his statement to the jury, when that admission was coupled with an explanation which negated malice. The principle of the foregoing decisions was applied in *Green v. State*, 124 Ga. 343, 52 S. E. 431, wherein it was recognized that it was "a well-established rule in this state that where a killing of a human being is proved, and the evidence adduced to establish the killing does not show circumstances of justification or alleviation, malice will be inferred. But, if the evidence relied upon by the state to show the killing contains circumstances of justification or alleviation, the burden of proving that the crime was murder is not shifted." The charge given in that case was held to be inapplicable, because all the evidence introduced to establish the killing, as well as the defendant's statement, showed mitigating circumstances.

From this analysis of the prior adjudications of this court we conclude that, in a case where the evidence adduced to establish the homicide presents two conflicting theories of fact, one based upon circumstances indicating malice, and the other upon warranted inferences which negative its existence, then it becomes a question of fact, to be decided by the jury, as to which one of these inconsistent theories is in accord with the real truth of the occurrence; and in such a case it is proper to charge the jury as was done in this case. The witnesses for the state testified to facts which excluded all idea of any palliation, the defendant's evidence showed mitigating circumstances, the charge of the court submitted this conflict in the evidence to the jury, and they were told in substance, that if they found from the evidence that the homicide was without excuse or extenuation, the killing would be murder. The charge was correct in its statement of the law, and was applicable to the facts of the case. We have discussed this question at length, because it was doubted by counsel for the state that the later cases of *Perkins* and *Green* were in line with the older adjudications, and permission was granted to review them. Upon a careful examination of those cases, we are of the opinion that they do not conflict with any prior decision, but are in entire harmony with all previous adjudications on the subject.

Attack was made on another excerpt from the charge, substantially like the one under discussion, on the ground that an instruction

that the grade of the homicide might be reduced below that of murder by evidence offered either by the state or the defendant was too restrictive, inasmuch as the jury would have the right to reduce the killing from murder, if there was a lack of evidence, or a conflict of evidence, or the witnesses were not credible. From what has already been said on this subject, it is apparent that this exception is without merit. In every case the corpus delicti must be established beyond a reasonable doubt. The jury was so instructed in this case. If the homicide was proved beyond a reasonable doubt, and if, from the evidence establishing the homicide, the jury found no facts of extenuation, they had a right to imply a felonious killing.

2. Complaint is made of the definition of malice which was given to the jury. In its charge the court said: "Legal malice is an intent unlawfully to take away the life of a fellow creature, in a case where the law would neither justify nor to any degree excuse the intention, if the killing should take place as intended." The criticism is that this charge made the existence of legal malice depend upon facts which would justify or excuse the intention, whereas there would be no legal malice if, under the circumstances of the case, there was mitigation which would reduce it to manslaughter. Every intentional or unjustifiable killing is not necessarily murder. It may be manslaughter. If the charge is to be construed as defining malice to be an intent unlawfully to take human life under circumstances the law would not justify, then it was erroneous. *Dowdy v. State*, 96 Ga. 653, 23 S. E. 827. But this is not a proper construction of this charge. It does not stop with declaring that malice implies an intent unlawfully to slay under circumstances affording no justification; but it goes further, "nor to any degree excuse the intention." Unless we say that this last phrase amounts to nothing more than tautology, the exact equivalent of justification, the construction contended for cannot be placed on the court's language. The language, "nor to any degree excuse the intention," fairly, by contrast, should be held to refer to mitigation, and the charge to convey the meaning that malice is the intent to take human life, in cases where the law neither mitigates nor justifies. The definition given by the trial judge was taken from the case of *Taylor v. State*, 105 Ga. 746, 31 S. E. 764, where it was admitted by counsel to state a correct principle of law, and the court concurred in this view. The criticism now urged was not made in that case. See, also, *Jones v. State*, 29 Ga. 607.

3. The court charged, literally, Pen. Code 1895, § 65, defining voluntary manslaughter. This charge is attacked because the court omitted to tell the jury that they were the judges of what is "cooling time." This assignment is without merit, for the court, in a

subsequent part of the charge on voluntary manslaughter, instructed the jury that "what is known in law as 'cooling time' is always a question for the jury."

4. Another ground of the motion for a new trial complains of the following charge: "When an apparent discrepancy exists between the testimony of the different witnesses, it is the duty of the jury to reconcile the whole together, if it can be done, so as not to impute perjury to any one. When witnesses agree as to the important facts testified to, slight discrepancies in the collateral attendant facts afford no ground to discredit them." The error alleged is the invasion of the province of the jury by the court, in that it was for the jury to say what discrepancies in the testimony of a witness should discredit him. This instruction was in the language of a charge delivered in the case of *Cobb v. State*, 27 Ga. 685, of which the court said, at page 699: "We perceive no error in the charge of the court in laying down the rule for reconciling conflicting evidence." Unquestionably the court must have considered the phrase, "slight discrepancies in the collateral attendant facts," equivalent to "immaterial matters." So construed, the charge was not objectionable, because a witness is not to be discredited simply for the reason that his testimony concerning a wholly immaterial matter may not be in accord with the truth. Civ. Code 1895, § 5295. We doubt the correctness of the ruling in *Cobb's Case* on this subject, but do not think the instruction, even if erroneous, ground for a new trial in the present case. The only variance between the state's witnesses was upon an immaterial matter, and we are of the opinion that a verdict so strongly supported by evidence as this one is should not be disturbed because of a verbal inaccuracy which, under the facts, was not harmful to the accused.

5. The last ground of the motion complains of the charge: "The jury cannot act upon their private or personal knowledge of the question at issue. You try the case from what you hear from this stand, and from the law applicable thereto, using the argument of counsel to assist you in understanding the law as applicable to the evidence." It is counsel's contention that the court restricted the use of the argument by the jury. When the judge was giving them this instruction, the evidence had all been delivered, and the case fully argued by counsel. Presumably the case was discussed by counsel with reference to the application of the facts to the law of the case. The burden of this instruction was a caution to the jury to try the case on the evidence and the law, and not to act upon their personal knowledge of the facts. The jury could hardly have understood, from this charge, that the court intended them to reject any impressions of fact made on their minds by a fair and full discussion of the evidence by counsel. We

see no error in this charge which requires a new trial.

6. A strong case of murder was made out by the state's evidence, the trial judge approved the verdict, and we do not think any error of law was committed which authorizes a vacation of the verdict.

Judgment affirmed. All the Justices concur.

(124 Ga. 767)

TOLBIRT v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW—APPEAL—REVIEW.

The finding of the trial judge on conflicting affidavits as to alleged misconduct of the bailiff having charge of the jury while considering as to their verdict will, in the absence of abuse of discretion, be upheld by the Supreme Court.

2. SAME—INSTRUCTIONS.

It is proper for the judge to frame his general charge to the jury upon the evidence alone, appropriately instructing them, however, at some stage thereof, with respect to the prisoner's statement.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1895-1901.]

3. HOMICIDE—MALICE.

The charge as to the presumption of malice arising upon proof of a homicide was not open to the exceptions made thereto.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, §§ 285-269.]

4. SAME—REASONABLE FEAR.

"The doctrine of reasonable fear as a defense does not apply to any case of homicide where the danger apprehended is not urgent and pressing, or apparently so, at the time of the killing."

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, §§ 158-163.]

5-14. SAME—INSTRUCTIONS—EVIDENCE.

There was no material error in any of the charges complained of, the court did not err in its failure to charge as alleged, the evidence fully warranted the verdict, and the court did not abuse its discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

A. G. Tolbirt was convicted of murder, and brings error. Affirmed.

J. M. McBride, S. L. Craven, and W. R. Hutcheson, for plaintiff in error. W. K. Fielder, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. A. G. Tolbirt was convicted of murder, and recommended to life imprisonment, on July 12, 1905. He made a motion for a new trial, which was refused, and he excepted.

1. One of the grounds of the motion was that the jury was improperly influenced to agree upon a verdict by the misconduct of J. W. Bagwell, deputy sheriff, and T. P. Eubanks, the bailiff who had the jury in charge. In support of this ground, the movant introduced in evidence the affidavit of Bagwell, wherein he deposed that he was

deputy sheriff attending the term of the court at which the accused was convicted; that, while the jury was considering the case, Eubanks, the bailiff who had the jury in charge, requested deponent to inform the judge that the jury said they could not agree on a verdict; that deponent gave the judge such information, and was directed by him to ask the jury how they stood; that deponent went to the jury room and delivered the judge's message, whereupon the jury requested him to retire until they could take another vote; and that, after taking the vote, they informed the bailiff, Eubanks, how they stood. The affidavit of Eubanks was also introduced by the movant. He deposed as follows: The jury requested him to inform the judge that they could not agree upon a verdict, and he asked Bagwell, the deputy sheriff, to convey this information to the judge. Soon thereafter Bagwell returned and went into the jury room and asked them how they stood in the case. The jury asked Bagwell to retire until they could take another vote, and in a few minutes the jury called deponent and told him they stood eight for conviction and four for acquittal. Deponent then went to the judge, and gave him this information. A short time after this "deponent went to the jury room, opened the door, and told them that the judge had directed him to tell them that they must make a verdict. Soon after this the jury was taken to the hotel for dinner, and in a few minutes after they had returned from dinner to the room the jury returned a verdict." Movant and each of his counsel made affidavit that they had no notice of the facts alleged in these affidavits until after the verdict was rendered and the jury discharged. The movant also introduced the affidavits of the ordinary and the clerk of the superior court as to the good character of Bagwell and Eubanks. The trial judge, in a note to the bill of exceptions, states that he did not direct Bagwell to inquire of the jury how they stood, nor did he instruct Eubanks, the bailiff, to tell the jury they must make a verdict. The state submitted the affidavits of the following named persons, all of whom were members of the jury that tried the case, who respectively testified as herein indicated: W. V. Nestlehutt deposed "that there was no statement made to the jury on July 12th, or at any time, by J. A. Bagwell or any other person, that the judge wanted to know how the jury stood, or that he would keep the jury for the remainder of the week and the next week [or] that the jury must make a verdict." J. T. Hitt testified: "I did not hear Bagwell or Eubanks, or any other officer, say that the judge said he would keep the jury all the week, or next week, or anything like it, and, if such statement had been made to the jury, deponent would have heard it." P. S. Dean and Jacob T. Cupp testified that, if there was any undue or improper

communication with the jury on July 12th by Bagwell or any one else, they knew nothing of it. J. A. Nicholson deposed that on the morning of July 12, 1905, J. A. Bagwell came to the jury room and said the judge said, "Nothing short of a verdict will do him." J. A. Copeland deposed "that the jury informed the judge that the jury was not likely to agree, and the officer in charge of the jury, Tom Eubanks, stated to the jury that the judge said for them to make a verdict." T. J. Wood testified "that on the morning of July 12, 1905, some one knocked at the door and made some statement to some one of the jurors. Deponent did not hear what he said, or, if he did, does not remember what it was. In a short time he came back and said that nothing short of a verdict would satisfy him." B. Z. T. Bush testified that "J. A. Bagwell, deputy sheriff, came to the door of the jury room and said the judge wanted to know how the stood. He was told that there were eight for conviction and four for acquittal. He went away, and shortly returned, and stated that the judge said he would keep us over the next week; that we had to make a verdict. This statement was also made by the bailiff, Eubanks." Each one of these jurors, except Nestlehutt, testified that the verdict rendered was his verdict, made up from the law and the evidence in the case, and was not influenced by any communication made to the jury. The Solicitor General submitted his own affidavit to the effect that the remaining two jurors declined to make affidavits to be used in the case.

"The affidavits of jurors may be taken to sustain, but not to impeach, their verdict." Civ. Code 1895, § 5338. According to this rule, so much of the affidavits of the jurors as tended to show that the deputy sheriff or bailiff had improper communications with the jury could not be considered by the judge, in passing upon the issue as to whether such communications were had with the jury; for, if they were, it would be cause for a new trial, though the judge did not authorize them. *Gholston v. Gholston*, 31 Ga. 625. As the rule just referred to is so well settled, we take it that the judge did not consider that portion of the affidavits of the jurors to the effect that such communications were had. The question of fact, as to whether the communications in question were had with the jury, depended upon the credit given by the judge to the affidavits of Bagwell and Eubanks that they were, and that of the juror Nestlehutt that they were not, which was to some extent, supported by the affidavit of the juror Hitt that he did not hear such communications, and that if they had been made he would have heard them. The findings of the trial judge on conflicting affidavits as to the alleged misconduct of the jury while considering as to their verdict will, in the absence of abuse of discretion, be upheld by

the Supreme Court. *Buchanan v. State*, 118 Ga. 751, 45 S. E. 607; *King v. State*, 119 Ga. 426, 46 S. E. 638; *Sullivan v. State*, 121 Ga. 183, 187, 48 S. E. 949; *Desverges v. Goette*, 121 Ga. 65, 48 S. E. 693. The same rule clearly applies here. The judge, in overruling the motion for a new trial, necessarily held that the alleged improper communications were not had with the jury.

2. Complaint was made of the following charge: "It is your duty to find the facts from the testimony submitted on the trial of this case. *You are not authorized to go outside of the testimony to find the facts in the case.* On the trial of this case you are the judges of the law and the facts. You receive the law that should govern you in your consideration from the court. *You are and should be bound by the law as it is written and given you in charge by the court.* That is the means, and the only means, by which you are to find out what the law is, *just as the testimony put before you is the only means by which you are to find out what the facts are in the case.* After receiving the law from the court, and finding out what the facts are from the testimony submitted on the trial of the case, you are then to judge of them. *You are to say what are the facts according to the testimony;* what is the law, according to the charge of the court." The assignment of error was that the portions of the charge which we have italicized "confined the jury to the sworn testimony in the case to find the facts, and deprived defendant of the benefit of his statement to the jury." We think that what the court evidently intended to impress upon the minds of the jury might have been more aptly expressed, but are confident that the language used, when taken in connection with what immediately preceded it, as appears from the charge sent up as a part of the record, was not calculated to induce the jury not to give due weight to the prisoner's statement. The court had just called the attention of the jury to the fact that reference had been made to a former trial or trials of the case, and instructed them that they were not to be influenced in any way by this fact; that they should try the case as though there had been no former trial; that the trial was a de novo investigation, separate and distinct from any former trial, etc. Then, after the statement that the judge did not mean by anything he might say to intimate to the jury what had or had not been proved, came the instructions in question. The purpose of the court, it seems clear, was to inform the jury that they were the sole judges of what the facts in the case were, and that in finding the facts they could consider only the evidence before them. The court had just previously instructed the jury fully and accurately as to the law in reference to the prisoner's statement; and it has been frequently held that it is proper for the judge

to shape his general charge to the jury upon the evidence alone, appropriately instructing them, however, at some stage of the charge, with respect to the prisoner's statement. *Hoxie v. State*, 114 Ga. 19, 39 S. E. 944 and cit.

3. Another charge excepted to was: "When the homicide is proven, the law presumes malice, and unless the evidence should relieve the slayer he should be found guilty of murder. When the killing is shown, it is on the prisoner to justify or mitigate the homicide." The exceptions were (1) that the charge "was not authorized by the evidence," (2) "was not properly adjusted to the facts in the case," and (3) "deprived defendant of the evidence of his claim and admission that he shot the deceased in self-defense." None of the exceptions was well taken. The first sentence of the instruction now under consideration substantially states the law on the subject, as held in many cases by this court. *Mann v. State* (this day decided) 53 S. E. 324, and cases cited. The second sentence of this instruction, however, is not an accurate statement of the law, for the reason that it is not incumbent on the slayer to show circumstances of alleviation or justification of the homicide, when such circumstances arise out of the testimony produced against him. *Mann's Case* supra. But the charge was not excepted to on this ground, and we may say that, even if it had been, the error was not cause for a new trial in this case, as the evidence introduced by the state tended to show that the homicide was committed by the accused without legal provocation or extenuating circumstances. In such a case the charge given was authorized by the evidence and was properly adjusted to the facts, if the jury believed the evidence for the state. Nor was there any merit in the third exception, that the charge "deprived defendant of the evidence of his claim and admission that he shot the deceased in self-defense." The charge certainly left the jury free to consider the evidence submitted in behalf of the accused, as well as his statement made to the jury, to the effect "that he shot the deceased in self-defense," and to give such evidence and statement the credit and weight the jury thought they deserved. Counsel for plaintiff in error cite *Perkins v. State*, 52 S. E. 17, and *Green v. State*, 52 S. E. 431, decided during the present term; but an examination of these cases will disclose that no ruling made in either is in point here. As those cases were under review in *Mann v. State*, supra, and were there fully discussed in an able and exhaustive opinion delivered by Mr. Justice Evans, on the subject of the rule of presumption when a homicide is proved, we forbear to say more in reference to them.

4. The court did not err in instructing the jury that "the doctrine of reasonable fear only applies when the danger is urgent and

pressing, or apparently so, at the time of the homicide." *Jackson v. State*, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; *Williams v. State*, 120 Ga. 873, 48 S. E. 368.

5. The court charged the jury that if the accused killed the deceased, and if, at the time, the deceased was manifestly intending or endeavoring to commit a felonious assault upon the accused, the latter would be justifiable in defending himself from such an assault, "and if necessary, or apparently so, to prevent such assault, the defendant would be justifiable in taking the life of the deceased, and * * * under such circumstances should be acquitted." The only assignment of error on this charge, urged in the brief of counsel for plaintiff in error, is that the jury must have understood from it that before the accused would be justifiable there must have been an actual necessity for the killing. Manifestly the charge was not open to this criticism.

6. The charge that if the deceased was the aggressor, and was attempting to shoot the accused, the latter would be justified in defending himself, "as before stated," was not tantamount to an instruction that "the deceased must have been the aggressor and * * * attempting to shoot defendant before defendant could be justified."

7. Nor could the plaintiff in error justly complain of a charge that "the defendant would be justifiable, if there be a reasonable doubt as to whether he acted under such fears, or had reason to fear that it was necessary to kill to save his own life."

8. The court instructed the jury as follows: "Reference has been made to evidence taken on a former trial or trials of this case. I charge you that you are in no way concerned with a former trial or trials," etc. The exception to this charge was that it in effect instructed the jury "that they could not consider the evidence of the witness Miller, taken on a former trial and introduced by the defendant on this trial, to prove contradictory statements made by said witness." This was not a good exception, for the reason that it does not appear from the motion what Miller's testimony was.

9. During the charge, the court stated to the jury that, in reply to the contention of the accused that the homicide was justifiable, the state contended that the accused was the aggressor and brought on the difficulty, and that, if any necessity existed at the time of the homicide for the accused to take the life of the deceased, the accused brought about such necessity, and that therefore he could not take advantage of a necessity brought about by himself to take the life of the deceased. Such statement was not justly subjected to criticism on the ground that "it was argumentative," or upon the ground that "it was not authorized by the evidence."

10. The court instructed the jury that if they should find from the evidence, beyond

a reasonable doubt, that at the time of the homicide the deceased was not attempting to shoot the accused, but that the gun of the deceased was discharged in a struggle over it, caused by the accused attempting to take it from the deceased; that there was no necessity, or apparent necessity, for the accused to shoot the deceased to save himself from a felonious assault; that the circumstances were not sufficient to excite the fears of a reasonable man; that the accused was not in danger of any great bodily harm, or of a felony being committed on him by the deceased; and that the accused intentionally shot and killed the deceased, with malice aforethought, either express or implied, then the offense would be murder, and it would be the duty of the jury to find the accused guilty. Error was assigned upon this charge upon the following grounds: That "it was unauthorized by the evidence," that "it assumed that at the time of the killing the deceased was not attempting to shoot defendant, that if placed upon defendant the burden of proving that he was in great bodily harm or of a felony being committed upon him by the deceased," and that "it was not properly adjusted to the facts and issues in the case." None of these assignments of error was meritorious, as the charge was not erroneous for any of these reasons.

11. The following charge was also excepted to: "If the defendant * * * assaulted the deceased, [the latter] had a right to use such force as was necessary to prevent such assault, and if the defendant shot and killed the deceased when the deceased was using such force only, or making such resistance only, as was necessary to defend himself from the assault made on him by the defendant, the defendant would not be justifiable in killing the deceased for defending himself from the felonious assault made upon him by the defendant." The exceptions were that the charge "was unauthorized by the evidence," that "it assumed that the defendant assaulted the deceased," and that "it was not properly adjusted to the facts and issues in the case." None of these exceptions was meritorious.

12. "Because the court erred in failing to charge on the bad character of the deceased for violence" was an assignment of error which was without merit.

13. There are several grounds in the motion for a new trial, based on alleged errors in the court's instructions to the jury, and on the failure of the court to charge in certain respects, which we do not deem it necessary to further notice, for the reason that when this case was before this court on a former occasion (119 Ga. 970, 47 S. E. 544) similar assignments of error were passed on and ruled adversely to the plaintiff in error.

14. We have very carefully studied the evidence in the record, and have no hesitan-

cy in reaching the conclusion that it was amply sufficient to warrant the verdict. The court did not err in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 780)

JORDAN v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

HOMICIDE—MURDER—EVIDENCE.

The evidence amply warranted a finding that the accused was guilty of involuntary manslaughter in the commission of an unlawful act, but as it did not appear beyond a reasonable doubt that there was any intention to kill, or that the killing was done with a weapon likely to produce death, a verdict finding the accused guilty of murder should have been set aside.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 14.]

(Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

Henry Jordan was convicted of murder, and brings error. Reversed.

Henry Jordan was convicted under an indictment charging him with murder, and assigns error upon the refusal of the judge to grant him a new trial. Carrie Verner, a witness for the state, testified as follows: Henry Jordan and Mattie Jordan were at the home of the witness, and were talking about going to Fred Conners'. Henry told her she was not going without putting on her shoes. Mattie Jordan said that one of her feet were swollen, and it hurt her to wear shoes, and she was going anyway. Henry was sitting in the door trimming a piece of plank. She started off, and he threw down the plank and started after her. She looked back, saw him coming, and started to run. Henry threw the rock. He got it from under a hickory tree while following her. Witness could not tell exactly what size it was. It looked as if it might be as big as her fist. The rock hit Mattie Jordan, she fell, and when witness reached her she was dead. Dr. W. H. Dorsey testified that on post mortem examination he found a bruise at the top of the vertebral column of the deceased, the third vertebra being broken. This could have been done by a rock hitting the deceased in the back of the neck. Breaking her neck would cause her death, but he could not tell what broke her neck. Striking it with a rock would produce the bruise he found. He found no abrasion of the skin. Whether a rock of sufficient size to break the neck would make an abrasion of the skin would depend upon the character of the rock. A smooth rock would not necessarily make an abrasion. A rough one would. It is possible that the neck might have been broken by the fall. A person falling in the position in which the deceased is said to have fallen and broken her neck, it would

be almost impossible for her to cry out. A person hit from behind might go for some distance and fall without crying out. A person throwing a rock of the size as testified to by Carrie Verner might produce a wound on the neck of the character found on deceased. The witness looked thoroughly about the place where the woman was lying, and found no rock. There was a stump standing up in the ground near where deceased had fallen. Witness was shown a rock afterwards which was said to have caused the wound, but he did not see it at the place of the killing. The accused, in his statement, denied that he killed his wife, saying that he ran after her and she fell. He also asserted that they had had no trouble, and they had always gotten along well together. There was rebuttal evidence for the state that the accused and his wife had been seen quarreling at different times, but no evidence that he had ever made any threats to kill her or harm her in any way. One witness testified that the rock, as described by Carrie Verner, was, in his opinion, likely to produce death, and that a red, smooth rock was found near the place of the killing, a little larger than a man's fist. The witness did not state that he found the rock, but that it was found by one Jake Barrett, who seems not to have been called as a witness.

J. J. Flint and Thos. W. Thurman, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, P. J. (after stating the facts). Even if it cannot be said that the testimony, taken as a whole, establishes that there was no intention to kill, it certainly can be, with confidence, asserted that it does not appear beyond a reasonable doubt that there was such an intention. If there was no intent to kill, the accused was not guilty of murder, unless the killing happened in the commission of an unlawful act which in its consequences naturally tended to destroy the life of a human being. Pen. Code 1893, § 67. The throwing of the rock was an assault, and was, of course, an unlawful act. In determining whether the killing happened as the result of an act naturally tending in its consequences to destroy the life of a human being, much will depend upon the size and character of the rock. On this vital matter the evidence at its best is vague, uncertain, and unsatisfactory. The principal witness for the state testified that the rock "looked like it might be as big as my fist. I don't know whether it was or not." Where all the circumstances are such as to preclude the idea of deliberation, and where the weapon used is one caught up hastily, a killing resulting from the use of such a weapon under such circumstances is not generally murder, but only involuntary manslaughter. In Ray's Case, 15 Ga. 223, it

was said that the fact that a person had accidentally and hastily taken up a board, with which he had inflicted wounds which produced death, and had not provided the same, was a circumstance which did not favor the presumption that malice will be implied because the weapon was of a character likely to produce death. In *Henry's Case*, 33 Ga. 441, the accused was a slave and a blacksmith, who intended to whip a striker, also a slave, striking him over the head with an axe helm and killing him, but with no intent to bring about that result, and there being no evidence from which such an intention could be inferred, because the helm may have been a weapon likely to produce death, a verdict of guilty of murder was set aside on the ground that the evidence did not warrant such a finding. See, also, *Crawford's Case*, 90 Ga. 709, 17 S. E. 628, 35 Am. St. Rep. 242; *Taylor's Case*, 108 Ga. 390, 34 S. E. 2.

The accused, according to the evidence of the state, was clearly guilty of involuntary manslaughter in the commission of an unlawful act; but the evidence did not authorize a finding that he was guilty of murder. It did not appear beyond a reasonable doubt that there was any intention to kill, nor did it appear beyond a reasonable doubt that the weapon used was one likely to produce death.

Judgment reversed. All the Justices concur, except BECK, J., disqualified.

(124 Ga. 778)

SAMPSON v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

INDICTMENT—RETURN—PLEA IN ABATEMENT.

An indictment must be returned into open court. Accordingly, when the judge of a superior court, at 10 o'clock a. m. of a given day, ordered that a recess of the session of the court for that day be taken from that hour until 8:30 o'clock the next morning, and then left the courtroom and did not return during the remainder of that day, an indictment returned during the afternoon of the same day by the bailiff of the grand jury to the clerk of the court, while he was in the courtroom, was not properly returned, and a plea in abatement setting up such facts, and supported by uncontroverted evidence, should have been sustained.

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Mitch Sampson was convicted of crime, and brings error. Reversed.

Theo. Titus, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

FISH, C. J. At the October Term, 1905, of the superior court of Thomas county, the judge, about 10 o'clock a. m. on October 17th, having disposed of the civil cases set for that day, ordered a recess of the court until 8:30 o'clock the next morning, excusing the petit jurors until that time, but not so relieving the grand jury and the clerk of the court

from duty. The judge then left the courthouse and did not return until the next morning. During the afternoon of October 17th the bailiff of the grand jury delivered to the clerk of the court, who was in the courtroom, an indictment against Mich Sampson, which was marked "True bill" and signed by the foreman of the grand jury. Upon the call of the case for trial at that term of the court, the accused filed a plea in abatement, to the effect that no indictment had been returned against him in open court, either by the grand jury or by the bailiff thereof. The state traversed this plea, and upon the trial of the issue thus made, before a jury, the accused submitted evidence establishing the facts as above stated. The court directed a verdict against the plea. The case was then tried upon its merits and the accused found guilty. He moved for a new trial, which motion was overruled by the court, and he excepted.

In 10 Encyclopedia of Pleading and Practice it is said: "An indictment must be returned into open court by the grand jury and in the presence of its members." The decisions of many courts are cited which sustain the text. Such was the procedure at common law, which is described by Chitty as follows: "When the jury have made [the] indorsements on the bills, they bring them publicly into court; and the clerk of the peace at sessions, or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present; and then the clerk of the peace, or assize, asks the jury whether they have agreed upon any bills, and bids them present them to the court, and then the foreman of the jury hands the indictments to the clerk of peace, or clerk of assize, who asks them if they agree the court shall amend matter of form, altering no matter of substance, to which they signify their assent. This form is necessary in order to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation, without the consent of the accusers." Chitty's Criminal Law, *324, *325. The practice of grand juries returning indictments into open court prevailed in this state until a comparatively recent period. In *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 490, Mr. Justice Hall, in delivering the opinion, said: "Within the memory of many of us, bills and presentments were returned into court by the entire body, whose names were called by the clerk, and in that way it was ascertained that a legal quorum was present, and after consenting that the state's counsel might alter any matter of form, but not any matter of substance without their privy and consent, they made their report to the court, which was directed to be entered on the minutes." He further said that prior to the act of December 21, 1857, all witnesses to be examined before the grand jury, accompanied by some

members of that body, were sworn in open court in each particular case in which they were summoned to testify, but that under that act, it was made lawful for the foreman of each grand jury to administer the oath prescribed by law to witnesses that might be required to testify before that body. The motive that led to this change, the learned justice said, was to prevent interruptions to the business of the court and the timely warning that was given to offenders of what was transpiring before the grand jury. He further said: "The administration of oaths to witnesses was regulated by a rule prescribed by law, but it was otherwise with the formalities observed in receiving and reporting to the court bills and presentments found by the grand jury. * * * The oath taken by the bailiff attending the grand jury, for many years before the adoption of the code, was the same as that now found in the section above cited [section 3916 of the Code of 1882]. But when it was adopted, or from what source it was derived, we are unable to determine. That the latter clause in it was not contained in the oath administered to bailiffs waiting on grand inquests in England, whence we derived our laws and customs and much of our practice, is rendered tolerably certain by reference to the old books of practice. * * * The power of returning to the court bills and presentments found by the grand jury, if not expressly given by the latter clause of the bailiff's oath, which has now become a part of our law, may be well implied from the obligation and duty it imposes upon that officer, and so far no complaint has been heard of any detriment or wrong to parties from the practice, while it is evident that it has facilitated the business of the court, and rendered the execution of its penal process more easy and certain than it was under the former methods." The part of the oath of the bailiff of the grand jury referred to in that opinion is as follows: "You do solemnly swear that you will * * * carefully deliver to that body all such bills of indictment, or other things, as shall be sent to them by the court, without alteration, and as carefully return all such as shall be sent by that body to the court." In *Danforth's Case*, following *Davis' Case*, 74 Ga. 870, it was held, that the sworn bailiff of the grand jury is competent to make return into court of bills found by the grand jury. In *Bowen v. State*, 81 Ga. 482, 8 S. E. 736, Chief Justice Bleckley said that the rulings in the *Cases of Davis and Danforth* went quite far enough, and that the Solicitor General, though an officer of the court, has no legal authority to make such return of an indictment, in the absence of the grand jury from the courtroom, received by him in private from one or more members of the grand jury. It seems to us clear that the only change in procedure contemplated and authorized by the provisions

of the oath prescribed for the bailiff of the grand jury was, to substitute the bailiff for the grand jury as the medium for returning the indictments and presentments found by that body to the court; and as, under the old practice, the grand jury was required to return indictments and presentments into open court, it follows that the bailiff must do likewise. In *Gardner v. People*, 20 Ill. 430, the court, after holding, "Before a party can be tried on an indictment, it must appear from the record that it was returned into open court," said: "This requirement is proper for the protection of the citizen against being forced to defend himself against charges never acted upon or presented by a grand jury. If it were otherwise, by either accident or design, he might be compelled to make such defense." In *Goodson v. State*, 29 Fla. 511, 10 South. 738, 30 Am. St. Rep. 135, it was held: "The only recognized manner in which the findings of a grand jury can be authoritatively presented is in open court." And the court said: "Were the rule otherwise, it would render it possible for a designing or revengeful foreman of a grand jury to ruin any citizen by surreptitiously filing with the clerk in his office an indictment manufactured by himself alone, upon which his fellow jurors had taken no action."

Whether the rights of citizens might be jeopardized by a failure to require indictments to be returned into open court or not, we conceive that there is a sound reason in practice for requiring this to be done, and that is, that there may be sufficient record evidence that the indictment has been duly found and returned. See, in this connection, *Nunn v. State*, 1 Ga. 243; *Bowen v. State*, 81 Ga. 482, 8 S. E. 736; *Rutherford v. Crawford*, 53 Ga. 138 (3). The clerks of the superior courts are required to keep regular minutes of their proceedings from day to day, Civ. Code 1895, § 4360. The proceedings of the court for the day on which the bailiff delivered the indictment in the present case to the clerk were terminated at about 10 o'clock a. m., by the judge's order for a recess for the remainder of that day. Therefore the return of the indictment by the bailiff to the clerk during the afternoon of that day, the court not having reconvened and the judge not being present, was no part of the proceedings of the court of that day, and could not properly be so entered on the minutes. This being true, the entry could not properly be made by an entry nunc pro tunc. There could, therefore, be no sufficient evidence of record that the indictment was duly found by the grand jury and returned into court.

Our conclusion is that the court erred in directing a verdict against the plea in abatement and in refusing to grant a new trial. We do not, however, mean to intimate that a grand jury cannot continue its deliberations, examine witnesses, and find pre-

sentments and indictments during a recess of a term of court. See *Commonwealth v. Bannon*, 97 Mass. 214. All that we hold is that presentments and indictments found by that body must be returned into open court.

Judgment reversed. All the Justices concurring.

(124 Ga. 767)

GRANT v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW—INSTRUCTIONS—STATEMENT OF ACCUSED.

It is not error for the court in a criminal case, when charging the jury in regard to the prisoner's statement, to give them in charge section 1010 of the Penal Code of 1895 in its entirety; and, having followed the language of the statute, it may there leave the matter.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1902, 1903.]

2. HOMICIDE—INSTRUCTIONS AS TO VERDICT.

A charge: "In the event you find the defendant guilty, you will render one of two verdicts, exercising the power and discretion which the law vests in you. You can say, 'We, the jury, find the defendant guilty,' or 'We, the jury, find the defendant guilty, and recommend that he be punished by imprisonment in the penitentiary for life'"—is not error for lack of fullness, or because the judge did not explain to the jury "what that power and discretion was." See *Taylor v. State*, 31 S. E. 773, 105 Ga. 782, and cases cited.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 663.]

3. SAME—INSTRUCTIONS.

There being nothing in the evidence to call for such charges, it was proper for the court to omit the law in reference to voluntary manslaughter, as well as that as to confessions, from his instructions to the jury.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 652, 653.]

4. SAME—EVIDENCE.

There was no error in the admission of testimony, the evidence demanded the verdict, and the court did not err in refusing to grant a new trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 821.]

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Huss Grant was convicted of murder, and brings error. Affirmed.

Foster & Butler, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. The plaintiff in error was charged with the offense of murder, and was convicted of that offense without a recommendation. He moved for a new trial, his motion embracing several grounds.

1. Counsel for plaintiff in error contend that the court erred in charging on the subject of the defendant's statement as follows: "The prisoner shall not be compelled to answer any question on cross-examination should he think proper to decline to do so"—and insist that this language of the statute contains no part of the law to be given in

charge to the jury. It will be observed that the extract from the charge complained of and alleged to be error is in the exact words of the statute, and this court has repeatedly ruled that in charging upon the defendant's statement it is best for the trial court to follow the statute and there leave the matter. These rulings were scrupulously observed by the court in the trial of this case. In fact the criticism made upon this charge by counsel is that the trial court only too strictly followed the rulings referred to, and gave the section in regard to the prisoner's statement literally and in its entirety. In doing so, however, no error was committed that would justify this court in interfering with the court's discretion in the refusal of a new trial. The cases of *Morgan v. State*, 119 Ga. 566, 46 S. E. 836, *Hackett v. State*, 108 Ga. 40, 33 S. E. 842, and *Teasley v. State*, 105 Ga. 842, 32 S. E. 335, in so far as they announce and maintain this principle of law, are correct and sound, and, upon review thereof, are affirmed.

2. The second headnote deals sufficiently with the error alleged in the motion for new trial to have been committed by the trial judge in his instructions to the jury touching the exercise of their discretion and power, in the event they should find the accused guilty of murder, to recommend that he be punished by imprisonment in the penitentiary for life.

3. There was nothing in the evidence upon which to base a charge upon voluntary manslaughter, or upon the subject of confessions.

4. Exception was taken to the refusal of the court to exclude the following testimony: "Mary's [deceased's] child said, 'Huss [defendant], you have shot mamma.'" The testimony quoted was that of Jake Colbert, a witness for the state, and it was objected to "on the ground that the Solicitor General, in opening the case to the jury, had stated that Mary Johnson's [deceased's] child, the one referred to by the witness Colbert, was too young to be a competent witness or to testify." And movant adds that this (the foregoing statement of the Solicitor General) "was true, and allowing Colbert to testify as to what the child said was, in effect, allowing the child to testify." We cannot agree with counsel that permitting the witness to testify to the words of a little child, too young to be brought into court as a witness, was equivalent to permitting the child itself to testify. It appears from the evidence that the witness Colbert, at the sound of the shots which slew the deceased, ran immediately from an adjoining room into the one where the homicide was committed, and said twice to the defendant, "Have you shot Mary?" The defendant made no answer, but the child, as the defendant silently left the room, uttered the words, "Huss, you have shot mamma." These words, spoken by a little child immediately after the shock-

ing occurrence, were clearly admissible as a part of the res gestæ. No declaration could have been freer "from all suspicion of device or afterthought," and it was, in point of time, almost concurrent with the act to which it referred. It was the very deed itself, speaking through the mouth of a babe.

Judgment affirmed. All the Justices concurring.

(124 Ga. 793)

FORD v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)
CRIMINAL LAW—EVIDENCE—CONVERSATION
BETWEEN ACCUSED AND WIFE.

Evidence of a conversation overheard between the accused and his wife is not inadmissible for the reason that the wife is incompetent to explain or deny her part in the conversation.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 907; vol. 50, Cent. Dig. Witnesses, § 740, 741.]

(Syllabus by the Court.)

Error from Superior Court, Schley County;
Z. A. Littlejohn, Judge.

J. W. Ford was convicted of assault with intent to kill, and brings error. Affirmed.

Williams & Harper, for plaintiff in error.
F. A. Hooper, Sol. Gen., for the State.

COBB, P. J. The accused was tried upon an indictment charging him with an assault with intent to murder, and was convicted of the offense of stabbing. He filed a motion for a new trial upon the general grounds, and upon the further ground that the court erred in admitting the evidence of one Jordan, who testified to a conversation he had overheard between the accused and the wife of the accused, as follows: "His wife says to him: 'Hush, John, you know you are in fault. You ain't got no business to say that anybody interrupted you at all.' He says: 'Well, I meant to do that young man up a job, if it had not been for his wife.'" The objection urged to this testimony was that the wife of the accused was an incompetent witness to testify for or against him, and she would, therefore, not be permitted to deny or explain the above conversation. We do not think the objection was well taken. It is true that the wife is an incompetent witness in a case where the husband is on trial, but the accused had the privilege of referring to this conversation in his statement and explaining it in any way he could, and the jury were authorized to accept his explanation. The wife's explanation as to her part of the conversation is immaterial. It is the silence or the sayings of the husband that are pertinent, and throw light upon the issue. He is the proper person to explain or deny his statement. A conversation between husband and wife, overheard by a third party, may be testified to by such third party, just as any other conversation so overheard might be testified to, and such evidence, when revelant, is ordinarily admissible. See *Grant v. State*

(Ga.; decided Feb. 15, 1906) 53 S. E. 334. The evidence authorized the verdict, and the discretion of the trial judge in refusing to grant a new trial will not be controlled.

Judgment affirmed. All the Justices concur.

(124 Ga. 829)

MILLER & CO. v. SHROPSHIRE.

(Supreme Court of Georgia. Feb. 15, 1906.)
GAMING—DEALING IN FUTURES—MONEY LOST
—RECOVERY.

Irrespective of whether a purely speculative transaction in cotton is a "gaming" contract, within the meaning of Civ. Code 1895, § 3671, inasmuch as the General Assembly permits one paying a license tax to engage in the business of buying and selling "futures," he cannot be subjected to the penalty imposed by that section, which declares that "money or property delivered up upon" a gaming consideration "may be recovered back from the winner by the loser, if he shall sue for the same in six months after the loss," or, if he shall fail to bring suit within that period, "by any person, at any time within four years [thereafter], for the joint use of himself and the educational fund of the county."

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 72.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. F. Shropshire against Miller & Co. Judgment for plaintiff, and defendant brings error. Reversed.

W. F. Shropshire brought suit by attachment against Miller & Co., a nonresident partnership, alleging that the defendant operated in the city of Atlanta what is commonly known as a "bucket shop"; that the business of the defendant was to buy and sell cotton "futures" upon margins, it not being contemplated by either the buyer or the seller that there should be any actual delivery of the cotton, but it being understood that they should settle according to the market prices on certain specified dates and that the margins were placed to cover the fluctuations of the market; and that in his dealings with the defendant the plaintiff had lost \$490 to the defendant by speculating in this manner upon the rise and fall in the price of cotton. The defendant demurred to the petition on the ground that it set forth no cause of action, for the reasons (1) that the plaintiff sought to recover money lost upon an illegal contract, in which the plaintiff appeared to be in pari delicto, and (2) that the plaintiff sought to recover money lost upon an alleged "gaming" contract, when it appeared from the plaintiff's petition that the contract was not a "gaming" contract in the sense of the statute authorizing the recovery from the winner of money hazarded under such a contract. There were also certain special demurrers filed by the defendant, but the petition was amended so as to meet the objections to it thus urged. The court overruled the demurrer, and the defendant excepts.

Hoke Smith and Henry Hull, for plaintiff in error. J. F. Golightly, for defendant in error.

EVANS, J. (after stating the facts). In the view we take of this case, it is unnecessary to express any opinion upon the question whether, as a purely abstract proposition, a speculation in cotton "futures" is to be regarded as a "gaming" contract; nor are we called on to say whether such a transaction is, or is not, within the purview of our Civ. Code 1895, § 3671. The real and controlling question presented for decision is whether or not the penalty provided for by that section can be enforced against one who conducts what is commonly known as a "bucket shop." For a number of years past the General Assembly has imposed upon every individual or firm engaged in the business of buying or selling "futures" on farm products, or other commodities, a license tax of \$1,000 per annum. See citation of the various general tax acts in *Jones v. Stewart*, 117 Ga. 985, 986, 44 S. E. 879, and Acts 1904, p. 31. The business is licensed by express act of our Legislature. It is not, of course, to be presumed that the state has thereby abandoned its long-declared policy of declining to lend the aid of its courts to enforce "wagering contracts" (Civ. Code 1895, § 3668); nor, on the other hand, can it be assumed that the General Assembly contemplated that persons paying the license tax were to be permitted to conduct the business at the peril of being forced to disgorge all sums of money placed with them as "margins" and lost by their customers in the licensed speculations incident to the business. Such duplicity is not to be attributed to our lawmakers, in the absence of a definitely expressed intent to compel the payment of the license tax and then impose upon the persons taxed a penalty for conducting the business, as though it were an illegal enterprise in which they had absolutely no right to engage. Thus it has been held that where the pursuit of a particular calling, such as maintaining a gaming house, has been prohibited by a criminal statute, yet if the Legislature subsequently imposes a license tax upon that occupation, those who engage in it after paying the required tax are

exempt from prosecution and punishment for a penal offense. *Houghton v. State*, 41 Tex. 136; *Overby v. State*, 18 Fla. 178; *Rodgers v. State*, 26 Ala. 76. The same reasoning upon which these decisions are based applies with equal force to the collection of a penalty in a civil proceeding which is designed to take the place of a fine or of punishment by imprisonment.

The licensing of the business of speculating in "futures" does not necessarily imprint sovereign approval upon that occupation, but it enables persons who are thus permitted to engage in the business to escape the consequences which would ensue were they warned not to pursue their calling, upon peril of being subjected to a deterring penalty, to be enforced by a civil or criminal proceeding, or both. It is undoubtedly within the province of our General Assembly to divide those who hazard their money upon chance into two distinct classes, one to be known as "gamblers," the other as "financiers." It may not be equally apparent that the interests of the commonwealth are best conserved by sending the gamester to the chain-gang and licensing the professional speculator to open a place of business and invite the public at large to there call upon him and place their bets upon the probable rise or fall in the stock market. Be this as it may, the General Assembly has advisedly adopted, and has for many years pursued, this definite business policy, and we cannot defeat it. The general tax acts above referred to are purely revenue measures, though enforceable by penalty for failure to pay the imposed tax, as distinguished from police measures, designed to regulate internal affairs. *Racine Iron Co. v. McCommons*, 111 Ga. 542, 543, 36 S. E. 866, 51 L. R. A. 134. Taxes cannot, of course, be raised by imposing upon the taxpayer a burden which he is unable to carry. *Morton v. Macon*, 111 Ga. 164, 36 S. E. 627, 50 L. R. A. 485. To hold that the proprietor of a licensed "bucket shop" is subject to the penalty of making good all losses sustained by his customers would be to place him in this situation.

Judgment reversed. All the Justices concurring, except BECK and ATKINSON, JJ., not presiding.

(140 N. C. 562)

REDDING v. VOGT et al.

(Supreme Court of North Carolina. March 20, 1906.)

1. DEEDS—RESCISSION.

Where a deed conveyed a half of certain land in fee, but a subsequent deed between the same parties conveyed the same land and other land, all subject to a life estate in the grantors, and the grantee took possession and claimed title under the latter deed, the former deed was rescinded and replaced by the latter.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 550.]

2. SAME—RESERVATIONS AND EXCEPTIONS.

Though a life estate in a third person cannot be created by a reservation in a deed, yet, where the grantor owns only a remainder after an estate for the life of a third person, his deed may properly except an estate for the life of that person.

3. DOWER—SEISIN OF HUSBAND.

Actual possession of land by the remainderman during the existence of the life estate is not seisin such as to give his wife the right to dower.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, §§ 10, 63.]

Appeal from Superior Court, Pamlico County; E. B. Jones, Judge.

Action by Lillian Redding against Lucy R. Vogt and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Special proceeding tried upon issues joined before Judge E. B. Jones and a jury at fall term, 1905, of Pamlico superior court. The plaintiff brought the proceeding for the purpose of having her dower assigned in the lands described in her petition. The evidence disclosed the following facts: (1) On February 17, 1890, John P. Redding and his wife, Elizabeth Redding, executed a deed to Lizzie C. Redding (now Lizzie C. Brown), their daughter, for two tracts of land therein described. This deed was recorded in Book 17, p. 234. (2) Lizzie C. Redding, October 3, 1898, agreed in writing to convey to her brother, S. A. Redding, one-half of the land described in the deed first mentioned, reciting in the agreement that the land had been conveyed to her by her parents with the understanding that she would convey to S. A. Redding one-half thereof. (3) On June 5, 1899, John P. Redding and wife executed another deed to Lizzie C. Redding (now Lizzie C. Brown) for the land described in the first deed, as well as for other tracts. This deed contained in the premises the following clause: "Reserving always to the parties of the first part an estate in the said lands for the terms of their natural lives"; and in the habendum the following: "Excepting and reserving always unto themselves the said John P. Redding and Elizabeth Redding an estate for the term of each of their natural lives in and to all the lands hereby conveyed, and it is expressly agreed and understood that none of the property hereby conveyed or herein mentioned shall pass from the possession of the said first parties during their natural

lives, and the said parties of the first part covenant to and with the said party of the second part that they are seised of said lands in fee and have a right to convey the remainder in the same, and that they will warrant and defend the title to the same against all lawful claims." (4) On the same day (June 5, 1899) Lizzie C. Redding agreed in writing to convey to S. A. Redding a one-half interest in the land described in the second of the said deeds to her, reciting the fact that in the deed last mentioned John P. Redding and wife, who had conveyed the land to her, had reserved a life estate in all the tracts to themselves. (5) On November 18, 1901, Lizzie C. Brown (formerly Lizzie C. Redding) and her husband, E. A. Brown, joined in a deed to S. A. Redding for a part of each body of the land conveyed in the two deeds from John P. Redding and wife to Lizzie C. Redding. The deed, just after the description of the land, contained this clause: "Excepting always a life estate in and to the said lands for the natural life of Mrs. Elizabeth Redding." Her husband had died in the meantime. (6) S. A. Redding and wife, Lillian Redding, the plaintiff, who were married on January 8, 1902, without the joinder of Mrs. Elizabeth Redding, conveyed 76 acres of the said land to one Thomas A. Hadder by deed dated March 29, 1902. S. A. Redding took possession of the land conveyed to him by E. A. Brown and wife immediately and continued in possession, treating it as his own, until his death, which occurred September 29, 1902; it being the land in controversy. The defendants' counsel requested the court to charge the jury that, if they believed the evidence, the plaintiff was not entitled to dower in the said land, and that they should therefore answer the issues in favor of the defendants. This instruction the court refused to give, but charged the jury that, if they believed the evidence, they should find that S. A. Redding died seised and possessed of the said land and answer the issues in favor of the plaintiff. Defendants excepted. The issues, with the answers of the jury thereto, are as follows: "(1) Did Shade A. Redding, husband of feme plaintiff, die seised and possessed of the lands in controversy? Ans. Yes. (2) If so, what part of said lands? Ans. Yes; that part of the land conveyed in the deed of J. P. Redding and wife, Lizzie C. Redding, dated February 17, 1890, and recorded in Book 17, p. 234, which is included in a deed from Lizzie C. Brown and husband to S. A. Redding, dated November 18, 1901, and registered in Book 32, p. 120." The court adjudged upon the verdict that the plaintiff was entitled to have dower allotted in that part of the land described in the deed of John P. Redding and wife to Lizzie C. Redding, dated February 17, 1890, which was conveyed by the deed of E. A. Brown and wife, Lizzie C., to S. A. Redding, and process for that purpose was directed to be issued by the clerk. Defendants excepted and appealed.

H. L. Gibbs and Simmons & Ward, for appellants. D. L. Ward, for appellee.

WALKER, J. (after stating the case). The plaintiff seeks to have dower allotted in the lands described in her petition, and her right to the relief depends upon the construction and legal effect of the contracts and deeds mentioned in the statement of the case. It is provided by statute that a widow shall be endowed as at common law and shall be entitled to an estate for her life to the extent of one-third in value of all the lands, tenements, and hereditaments whereof her husband was seised and possessed at any time during the coverture, and to the same estate in all legal rights of redemption and equities of redemption or other equitable estates, inlands, etc., of which her husband was likewise seised in fee at any time during the coverture, subject to valid incumbrances existing before, or with her free consent created during, the coverture. Revisal 1905, §§ 3083, 3084. The right to dower, therefore, does not attach to the lands of the husband unless he was seised during the coverture, and the husband must have had an estate of inheritance. *Houston v. Smith*, 88 N. C. 312. The word "seisin" is said to have a technical meaning when used in this connection, and at common law it imported a feudal investiture of title by actual possession and with us it has the force of possession under some title or right to hold the same. It is either a seisin in deed or a seisin in law; the former being the actual possession of a freehold estate and the latter the right to the immediate possession or enjoyment of a freehold estate. Seisin applies only to freehold estates or to the possession of land of a freehold tenure. Seisin in fact or in deed has also been defined to be possession with intent on the part of him who holds it to claim a freehold interest, and seisin in law as the right of immediate possession according to the nature of the estate. *Washburn on Real Property*, 33, 34; *Early v. Early*, 134 N. C. 258, 46 S. E. 503; *Houston v. Smith*, supra. A somewhat different and broader meaning is assigned to the word "seisin" in our statutes of descent, where it is provided that every person in whom a seisin is required by any of the rules of descent shall be deemed to have been seised, if he may have had any right, title, or interest in the inheritance. Revisal 1905, § 1556, rule 12; *Early v. Early*, supra. "To give a right of dower, the estate of the husband must confer a right to the immediate freehold. This is an essential requisite at the common law. Dower is not allowed in estates in reversion or remainder expectant upon an estate of freehold; and hence, if the estate of the husband be subject to an outstanding freehold estate, which remains undetermined during the coverture, no right of dower attaches." *Houston v. Smith*, 88 N. C. 312; 1 *Scribner on Dower*, 217.

Under this settled rule of the law the de-

fendants contended that the plaintiff is not entitled to dower in the lands in question, because there is an outstanding freehold estate in Mrs. Redding by virtue of the deed of J. P. Redding and wife to Lizzie C. Redding, dated June 5, 1899, the contract between Lizzie C. Redding and S. A. Redding, dated June 5, 1899, and the deed of E. A. Brown and wife (formerly Lizzie C. Redding) to S. A. Redding, dated Nov. 18, 1901. The plaintiff, on the other hand, insists that she is entitled to dower for either of two reasons: First, because by the agreement between Lizzie C. Redding and S. A. Redding dated October 3, 1898, the latter acquired an equitable estate in fee in so much of the land as is described in that agreement and that as, under our statute, a widow is now dowerable in an equitable estate, contrary to the rule of the common law (*Fortune v. Watkins*, 94 N. C. 314), she is entitled to have her dower set apart in those lands; and, second, because the reservation of the life estate in the agreement of June 5, 1899, and the deed of November 18, 1901, is to persons who were strangers to the contract and deed, and therefore void. In this conflict of views, as to the law of the case, our opinion is with the defendants. If the contract of October 3, 1898, had not been followed by that of June 5, 1899, and by the deed of the same date made in execution of it, there would be force in the plaintiff's contention, but it is apparent to us that the latter contract and deed were made as substitutes for the contract of October 3, 1898, and that, by the transactions between them, the parties clearly intended to rescind that contract and to give full force and effect to the latter contract and the deed made under it. That parties may rescind a contract, either expressly or by substituting another in its place which is so inconsistent with it that the two cannot well coexist and operate at one and the same time, cannot be doubted. Rights acquired under a contract may be abandoned or relinquished, either by agreement or by conduct clearly indicating such a purpose. *Falls v. Carpenter*, 21 N. C. 237, 28 Am. Dec. 592; *Faw v. Whittington*, 72 N. C. 321; *Miller v. Pierce*, 104 N. C. 389, 10 S. E. 554; *Holden v. Purefoy*, 108 N. C. 163, 12 S. E. 848; *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924; *Gorrell v. Alsbaugh*, 120 N. C. 368, 27 S. E. 85; *May v. Getty* (at the last term) 53 S. E. 75; *Lipschutz v. Weatherly* (at this term) 53 S. E. 132. A contract may be discharged by the substitution of a new contract, and this results (1) where a new contract is expressly substituted for the old one; (2) where a new contract is inconsistent with the old one; (3) where new terms are agreed upon, in which case a new contract is formed, consisting of the new terms and of the terms of the old contract which are consistent with them; and (4) where a new party is substituted for one of the original parties by agreement of all three. Clark on

Contracts, p. 610, § 260. The authorities are numerous to the same effect. It was held in *Cocheco Bank v. Perry*, 52 Me. 293, that where parties make two contracts upon the same subject-matter, which cannot be reconciled without rejecting some of the material stipulations in one or the other or both, the court will not enter upon this work of expurgation, but will endeavor to give effect to the one contract or the other, as the intention of the parties shall seem to require. Substantially the same ruling was made in *Stow v. Russell*, 36 Ill. 18, and *Chrisman v. Hodges*, 75 Mo. 413. The principle is thus stated in *Harrison v. Polar Star Lodge*, 116 Ill. 287, 5 N. E. 546: "When the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of novatio in the Roman law. When an agreement is thus rescinded by novation, the contract in existence prior to the novation loses its individuality, and becomes merged in the new contract. Any circumstances or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract will amount to a rescission of it." *Fry on Specific Performance* (3d Am. Ed.) 998, 1009 et seq. In *Patmore v. Colburn*, 1 C. M. & R. (Exch.) 65, Lord Lyndhurst said that, when the provisions of two contracts are inconsistent and the second cannot be operative if the first is still in existence, the first is no longer a subsisting agreement. *Hart v. Lauman*, 29 Barb. (N. Y.) 410; *Paul v. Meservey*, 58 Me. 419. Many other decisions of the same import might be cited. If upon the facts of our case, therefore, we can gather that the parties intended the two contracts not to coexist, and the second was designed to take the place of the first, the former must be taken to embody the entire and final agreement of the parties. *Mather v. Butler County*, 28 Iowa, 253.

By their first deed John P. Redding and wife conveyed to Lizzie C. Redding the land, one-half of which she subsequently agreed to convey to her brother, S. A. Redding. After the making of this agreement, and on the 5th day of June, 1899, John P. Redding and wife conveyed to Lizzie C. Redding, not only the land embraced by their first deed to her, but another large body of land, excepting and reserving a life estate to themselves in all the land, and thereafter, on the same day, Lizzie C. Redding agreed to convey to S. A. Redding one-half of the lands which she acquired by the last deed from her parents, reciting in the contract that, by the deed she had received, a life estate was reserved to John P. Redding and his wife. Afterwards, and in performance of this agreement, Lizzie C. Brown (formerly Redding) and her husband conveyed to S. A. Redding certain tracts of land and interests in other tracts, all of which consisted of portions both of the land described in the first deed of John P. Redding

and wife to Lizzie C. Redding and of the additional land conveyed by their second deed, excepting and reserving a life estate to Elizabeth Redding, then the widow of John P. Redding, who had died. S. A. Redding took possession of the lands so conveyed to him by Mrs. Brown, claiming them as his own, and actually sold and conveyed 76 acres of the same to one Thomas A. Hadder. It does not seem to us that a stronger case of an election, on the part of S. A. Redding, to take under the second contract and the deed made in pursuance thereof, could be presented. It was impossible for the first and second transactions to stand together. By the first contract S. A. Redding acquired absolutely the entire interest and estate in one-half of the land, according to the very terms of the instrument, and by the second he was given only a remainder in one-half of that and other land; that is, a one-half interest therein subject to the life estate. His acceptance of the last contract is conclusively established by his taking the deed from his sister and thereupon entering into possession of the land and conveying a part of it to another. The first and second contracts could not, therefore, stand together, because the two estates conveyed are radically different; one being the entire fee, and the other only a remainder. If he claimed under the first contract, he must necessarily have rejected the second, and, if he claimed under the second contract and the deed made in fulfillment of it, he must just as surely have rejected the first contract. He acquired additional land under the second contract and the deed which he could not in good conscience keep and at the same time repudiate the provisions of the deed by virtue of which he asserted his right to it. If he had claimed under the first contract, the life estate excepted in the second contract and the deed to him would necessarily fall. When he claimed under the second contract and the deed, he thereby as fully recognized the existence of the life estate as if he had expressly done so by an instrument in due form of law, and those claiming under him will not be allowed to assert a right or title totally inconsistent with his deliberate choice so clearly manifested and in contravention of the just rights of others who must be held to have acquired interests, by virtue of his election which induced them to part with their land upon the faith of the rectitude of his conduct. The last contract and the deed made to S. A. Redding must be regarded as a substitute for the first contract and as a rescission of it; the two transactions being wholly irreconcilable. We do not leave out of consideration the second deed from John P. Redding and wife to Lizzie C. Redding, as that must be treated as a part of the transaction by which the first contract was rescinded. Lizzie C. Redding could not have made the second contract and the deed in execution of it, so as to convey to S. A. Redding the additional land

described in the second deed of John P. Redding and wife, if she had not received that deed, and he was as much bound by the provisions of the deed as by those of the subsequent contract between Lizzie C. Redding and himself and the deed by her and her husband to him. He derived his title to the additional land under the second deed of John P. Redding and wife to his sister, and those claiming under him must abide by its terms. He having deliberately taken benefit under it, they will not now be heard to say that he did not intend to rescind the first contract and substitute the second one and the deed to him in its place. All this occurred before the plaintiff and S. A. Redding were married, and at no time, therefore, during the coverture has he had any equitable interest or estate in the land under the first contract.

Having come to this conclusion, the remaining question will not be difficult of solution. It is undoubtedly true that a reservation cannot be made to a stranger. We find the principle stated in *Warvelle on Vendors*, p. 474, as follows: "It is a rule that a reservation must be to the grantor, and not to a stranger, but, while a reservation will not give title to a stranger, it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or 'reserved.' It must not be understood, however, that the exception in such case gives title to such third person, for no one not a party to the deed can acquire any rights or interests in the land by virtue of any exception therein contained more than by a reservation; yet, where third parties already possess rights adverse to those conveyed, an exception may properly be made for the purpose of relieving the grantor from liability on his covenants. The exception, in such event, operates as a recognition of the existing rights of third persons, and serves to convey notice to the grantee." *Hopkins on Real Property*, 418. It is familiar learning that a reservation (*redendum*) is a clause in a deed, whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not in esse before, while an exception is always of a part of the thing granted or out of the general words and description in the grant and is ever a part of the thing granted. It takes something out of the grant which would otherwise pass thereby. 4 Kent, Com. 468; *Sheppard's Touchstone*, 77 et seq.; *Wall v. Wall*, 126 N. C. 405, 35 S. E. 811; *Hopkins on Real Property*, supra. Whether the clause in the deed to S. A. Redding, which is in the form of an exception, can operate as such under the principle stated in *Warvelle on Vendors*, it is not necessary to say, as it follows from what we have already decided that the second deed of John P. Redding and his wife to Lizzie C. Redding must be construed with the second contract and the deed

to S. A. Redding as one transaction and as intended to supersede the first contract, and, that being so, the reservation by John P. Redding and wife to themselves in their second deed of a life estate is valid and effectual and prevented the vesting of an immediate estate of freehold in S. A. Redding; he having taken under a contract and deed which expressly recognizes the existence of the life estate in John P. Redding and his wife which was created by that second deed. The mere fact that he was bound by the provisions of that deed deprived him of any claim to a present estate of freehold. It follows that the plaintiff cannot have dower for want of the seisin of her husband, for the right of dower, as we have said, can attach only when the husband has the immediate estate of freehold, as well as the inheritance, and here the tenant for life was living at the death of the husband and at no time during the coverture could the latter have had the requisite seisin. *Weir v. Humphries*, 39 N. C. 264.

We do not know upon what ground his honor placed his decision. There was evidence that S. A. Redding had actual possession of the land, but this fact, while it tends to show that he accepted and treated the second contract and deed as a rescission of the first contract, did not in itself constitute seisin, for the bare possession of land is not seisin. *Barnes v. Raper*, 90 N. C. 189; *Efland v. Efland*, 96 N. C. 488, 1 S. E. 858.

Upon the consideration of the whole case, we conclude that S. A. Redding had no equitable estate in the land under the first contract, at the time of his death, and no seisin sufficient to support the plaintiff's claim of dower.

There was error in the charge given to the jury, and the case must again be submitted to them, with proper instructions as to the legal effect of the facts, disclosed by the evidence, in determining the rights of the parties.

New trial.

(141 N. C. 88)

HAIRE v. HAIRE et al.

(Supreme Court of North Carolina. April 10, 1906.)

DOWER — LANDS AFFECTED — CONVEYANCE BEFORE MARRIAGE — FAILURE TO RECORD.

Under Revisal 1905, §§ 979, 980, providing that no conveyance shall be valid as against creditors of purchasers for a valid consideration, except from the registration thereof, a wife is not entitled to dower in land aliened by her husband by a deed which was unrecorded at the time of the marriage.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, § 16.]

Appeal from Superior Court, Anson County; Ferguson, Judge.

Special proceeding for dower by Leonard Haire against Owen L. Haire and others. From a judgment allotting dower, defendants appeal. Reversed and remanded.

Bennett & Bennett, for appellants. Jas. A. Lockhart, for appellee.

BROWN, J. According to the answer of Daniel L. Smith, answering for himself and infant defendants, W. M. Haire and his first wife, Christian, on the 17th of March, 1888, executed a deed in fee for the lands described in the petition for dower to Rosa Smith and Alpha A. Teal. It was alleged that the grantor delivered said deed in the presence of his wife to the defendant Smith, with the declaration that he should keep it; that the said Smith did keep it for the grantees until the death of the grantor; that grantor never knew that the deed was not recorded; and that it was Smith's carelessness that it was not recorded until the day after W. M. Haire's death. After the death of his first wife the grantor married petitioner, who claims dower in the land. Haire remained on the land up to the time of his death.

The petitioner contends that marriage is a civil contract and constitutes valuable consideration; that by it the feme acquires in the quality of a purchaser an estate for the term of her life in one-third in value of the lands wherein her husband is seized of an estate of inheritance; that since chapter 147, p. 233, Public Laws 1885, commonly known as the "Connor Act," now brought forward in the Revisal of 1905, sections 979 and 980, went into effect, the deed of her husband made prior to the marriage with her is not operative to defeat her dower unless it was registered before her marriage. She contends that the right of dower is entitled to the same standing before the courts as the rights of purchasers of estates in lands, and for this reason, it being admitted that the deed was not registered, she is, upon the pleadings, entitled to judgment for dower. The fallacy of plaintiff's contention consists in assuming that she is a purchaser for value within the terms of the act referred to. There is no contract between husband and wife in respect to curtesy or dower. Neither is, therefore, creditor or purchaser as to the other. The wife's right to dower is derived solely from the statute conferring and defining it, and not by reason of any contract with the husband. It is given by law and even against the husband's will. Chief Justice Ruffin says that the interest the one gets in the property of the other is given by law for the encouragement of matrimony. *Norwood v. Marrow*, 20 N. C. 578. The plaintiff must rest her claim solely upon the seisin of the grantor, her husband. Such seisin, in order to support dower, must be seisin in law, not only actual or constructive possession, but the legal right to possession. *Redding v. Vogt* (at this term) 53 S. E. 337. It follows, therefore, that if the delivery of the deed, although unrecorded, was sufficient to defeat the husband's seisin, plaintiff's right to dower must fail. *Blood v. Blood*, 23 Pick. (Mass.) 85.

At common law, to entitle her to dower, plaintiff must show seisin of her husband during coverture. The unrecorded deed is good against him. By force of it he parted with his right to possession, his seisin in law, so that at no period during coverture was plaintiff's husband both seised and possessed of the land described in the petition. In a case similar to this the Supreme Court of Maine says: "The demandant had no rights in the land which could be effected by the matter of the registry of the mortgage. Her inchoate right of dower was no more a right of dower in the land than is an acorn an oak. It was immaterial to her so far as her legal rights were concerned whether the mortgage was recorded or not. She had no right of dower while her husband lived, and when he was dead she was dowable only of lands of which he had been seised during her coverture, and he was not seised of the land which he had previously conveyed, whether his grantee had caused his deed to be recorded or not." *Richardson v. Skolfield*, 45 Me. 389.

As a matter of convenient practice, his honor should have reserved the question presented on this appeal, and have submitted to the jury the issue raised by the pleadings as to the actual delivery of the deed, and had a finding upon that vital matter. Then the case could have been finally determined. As it is, there must be a trial now to determine that issue.

New trial.

(140 N. C. 498)

THORNTON et al. v. HARRIS et al.

(Supreme Court of North Carolina. March 13, 1906.)

1. TRUSTS — REMOVAL OF TRUSTEES — STATUTES.

Revisal 1905, §§ 2670, 2671, conferring on any church the right to appoint trustees to hold its property and to fill vacancies and remove trustees at will, applied only to church property, and not to property held in trust for a church and for the education of the youths of the colored race.

2. SAME — SUCCESSION — APPOINTMENT OF TRUSTEES.

Where certain property was conveyed in trust to provide a site for a schoolhouse to be used for the education of freedmen and children, irrespective of race or color, on the death of one of the trustees the trust devolved on the survivor, and on the death of such survivor the trustees' successors might be appointed by the clerk of the court, as authorized by Revisal 1905, § 1037.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 222, 249.]

3. SAME—TRUST PROPERTY—LEASE.

Where property was conveyed to trustees to provide a site for a schoolhouse to be used for the education of children and freedmen, irrespective of race or color, a lease of the premises by a majority of the trustees for 200 years, in consideration of \$10 to be paid at the end of 100 years and \$10 at the termination of the lease, the rent to be applied to school purposes, and the property to be used for a Baptist church and for the education of colored youth, was unauthorized and void.

Appeal from Superior Court, Warren County; Long, Judge.

Suit by M. F. Thornton and others against John W. Harris and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Walter A. Montgomery, for appellants. Tasker Polk and Pittman & Kerr, for appellees.

CLARK, C. J. On March 11, 1870, S. P. Arrington conveyed to trustees named in the deed a certain lot in Warrenton "in trust, nevertheless, for the purposes of a site for a school house to be used for the education of freedmen and children, irrespective of race or color." On September 9, 1874, a majority of the trustees named in aforesaid deed executed a lease of said premises for 200 years to Lem Thornton and six others, as trustees, in consideration of \$20, \$10 thereof payable at the end of 100 years, and the other \$10 to be paid at the termination of lease, the rent to be "applied to school purposes," and the property "to be used as a Baptist church and for the education of the youths of the colored race." The property has ever since been so used. The three surviving trustees named in the deed of 1874 have filled the four vacancies caused by death, and these seven are the plaintiffs. The Baptist congregation (colored) which has been using the premises in March, 1905, filled the four vacancies by an election by the congregation and took possession of the property, and on April 17, 1905, the congregation removed the three surviving trustees named in the lease of 1870 and elected three others in their stead. The seven trustees thus elected by the congregation are the defendants.

The defendants claim the right of the congregation to thus fill vacancies and remove trustees at will under authority of Revisal of 1905, §§ 2670, 2671, which confer upon any church the right to appoint trustees to hold its property, and to fill vacancies and remove trustees at will. The plaintiffs contend that such provisions apply only to church property, and not to property held in trust "for the Baptist Church and for the education of the youths of the colored race," and that for such purposes, it being not exclusively church property, the trustees appointed in the conveyance of 1874 should hold the property. This was correctly so held by his honor. It is true that in an action of ejectment the plaintiff must recover upon the strength of his own title. But here the title does not come into controversy. As was said in the similar case of *Simmons v. Allison*, 118 N. C. 767, 24 S. E. 717: "The nature of an action is not determined by the prayer, but by the body of the complaint. * * * There is no element of the action of ejectment in this case, neither in fact nor technically." The beneficial owner and occupant, the congrega-

tion and the school, are the same, whether the plaintiffs are the rightful trustees or the defendants. The title is the same. The defendants have no title whatever, unless as substituted trustees they are entitled to take the place of the plaintiffs. The law, brushing aside technicalities, looks to the substance. Upon the facts alleged and proved this is simply nothing more than a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owners. We adjudge that the defendants have no claim; it not being a trust purely for the church. The three plaintiffs, who were on the original board, are entitled to execute their trust, as against these defendants, and to the process of the court to be restored to their functions. Upon the death of the last survivor, their successors will be appointed by the clerk of the court. Revisal 1905, § 1037.

But it may well be inquired into, upon proper proceedings and by the proper parties, whether the plaintiffs have any claim to hold the possession, upon their own showing, except against mere trespassers. The deed of 1870 conveyed the property "in trust for purposes of a schoolhouse for the education of freedmen and children, irrespective of race." The lease of 1874 of the property for 200 years (at a rental of \$10, payable, respectively, 100 and 200 years after date), "to be used as a Baptist church and for the education of the youths of the colored race," is wholly unauthorized and in violation of the power conferred by the deed of 1870. What effect, if any, the statute of limitations will have, and who are entitled to bring proceedings to enforce the trust, we need not now decide.

No error.

(140 N. C. 506)

FISHER v. CITY OF NEWBERN.

(Supreme Court of North Carolina. March 13, 1906.)

1. MUNICIPAL CORPORATIONS—OFFICERS AND AGENTS—WATER AND LIGHT COMMISSION— NEGLIGENCE—LIABILITY OF CITY.

Priv. Laws 1899, p. 164, c. 82, § 54, incorporating the city of Newbern, authorized the construction or purchase of an electric light plant; and Priv. Laws 1903, p. 81, c. 41, amending the charter, established the water and light commission to manage the water, sewer, and electric light systems, which commission is given entire control of such systems, and is to be elected in the manner provided for the election of mayor. *Held*, that this commission is not a separate corporation, but is an agency of the city, for the negligence of which the city is liable.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1565-1586.]

2. SAME—TEST OF LIABILITY—ACTS AS GOVERNMENTAL AGENCY—ACTS IN PRIVATE CAPACITY.

In so far as a municipal corporation is engaged in discharging the powers and duties im-

posed upon it as a governmental agency, it is not liable for breach of duty by its officers, who, while so acting, are agents of the state; but, when acting in the management of property used for their own benefit or profit or discharging powers and duties voluntarily assumed for their own advantage, municipal corporations are liable to persons injured by negligence of their servants, agents, or officers.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1563, 1569.]

3. SAME—OPERATION OF LIGHTING PLANT.

Where the charter of a city authorized it to own and operate an electric light plant not only to illuminate the streets, but to sell the power to its citizens for private use, the operation of the plant could not be regarded as a purely public function, so as to render the city exempt from liability for the negligence of its officers and servants in operating the plant.

4. NEGLIGENCE—DEFINITION.

In an action for death by wrongful act, an instruction that negligence is the failure to observe for the protection of another that degree of care which the circumstances justly demand, whereby such other person suffers injury, was proper.

[Ed. Note.—For cases in point, see vol. 87, Cent. Dig. Negligence, § 1.]

5. ELECTRICITY — OPERATION OF LIGHTING PLANT—NEGLIGENCE—QUESTIONS FOR JURY.

In an action against a city for death caused by a shock from an electric light wire, evidence held sufficient to justify submission to the jury of the question of defendant's negligence.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, § 11.]

Appeal from Superior Court, Craven County; Bryan, Judge.

Action by J. H. Fisher, as administrator, against the city of Newbern. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action for damages alleged to have been sustained by the plaintiff by reason of the death of his intestate caused by the negligence of the defendant. The testimony, which upon demurrer must be taken as true, showed that the defendant is a municipal corporation, having the usual powers and duties conferred and imposed upon cities and towns in this state. Section 54, c. 82, p. 164, Priv. Laws 1899, entitled "An act to incorporate the city of Newbern," provides "that the board of aldermen are authorized and empowered to construct or buy, maintain and operate an electric light plant for the purpose of furnishing light to the inhabitants of said city, water works system and sewerage system, and the said board of aldermen are authorized and empowered to charge reasonable prices for the use of said light, water and sewerage, when furnished to private consumers." Section 55 empowers the city to issue bonds when the proposition to do so has been approved by the qualified voters, for the purpose of buying or erecting a system of light and water, etc. Pursuant to the power vested in the board of aldermen by this act, they purchased a water and sewerage plant and erected an electric light plant. The charter was amended by chapter

41, p. 81, Priv. Laws 1903, and the sections of this statute pertinent to the questions presented by this appeal provide that, for the proper management of the water, sewer, and electric light systems, a commission is established. The members of the commission are named in the act and their terms prescribed. At the expiration of such terms their successors are to be elected in the manner provided for the election of the mayor of the city. The commission is given entire supervision and control of the maintenance, management, etc., of said systems, with power to fix rates for light, water, and sewerage, subject to an appeal to the board of aldermen. Provision is made for paying the expenses of maintaining and operating the systems and payment of interest on the bonds from rates, etc., and the surplus is directed to be held for a sinking fund to discharge the principal of the bonds when due. The commission is required to make quarterly reports to the mayor and board of aldermen of receipts and disbursements, and is given power to employ servants and agents to operate the systems, and to discharge them, etc.

The commission appointed by the act of 1903 were in control of the electric light plant when the plaintiff's intestate received the injury from which he died. The plaintiff's evidence showed that on the night of March 22, 1904, the electric wire on Queen street was down at Five Points at the police roundhouse. The wire was broken by an engine. The chief of police who saw the wire down telephoned for the electrician employed by the commission, whose duty it was to put up wires and attend to the line. When the electrician came to the place at which the wire was down, he said that the wire was not dangerous; that it could wait until morning. He wound the wire up in a coil and tied it with one end of the wire so that it would not come undone. He hung it upon the electric light pole at the corner of Roundtree street, as high as he could reach, about 5½ or six feet from the ground. It did not seem to be a live wire. It was the wire to a lamp. The chief of police also telephoned to the mayor about the wire, who directed him to see the railroad agent about it—said he had nothing to do with it. Large numbers of people generally congregate at the place where the wire was down. When the chief of police found the wire in the street the current was on it. The electrician said that it was not a live wire, and there was no danger in it. It supplied a 16 candle power light—the same wire which was run in all houses. Two nights after the wire was broken, the deceased, walking along the sidewalk, stepped on it and was killed. It was raining. There was some controversy in respect to the appearance of the body of the deceased after death. The defendant interposed a demurrer to the evidence, which was overruled. Verdict for plaintiff, judgment, and appeal by defendant.

W. D. McIver, for appellant. W. W. Clark, for appellee.

CONNOR, J. (after stating the case). The defendant's principal contention is presented by its exception to the following instruction: "Chapter 41, Priv. Laws 1903, does not create the water and light commission into a separate corporation. The act makes the commission officers and agents of the city of Newbern, and, if the jury find that the commission was negligent, the city would be responsible for such negligence." His honor correctly construed the statute and drew the proper conclusion in regard to the relation established between the commission and the defendant. The act of 1903, read in connection with sections 54 and 55, c. 82, pp. 164, 165, Priv. Laws 1899, simply establishes a new and separate agency for the management and control of the water, sewerage, and light systems. The vice in the defendant's contention lies in the assumption that the board of aldermen constitute the municipal corporation. It is no more the political entity created by the charter than the Legislature is the political entity called the state. Both are mere governmental agencies established for enabling the people to declare and enforce their sovereign will and purpose. It is entirely immaterial whether the commission is responsible to or under the control of the board of aldermen. Both are responsible to the municipality, which, for the dual purpose of local self-government and performing such other and appropriate powers as are conferred by the charter, is created by the Legislature under the provisions of Const. art. 8, § 4. If the Legislature had made the commission a corporation, the result would have been the same. It is competent and not unusual for municipal corporations, for convenience in carrying on their varied functions, to use commissions, made bodies corporate; when done, the corporation is a mere agency employed by the municipality with the power of visitation and control in the same manner as if an individual was employed. Such corporations occupy similar relations to the municipality as the university, the hospitals, and the state prison do to the state. They are governmental agencies. Their liability to be sued depends upon the purpose for which they are created. When they are simply agencies of the state, such as counties, they may not be sued for torts committed by the agents, as held in *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534, and many other cases. If, as in cities and towns, they have both governmental and business corporate powers conferred, their liability to suits for the torts of their servants and agents depends upon the sphere of activity in which the wrong complained of is committed. In so far as a municipal corporation is engaged in the discharge of powers and duties imposed upon it by the Legis-

lature as governmental agencies of the state, they are not liable for breach of duty by their officers; in that respect, the officers are the agents of the state, although selected by the municipality. When acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable to an action to persons injured by the negligence of their servants, agents, and officers; and it is immaterial whether such servant, agent, or officer be a corporation or an individual. *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810, in which the authorities are cited and reviewed by Mr. Justice Avery; *Willis v. Newbern*, 113 N. C. 137, 24 S. E. 706. "The distinction is between the exercise of its legislative powers, which it holds for public purposes and as a part of the government of the country, and those private franchises which belong to it as a creation of the law. Within the sphere of the former it enjoys the exemption of the government from responsibilities for its own acts and for the acts of those who are independent corporate officers deriving their rights and duties from the sovereign power." *McIlhenney v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; *Ingersoll on Pub. Corp.* 415; *Maxmillian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468; 1 *Smith, Mun. Corp.* § 807.

While it must be taken that one of the purposes of the defendant in erecting a system of electric lights was the illumination of its streets, it is equally manifest that in addition to such purpose was that of selling power to its citizens for their private residences and stores. Section 54, c. 82, p. 164, Laws 1899, expressly confers this power, and the amendment of 1903 (page 81, c. 41) in no way limits it. Without expressing any opinion upon the suggestion that the lighting its streets is a governmental function, if that was the sole purpose for which its plant was erected and was being operated, it would seem clear that, as the portion of its charter referring to an electric plant gives it the right to generate and sell power, we must conclude that it was exercising this right. *Nelson, C. J., in Bailey v. Mayor*, 3 Hill, 531, 38 Am. Dec. 669, discussing the question says: "As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in my mind and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred,

as to the object and purpose of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." In that case, the plaintiff sued for the negligent construction of a dam across the Croton river by the agents of the city. The work was done under the control of commissioners appointed by the Legislature. The same argument was made as in this appeal. The court said in response thereto that the city was under no obligation to accept the charter or amendments, but, having done so, it was bound for the acts of the commission appointed by the Legislature. That case has been uniformly followed by the courts of New York and other states. In *Chicago v. Selz*, 202 Ill. 545, 67 N. E. 386, it is said: "The injury to the plaintiff did not arise from negligence in the use of its hydrant for the purpose of extinguishing fire. The business of selling water to inhabitants and street sprinkling contractors is not an exercise of the police power, and the city is not exempt from liability for negligence in maintaining such a system." The conclusion is irresistible that the commission was the agent of the city, and that upon the maxim "respondeat superior" it must answer for any injury sustained by its negligence.

In respect to the merits of the case, his honor properly instructed the jury that "negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. It hardly admits of argument that hanging a live wire on a pole, in the manner testified to by all of the witnesses, in the portion of a city frequented by many persons, and permitting it to remain suspended for two days, in the place and under the circumstances testified to, is evidence of negligence. We see no reason to modify the language of *Cooke, J.*, in *Mitchell v. Electric Co.*, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735. The duty imposed upon persons and corporations maintaining wires charged with electricity, upon the public streets and highways, to exercise a high degree of care for the protection of persons using such highways, is imperative. The defendant insists that the wire, with which the plaintiff's intestate came in contact causing his death, was charged with a current of only 110 voltage, and could not produce death. The evidence shows that, notwithstanding the theory of the electrician, it did cause death. He was mistaken either as to the voltage or its effect

upon a human body. The man either touched it, as contended by the defendant, or stepped on it, as contended by the plaintiff and as found by the jury, and was instantly killed. Persons controlling so dangerous and subtle an agency as electricity must not be permitted to theorize in regard to its probable effects, or speculate upon the chances of results affecting human life. The wires must be either insulated or placed beyond the danger line of contact with human beings using the public streets in a lawful way. While the testimony regarding the manner in which the contact was brought about is conflicting, the jury have, upon a fair and impartial instruction, accepted the plaintiff's view. The question of contributory negligence was properly submitted. We find no error in the rule laid down in regard to the measure of damages.

The judgment must be affirmed.

(140 N. C. 503)

STANDARD SEWING MACH. CO. v. OWINGS.

(Supreme Court of North Carolina. March 13, 1906.)

ELECTION OF REMEDIES—CONSISTENCY OF REMEDIES—ACTION FOR PRICE OF PERSONALTY—SUBSEQUENT ACTION FOR FRAUD.

The recovery of an unsatisfied judgment on notes given for the price of personality is no bar to a subsequent action for damages for fraud and deceit, by which it was alleged the property was obtained.

Appeal from Superior Court, Craven County; E. B. Jones, Judge.

Action by the Standard Sewing Machine Company against D. A. Owings. From a judgment for defendant, plaintiff appeals. Reversed.

The plaintiff, holding notes of defendant for the purchase price of certain machines, had instituted two actions on same against defendant, and, said actions having been consolidated, plaintiff obtained judgment on said notes against defendant at May term, 1905 of Craven superior court. Defendant, having filed his petition in bankruptcy, obtained an order from the district court, staying further proceedings in that cause in enforcement of said judgment. Thereupon plaintiff, on July 29, 1905, instituted this action to recover damages for fraud and deceit on part of defendant, by which plaintiff had been induced to sell defendant said machines; and on this action an order for arrest was issued, and defendant gave bond as required by the statute. This last cause, coming on to be heard at October term, 1905, on motion, the order of arrest was discharged, and the surety on the bail bond relieved of all responsibility on same; the court holding that the prosecution of the action on the notes and obtaining judgment thereon was a bar to any action for fraud and deceit in procuring the sale of the machines. Plaintiff excepted and appealed.

Simmons & Ward, for appellant. Ernest M. Green, for appellee.

HOKE, J. (after stating the case). No reason occurs to us why a suit by plaintiff on the contract, pursued to judgment, uncollected and apparently uncollectible, should bar an action to recover damages for fraud and deceit on the part of defendant, and by means of which the sale was procured. Both actions are consistent in theory, and both in affirmance of the sale. The remedies, in this jurisdiction at least, while consistent, are not always entirely coextensive; nor are the damages necessarily the same. The weight of authority is also against the position of defendant. In *Enc. Pl. & Practice*, vol. 7, 362, the doctrine is stated as follows: "As already stated, the principle does not apply to all coexistent remedies. As regards what have been termed consistent remedies, the sutor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and, if not satisfied with the result of that, he may commence and carry through the prosecution of another. Thus, where a sale of chattels is induced by the fraud of the vendee, the vendor may prosecute the vendee for the price of the articles in one action, and in another for damages on account of the fraud; both proceeding on the theory of ratifying the sale. But he cannot maintain either if he has rescinded the sale, or if, on the theory of rescission, he has resorted to replevin to recover the property. No sutor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts." In 3 *Words & Phrases Judicially Defined*, p. 2333, it is said: "The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies." Those statements of the doctrine are supported by well-considered decisions and are very generally accepted as correct. *Whittier v. Collins*, 15 R. I. 90, 23 Atl. 47, 2 Am. St. Rep. 879; *Bacon v. Moody*, 117 Ga. 207, 43 S. E. 482; *Austin Mfg. Co. v. Decker*, 109 Iowa, 277, 80 N. W. 312; *Black v. Miller*, 75 Mich. 323, 42 N. W. 837.

We are referred by defendant to *Palmer v. Preston*, 45 Vt. 154, 12 Am. Rep. 191, and *Caylus v. Railroad*, 76 N. Y. 609, as cases sustaining his position. While the language of the court in these two opinions certainly tends to support the defendant's claim, we doubt if either is an authority in his favor. As decisions, both might very well be distinguished on grounds not inconsistent with our present opinion. If, however, the construction put upon these cases by the defendant be the true one, we hold that they are

not in this respect well considered, and that the better doctrine is to the contrary, as heretofore stated.

There was error in discharging the order of arrest and relieving the surety on the bail bond. The same will be set aside, and the cause remanded, to be proceeded with in accordance with the law.

Error.

(140 N. C. 524)

BOYLE et al. v. STALLINGS.

(Supreme Court of North Carolina. March 13, 1906.)

DISMISSAL AND NONSUIT—RIGHT TO TAKE—CONDITION OF CAUSE.

Where plaintiffs sue for an accounting, alleging that defendants are indebted to them, and defendants deny the indebtedness, but admit that an accounting should be had, and allege that plaintiffs are indebted to them, so that in effect a counterclaim was set up, the plaintiffs cannot, after an accounting has been had before referees, take a voluntary nonsuit.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Dismissal and Nonsuit. § 10.]

Appeal from Superior Court, Martin County; Ward, Judge.

Action by F. A. Boyle and another against Emma V. Stallings, executrix of W. L. Stallings, deceased. From a judgment for defendant, plaintiffs appeal. Affirmed.

Plaintiffs alleged that during the year 1898 they formed a copartnership with defendants for the purpose of operating a sawmill. Defendants owned the mill and agreed to sell plaintiffs a one-half interest therein for \$2,500. Pursuant to said agreement they took charge and control of said mill and operated the same until the latter part of the year 1899. During said time plaintiffs, with the consent of defendants and in accordance with the terms of the contract of partnership, made, at their separate expense, valuable improvement and additions to said machinery, one-half of the value of which should constitute a set-off against the purchase price, etc. They made sundry payments on the one-half interest in the mill in money, lumber, etc. That, during the latter part of the year 1899, the partnership between the plaintiffs and defendants was dissolved, and plaintiffs leased defendants one-half interest in the mill. Thereafter plaintiffs made sundry payments, and advanced sundry amounts on account of the purchase price of the one-half interest in the mill, and made improvements thereon, etc. That, by reason of the transactions and dealings had between the parties, a long unsettled account had been created, which should be stated and adjusted. That upon such adjustment it would be found that plaintiffs have paid the purchase money for said mill, and, in addition thereto, defendants would owe them \$500. That plaintiffs have endeavored to bring defendants to a settlement, but have failed to do so, etc. The

plaintiffs ask the court that an account be taken under its direction, etc. Defendants deny the allegations, but admit that an account should be stated, and aver that upon such accounting it will be found that no part of the purchase money for the mill has been paid, and that a balance is due them on account of rents, etc. An order was made upon the complaint and answer referring the cause to three gentlemen selected by the parties with directions to take and state an account of the transactions, etc., and declare the amount due. The referees met, and, after hearing testimony, examining the books of the parties, made their report to which is attached a statement of account covering 16 pages of the printed record. The plaintiffs filed several exceptions, a number of which are directed to the findings of fact upon the ground that they were not sustained by any evidence. They also excepted for that all of the evidence was not reported. When the cause was first called for trial upon the exceptions, the court remanded it to the referees with direction to report the evidence with their conclusions of law and fact. This was done, and the cause heard by his honor Judge Ward. Upon an intimation by the judge that he did not see any error in the report, "but would fully consider the same," the plaintiffs stated that they would withdraw their exceptions and take a nonsuit. Defendants objected. Motion for nonsuit was denied, and plaintiffs excepted. The court thereupon took the cause under consideration, overruled the exceptions, and confirmed the report. Plaintiffs excepted. Judgment according to report and appeal.

Ward & Grimes, for appellants. Stubbs, Gilliam & Martin, for appellee.

CONNOR, J. (after stating the case). We have examined the record with care and find no error in his honor's ruling. The plaintiffs insist that, as defendants did not set up any counterclaim, they were entitled at any time, prior to the final judgment, to submit to a nonsuit. We are of the opinion that, while not in express terms, the defendants did in substance set up a counterclaim. Plaintiffs asked for an accounting, averring that upon an account stated it would appear that defendants were indebted to them, etc. Defendants submitted to an account, averring that plaintiffs owed them a balance. Prior to the adoption of the Code, plaintiffs would have filed a bill in equity asking for an account. By reason of the inadequacy of the machinery of courts of law to deal with long and complicated accounts, courts of equity assumed jurisdiction, especially in winding up partnership dealings. *Eaton, Eq. 516; Bispham, Eq. 505*. The rule in courts of equity denied the right to the plaintiff to withdraw his bill after a decree has been made for an account. *Egg v. Devey, 11 Beav.*

221. After a consent order for a mutual accounting before a commissioner, the complainant cannot dismiss by a common order. *Wyatt v. Sweet, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525; Hall v. McPherson, 3 Bland (Md.) 529*, in which it is said: "But in this case, there having been a decree to account, each party has been thereby virtually clothed with the rights of an actor." 6 Enc. Pl. & Pr. 847. While the precise question has not been decided by this court, the language of *Morrison, J., in Bynum v. Powe, 97 N. C. 376, 2 S. E. 171*, indicates clearly the view which was entertained. He says: "Under the present method of civil procedure there is but one form of action, and the plaintiff, as indicated above, may, no matter what may be the nature of the cause of action, voluntarily submit to a judgment of nonsuit, except in cases purely equitable in their nature he cannot do so after the rights of the defendant in the course of the action have attached, that he has a right to have settled and concluded in the action. Thus, if an order of reference has been made, and the referee has made a report, the correctness of which is conceded by both parties, and the case is in condition to be finally disposed of, or if an account has been taken and report made, or a decree has been made under which the defendant has acquired rights, the plaintiff will not be allowed to suffer a judgment of nonsuit." *Gatewood v. Leak, 99 N. C. 363, 6 S. E. 706*. The cases cited by the plaintiffs' counsel had no equitable element in them. They were actions formerly cognizable at law and are based upon the well-settled rule that, when no counterclaim is pleaded, the plaintiff may at any time, before verdict, submit to a nonsuit. The defendants insist that, if this action came within the rule, the plaintiffs may not take a nonsuit, because under section 525, Revisal 1905, the report of the referee in regard to findings of fact "shall have the effect of a special verdict." When filed, the cause is in the same condition in respect to the right to submit to a nonsuit as if the jury had returned a special verdict. There is much force in the suggestion; but, as we have seen, the question does not necessarily arise. His honor correctly denied the motion.

The other exception which was argued with zeal and force in this court is that the referees adopted a settlement made between the parties by Mr. Fisher, who it appeared was selected, prior to the bringing of this action, to examine their books. There was some controversy as to the extent, in point of time, which Fisher was authorized to make the settlement. The plaintiffs insist that the referee, instead of adopting Fisher's figures, should have examined the items of account themselves, and reported the conclusions upon them. There was evidence in respect to Fisher's authority for the examination made by him and the acquiescence of the parties.

It appears that he entered upon the books of the parties the result of his work. The defendants' counsel, in their argument before us, exhibited the books, showing the items upon which Fisher's conclusions were reached, and that they were before and after considered by the referee. It is elementary that we have no power to review the conclusions of fact as found by the referees and sustained by the judge, unless it appears that such findings have no evidence to support them. While the result of the accounting is very different from that anticipated by the plaintiffs, and their able and zealous counsel have presented their views upon us forcibly, we are unable to perceive any error of law, with which alone we are permitted to deal. It is conceded that the referees are honorable, intelligent business men. They appear to have proceeded with intelligence and fairness, and his honor gave the record careful consideration.

The form of the judgment is in accordance with the report, and must be affirmed.

(140 N. C. 501)

CHADBURN v. DURHAM et al.

(Supreme Court of North Carolina. March 13, 1906.)

1. MORTGAGES—CONSIDERATION—FORECLOSURE.

The solvent sureties on a forfeited sheriff's bond paid the amount due on the judgment and caused the same to be assigned for their benefit and protection. Plaintiff, one of the sureties, was designated as agent to collect what he could from the insolvent sureties, and took from defendant, an insolvent surety, a note secured by mortgage. The pro rata due from defendant was more than the amount of the note. *Held*, in an action to foreclose the mortgage, that a verdict for plaintiff was proper.

2. SAME—DECREE.

The final decree should be so drawn as to relieve defendant of all liability by reason of the judgment on the bond.

Appeal from Superior Court, Pender County; Justice, Judge.

Action by W. H. Chadburn against R. I. Durham and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. D. Kerr and Stevens, Beasley & Weeks, for appellants. E. K. Bryan and J. T. Bland, for appellee.

HOKE, J. The plaintiff and defendants and some others were sureties on the bond of E. M. Johnston, ex-sheriff of Pender county. Said Johnston having failed to account properly for county funds, judgment was rendered against him and his sureties for \$5,075.85. The property of said Johnston was sold to satisfy said judgment, and several thousand dollars was realized from said sale, leaving a balance due. The solvent sureties, the plaintiff being among them, paid the amount due to the county on said judgment and caused the same to be assigned for their benefit and protection. The plaintiff was designated as agent to collect what he

could on the respective amounts due by the insolvent sureties, and as such agent holds and controls the balance due on the judgment against Johnston and others. In pursuance of this arrangement, the plaintiff took from the defendant, who was an insolvent surety, the note for \$150 secured by the mortgages sued on. Both the plaintiff and the defendant testified that the same was given by Durham in payment of the amount due from him on the judgment aforesaid, and that it was to be in full payment and discharge of any and all liabilities of said Durham on the judgments. It was found that the pro rata due from the defendant was more than the amount of the note. On these facts the court correctly instructed the jury that if they believed the evidence they would render a verdict for the full amount of the note and interest. The jury so rendered the verdict, and judgment was thereupon rendered for the plaintiff.

There is no error. The note was given by Durham in payment of the pro rata amount due from him on the judgment, and was to protect him from further liability. The plaintiff is in a position to comply with the agreement, and the judgment of foreclosure is affirmed.

Both the plaintiff and the defendant having testified that on payment of the note and interest Durham would be relieved of any and all liability by reason of the judgment, the final decree should be so drawn as to afford him protection in accordance with this stipulation.

Affirmed.

(140 N. C. 529)

ISLER v. DIXON.

(Supreme Court of North Carolina. March 13, 1906.)

1. MECHANICS' LIENS—CONSTRUCTION OF GUTTERS ON HOUSE—RIGHT TO LIEN.

Under Revisal 1905, § 2016, declaring that every building built, rebuilt, repaired, or improved shall be subject to a lien for the payment of all debts contracted for work done on the same or materials furnished, a person who erects gutters, spouts, and outlets upon a house under an indivisible contract for labor and materials is entitled to a lien for the whole amount due him.

2. SAME — EXEMPTIONS — FOUNDATION OF LIEN—BILL OF PARTICULARS.

Under Revisal 1905, § 2016, declaring that every building shall be subject to a lien for the payment of all debts contracted for work done on the same or material furnished, the bill of particulars furnished in filing a lien for gutters, spouts, and outlets on a house contained items of "158 feet gutter at 38 cents" and "283 feet gutter at 20 cents," did not show that the lien was only for materials so as to entitle the owner of the house to claim his exemptions under Const. art. 10, § 4, exempting homesteads, but providing that the exemption shall not prevent a mechanic's lien for work done on the premises.

Appeal from Superior Court, Lenoir County; Council, Judge.

Action by S. H. Isler, Jr., against J. W. Dixon. From a judgment for plaintiff, defendant appeals. Affirmed.

T. C. Wooten and Shepherd & Shepherd, for appellant. S. W. Isler, for appellee.

CLARK, C. J. There is only one exception that requires consideration. The plaintiff erected gutters, down spouts, outlets, etc., for the appellant's house and duly filed his lien. The building of the gutters, down spouts, outlets, etc., and furnishing the material, were all in the same contract, which was entire and indivisible. The contractor is entitled to a lien for the whole amount under the "mechanic's and laborer's lien law." Revisal 1906, § 2016; *Broyhill v. Gaither*, 119 N. C. 443, 28 S. E. 31, is exactly "on all fours."

The appellant contended that the words in the "bill of particulars" in filing the lien "158 feet gutter at 88 cents," "283 feet gutter at 20 cents," etc., showed that the lien was only for material furnished, and hence that the defendant could claim his exemptions. But the "facts found" by the referee and approved by the judge show that the contract and lien were for the gutters, down spouts, outlets, etc., including both work and material. The judgment is therefore superior to the homestead and personal property exemption. Const. art. 10, § 4.

No error.

(140 N. C. 530)

MATHIS v. MAGNOLIA MFG. CO.

(Supreme Court of North Carolina. March 12, 1906.)

MASTER AND SERVANT — INSTRUCTIONS TO YOUTHFUL EMPLOYÉ.

Where plaintiff, who was 18 years of age and a common laborer in defendant's mill, and had no knowledge of machinery, was injured by running his hand under the table in a slit in which a circular saw was operated without looking where he put it, *held*, that the foreman's failure to give plaintiff special instructions afforded no ground of recovery for the injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 310, 316½.]

Appeal from Superior Court, Duplin County; Council, Judge.

Action by Clifton Mathis, by his next friend, against the Magnolia Manufacturing Company. From a judgment denying a motion for nonsuit, defendant appeals. New trial granted.

Stevens, Beasley & Weeks and Shepherd & Shepherd, for appellant. Kerr & Gavin, for appellee.

BROWN, J. At the conclusion of the evidence defendant moved to nonsuit the plaintiff. The court overruled the motion, and defendant excepted. Upon examination of the entire evidence, and viewing it in the aspect most favorable to the plaintiff, we are of opinion that the motion should have been granted.

The plaintiff alleges, and offers evidence tending to prove that he was at the time of the unfortunate occurrence 18 years of age, and a common laborer in defendant's mill; that he was employed in carrying out lumber, and had no knowledge of machinery; that there was a circular saw about 14 inches in diameter operated through a slit in a table five feet square in the mill. About four inches of this saw was above the top of the table and the remainder below. The part of the saw below the table could not be seen from above when the top of the table was down. The top worked on hinges and could be turned back. The saw was run by means of a pulley connected from the floor. The sawdust was caught in a box under the saw. After plaintiff had been in the mill about two weeks he was directed by the foreman to operate this saw. The foreman instructed the plaintiff to "keep the sawdust cleaned out from the box, and around the saw clean." Plaintiff states: "I was pulling the dust to me from out of this box, and could not see the saw; thinking the frame was protection, and while pulling it to me, the saw struck the stick and jerked my hand on it." Plaintiff further states that he could have easily seen the saw whirling under the table by stooping down and looking while cleaning out the dust box.

The specific negligence charged in the complaint is the defective character and placing of the saw. We are unable to find any evidence in the record to support this allegation. The evidence shows that the machine was an ordinary cut-off saw used in box factories for cutting off boards. It was securely fastened on a table five feet square, and worked all right so far as the evidence discloses. The negligence pressed upon our attention in the argument was lack of proper instruction as to how to operate the saw. The evidence does not disclose any sort of complication in the machine, or anything requiring special instruction. Nor can we discover from the evidence that any kind of instruction would have prevented the deplorable accident to plaintiff's hand. The plaintiff was not injured while sawing boards. He was injured, according to his own evidence, by running his hand under the table without looking where he put it. The foreman could not have imparted to plaintiff any further information than he already had. The plaintiff had equal knowledge with the foreman as to the dangers incident to operating the saw, and he had sufficient discretion, so far as age and experience go, to appreciate the peril. The plaintiff knew the danger incident to cleaning out the sawdust box with the circular saw revolving rapidly just above it as well as the foreman could have told him. He knew the saw was there, and that it was in rapid motion, and highly dangerous. It would have been of no service to the plaintiff to have been told by the foreman to be

careful and not come in contact with it. *Kiser v. Barytes Co.*, 131 N. C. 610, 42 S. E. 986.

While the accident to plaintiff's hand is to be lamented, we are unable to find in the record any evidence of negligence upon the part of defendant which caused the injury.

New trial.

(140 N. C. 533)

MAST v. SAPP.

(Supreme Court of North Carolina. March 13, 1906.)

1. ABATEMENT AND REVIVAL — INJURY TO PROPERTY—REVIVAL OF ACTION.

Right of action for damages to land, if permitted to survive the person damaged, survives to his executor or administrator, and not to his heir.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 378-402.]

2. DAMAGES—CONTINUING FAULT.

When a cause of action once accrues, there is a right of action as of that time to recover all the direct and consequential damages which will ever ensue and that follow from the continuing fault.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 69, 70.]

3. SAME—INJURIES TO LAND—PERMANENT INJURY.

An injury to land is permanent, as distinguished from a continuing one, when it is done at once by an unlawful act or the negligent omission, from which the loss results without repetition of the act; there being only one act and one damage, though the latter may be composed of several items or consist in the destruction of several different pieces of property.

4. ABATEMENT AND REVIVAL—TIME OF INJURY.

A city maintained a water reservoir near the house of P. The reservoir suddenly broke, and either fell, or by the weight and force of the water was driven, against the house, crushing it and killing P., who, with her husband and son by a former marriage and stepson, lived therein. All were rescued, except P., who was found in the debris seated in a chair apparently dead. *Held*, that whether the cause of action for injuries to and destruction of the house survived to P.'s executor or to her heirs depended, not on whether she survived the destruction of the house, but on whether the injury was committed before or after her death.

Clark, C. J., dissenting.

Appeal from Superior Court, Forsyth County; Cooke, Judge.

Action by D. P. Mast, guardian, etc., against H. O. Sapp, as administrator of the estate of Angeline Peoples, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought to determine the right, as between the parties, to a fund of \$865, now in the hands of the defendant, by agreement, as stakeholder. The controversy arose on the following facts: Angeline Peoples was the owner of a house standing on her lot immediately north of and 12 feet from a reservoir belonging to, and used as a place of storage for water by, the city of Winston. On the 2d day of November, 1904, the wall of the reservoir, which was 20 feet

higher than the house, by reason of some negligent defect in its construction or its condition, gave way, and either fell, or by the weight and force of the water was driven, against the house, crushing it and killing the said Angeline Peoples, who with her husband, a son by a former marriage, and a stepson, lived in it. The city paid the sum of \$4,500 to the administrator of Angeline Peoples for negligently killing her, and also paid to him the said sum of \$865, the value of the property destroyed, the latter sum to be held subject to the determination by the court of the proper and rightful claimant thereto. The court submitted to the jury the following issue: "Did the intestate of the defendant survive the destruction of the property described in the pleadings?" Which the jury answered in the negative. The defendant's right to the fund was made to turn upon the survival by Angeline Peoples of the destruction of the property. The testimony, which was that of her neighbors, tended to show that within a very short time after they heard a roaring sound, they went out and discovered that the reservoir had burst, the water had spread over the ground and had rushed into some of the houses. The house of Angeline Peoples had then been crushed as if by the first impact of the wall and the water. They rescued Fred Burkhardt, son of Angeline Peoples, and Walter Peoples, her stepson, and Mr. Peoples, all in the order mentioned, who were more or less injured. They then searched for Mrs. Peoples, and found her under the debris, consisting of timbers, brick, and mortar, and seated in a chair. She was bleeding at the mouth and nose, and apparently dead, "as they discovered no signs of life." The brick found on her seemed to have fallen from the chimney. It was about half an hour after they heard the crash before they found Mrs. Peoples. The house had two rooms, and Mr. and Mrs. Peoples and her son slept in the room at the north end of the house—that is, the one farthest from the reservoir—and at the north end of that room.

At the request of the defendant, the court gave the following instructions: "(1) When the matter at issue is as to whether a person shown or admitted to be living just before, or a short time before, the happening of a certain event, continued to live until after the event happened, the presumption is that the person did continue to live until after the happening of the event, and the burden is upon the party who asserts the contrary to show that the death occurred prior to or instantaneously with the happening of the event." "(3) If the death of Mrs. Peoples did not occur until after the destruction of the property, though but a moment after, then Mrs. Peoples survived the destruction of the property. (4) The burden is on the plaintiff to show that the death of Mrs. Peoples occurred before or instantaneously with the injury to the real estate; or, in other words, that

she did not survive the destruction of the property." "(6) If the death of Mrs. Peoples did not occur until after the destruction of the property, though but a moment after, then Mrs. Peoples survived the destruction of the property, and the jury will answer the issue 'Yes.'" And the court refused to give the following: "(2) There is no evidence to show that the death of Mrs. Peoples took place before the injury occurred to the real estate, and therefore the jury must answer the issue 'Yes.'" "(5) There is no evidence to show that the death of Mrs. Peoples took place before or at the moment when the injury to the real estate occurred." The defendant excepted to the refusal to give instructions numbered 2 and 5. The court then charged the jury as follows: "If the jury should find from the evidence that the falling of the house crushed the life out of Angeline Peoples, then she did not survive the destruction of the house, and they should answer the issue 'No,' but if they should find that she was wounded by the falling of the house and afterwards died from her wounds, or that she was caught in the ruins and afterwards died from suffocation, then she did survive the destruction of the house, and the jury should answer the issue 'Yes.'" The defendant excepted. Verdict and judgment for plaintiff. Defendant appealed.

Lindsay Patterson, H. R. Starbuck, and F. T. Baldwin, for appellant. Watson, Buxton & Watson and E. A. Griffith, for appellee.

WALKER, J. (after stating the facts). The rule of the common law is that a personal right of action dies with the person, but great changes in this respect have been wrought by legislation and the decisions of the courts, and the maxim has thereby lost much of its vitality. As to pure torts, it still retains its ancient force and vigor—that is, as to those torts committed to one's person, feelings, or reputation—but it does not now apply to torts committed to the property, personal or real. As to the first kind of property, it was repealed by St. 4 Edw. III, c. 7, and as to the second, by St. 3 & 4 Wm. IV, c. 42. These provisions have been substantially adopted by our Legislature, and will be found in the several compilations of our statutes. Rev. St. c. 46, § 37; Rev. Code, c. 46, § 43; Code, §§ 1490, 1491, and 1497; Broom's Legal Maxims (8th Am. Ed.) 904 et seq.; *Howcott's Ex'rs v. Warren*, 29 N. C. 20; *Ripley v. Miller*, 33 N. C. 247; *Butner v. Keelhn*, 51 N. C. 60; *Schouler on Executors*, §§ 279, 373. But for this radical change in the law, neither the plaintiff nor the defendant would be entitled to the fund in controversy. One of them must have it, and which of the two is entitled to the favorable judgment of the court, under the law, is the question before us and is one not entirely free from difficulty. "A right to recover recompense for damages [to land] sustained is a chose in action, which, if permitted to survive the person damaged,

survives to his executor or administrator. The heir or devisee has no interest in or claim to it, and cannot, therefore, either originally prosecute a suit for it or revive one that has been instituted in the lifetime of the person injured." *Dobbs v. Gullidge*, 20 N. C. 197. But this presupposes, of course, that the cause of action accrued in the lifetime of the testator or intestate; or, in other words, that the injury was committed during that time. If it was committed after his death, the right of action would belong to the heir or devisee.

We must therefore inquire in such a case when, in contemplation of law, the injury was done. Where there is a breach of an agreement or the invasion of a right, the law infers some damage. *Bond v. Hilton*, 47 N. C. 149; 1 *Sedgwick on Damages* (8th Ed.) § 98. The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. *Hale on Damages*, § 32; *Brown v. Manter*, 2 Fost. (N. H.) 468. The accrual of the cause of action must, therefore, be reckoned from the time when the first injury was sustained. This has been expressly decided in this court. *Ridley v. Railroad*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; *Parker v. Railroad*, 119 N. C. 685, 25 S. E. 722. "When an injury is permanent, it is what is spoken of in the books as 'original' (that is, as accruing wholly when the wrongful act was done), and is distinguished from an act which is to be regarded as continuing (that is, an injury that could and should be terminated), and is to be compensated for strictly with reference to the past and upon the theory that it would be terminated." *Bizer v. Railroad*, 70 Iowa, 147, 30 N. W. 172. This case is cited with approval, and the language above quoted adopted in *Ridley v. Railroad*, supra. An injury committed is, then, a permanent one, in the sense above explained, when it is done at once by the unlawful act or the negligent omission from which the loss results without any repetition of the act; there being only one act and one damage, though the latter may be composed of several items or consist, for example, in the destruction of several different pieces of property. The wrong produces one continuous train of consequences. The loss is all traceable back to the single origin, and in that case the law awards damages once for all. *Ridley v. Railroad*, supra; *Beach v. Railroad*, 120 N. C. 498, 26 S. E. 703. "The right to recover prospective, as well as existing, damages in an action depends usually upon the answer to the test question, whether the whole injury results from the original tortious act or from the wrongful continuance of the state of facts produced thereby." *Ridley v. Railroad*, supra; citing *Troy v. Railroad*, 3 Fost. (N. H.) 83, 55 Am. Dec. 177. In the case of a nuisance or a continuing trespass, from the very nature of

the act, the cause of action must be of itself a continuing one; but, when there is a single wrongful act, which the law denominates the injury, the continuing damages flowing from the one wrong belong to the party originally injured and are recoverable in one suit—the cause of action and damage are an entirety. *Cook v. Redman*, 45 Mo. App. 397; *Moore v. Love*, 48 N. C. 215. When a cause of action once accrues, there is a right, as of the time of the accrual, to all the direct and consequential damages which will ever ensue—that is, all damages not resulting from a continuing fault which may be the foundation of a new action or of successive actions—and the law will in such a case take into consideration, not only damage already suffered, but that which will naturally and probably be produced by the wrongful act, subject, of course, to another rule as to what prospective damages can be recovered in actions of tort. 1 *Sutherland on Damages* (3d Ed.) § 120; *Beach v. Railroad*, supra.

It has been held that, where an attorney brought a suit improperly, the cause of action arose at the time the error was committed, and not at the time the damage was actually sustained, nor at the time it developed and became definite. *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821; *Smith v. Fox*, 6 Hare. 335; *Howell v. Young*, 5 Barn. & Cres. (11 E. C. L.) 219. So in *Shackelford v. Staton*, 117 N. C. 73, 23 S. E. 101, this court held that a cause of action arising against a clerk of the superior court, under the statute, for failure to docket a judgment, was complete when the failure first occurred, but the duty to docket was a continuing one during his term, and suit should have been brought within three years after his term expired, and, not having been brought within that time, it was barred, though the actual damage was not suffered by the plaintiff until after the bar of the statute had become effectual. In *Hocutt v. Railroad*, 124 N. C. 219, 32 S. E. 681, it is suggested that the cause of action does not accrue until there has been an injury or an actual invasion of the right of the plaintiff and he is in a position to recover his damages. He must, at least, have the ability to do so, it is said, or otherwise the principle underlying the statute of limitations, and, we may add, the assessment of damages, would be subversive of common right. These cases may all be reconciled, perhaps, by keeping in mind the true legal definition of an "injury," and by properly heeding the difference between those cases in which permanent damages, past and prospective, may be assessed and those in which only damages already accrued are awarded, either to the time of the trial or to the time of the verdict. The court in *Wilcox v. Plummer*, supra, draws the line of demarcation between a case where there has been an injury or violation of a legal right and one where there has been

consequential damages merely, and in that connection refers to the case of *Gillon v. Boddington*, 1 Car. & P. 541 (11 E. C. L. 463), which is a very instructive one and bears some resemblance, in its general features, or at least in the principles involved, to *Ridley v. Railroad* and *Hocutt v. Railroad*, supra. In the *Gillon* Case the plaintiff owned a remainder in fee in a wharf expectant on an estate for life in his father. The defendants in 1823 dug soil out of their dock near the foundation of the wall of the wharf in such a way that, by the action of the tide, the wall was undermined, and it fell in 1824. The father died in 1823, after the digging of the soil. The court held that the son had a right of action for undermining the wall against the defendants, although they had done no act which contributed to its destruction since the death of his father, at which time the plaintiff came into possession of the freehold of the wharf. It will be observed that in the *Gillon* Case there was a life estate and a remainder in the property and an injury to the inheritance, but the ground of decision was that the digging near the plaintiff's foundation, which was the primary cause of the subsequent injury, was in itself no violation of a right, and that by possibility the act might have proved harmless, as it would have been, had the wall never fallen, and this reason for the decision is the basis of the distinction between that case and *Wilcox v. Plummer*, as shown by the court in the latter case. When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptance of that term, at once springs into existence and the cause of action is complete. The recovery in such a case will embrace all damages resulting from the wrongful act. The cause of action and the damage are to be deemed inseparable. This principle, as we have shown, does not apply to a case of a nuisance or trespass, which torts are continuing in their nature; the nuisance of to-day being a substantive cause of action, and not the same with the nuisance of yesterday, and likewise in the case of a continuing trespass. *Wilcox v. Plummer*, supra; *Eller v. Railway* (at this term) 52 S. E. 305. If the trespass consists in one single act of wrong, and has not in it the element of continuance, the general rule we have stated will apply; for where there is the same reason, there must be the same law.

The cases of *Moore v. Love*, 48 N. C. 215, *Shaw v. Etheridge*, Id. 300, and *Jones v. Kramer*, 133 N. C. 446, 45 S. E. 827, are distinguishable from our case. They belong to a class of their own, and were decided upon the ground that the damage was not of a permanent character, as is illustrated in the case last cited, where the nuisance was abatable. They are manifestly not like a case where the wrongful act is single and the tort-feasor has irrevocably done all that

he can do, though the unlawful act has not fully spent its force, but as a self-acting agency, once put in motion, continues to cause damage. The wrong itself is an accomplished fact which its author cannot recall or stop, though its consequences in the way of damage still go on. The case just put is like that we find in *Hughes v. Newsom*, 86 N. C. 424, where it was said that the wrong or default of the sheriff, when once committed, was absolute and complete, and gave an immediate right to sue for all damages resulting therefrom.

Applying these general principles to the facts of our case, we conclude that this is an action for "consequential damage." The negligent construction of the reservoir did not become a technical wrong, until by its natural operation it culminated in the fall of the wall, and the latter is the gravamen of the action and the specific wrong which produced the damage, for the recovery of which the suit was brought. So long as the negligence of the city did no injury to any one else, it was not in a legal sense guilty of any wrong; the maxim of the law, "So use your own as not to injure others," not having been violated. The defective condition of the reservoir was a menace to adjoining property, against which the owners might, perhaps, have had preventive relief in equity, but no legal right of another was at all infringed until by the process of time, and the gradual operation of the primary cause, the wall was undermined and fell, in consequence of what the city had before that time done or failed to do. *Roberts v. Read*, 16 East, 215. This is what is called in law the "consequential damage," or, more correctly, the consequential injury resulting from the faulty construction of the reservoir, and that is the *causa litis*. *Hocutt v. Railroad*, *supra*. But just as soon as the wall fell on the lot of Mrs. Peoples and struck her house, the first injury, as said in *Ridley v. Railroad*, was sustained, and her cause of action immediately arose. *Roberts v. Read*, *supra*. It was not necessary that all of the damage should have been done at that particular instant of time, in order to constitute the wrong, for which she might sue and recover the full damages resulting therefrom. The very moment the wall fell, and surely when it struck the end of the house next to it, there was a wrong committed. It was not, then, a wrong merely threatened, but one which had begun to be executed. The city was not, then, legally within its right, but had transcended it and was actually invading the right of another to the peaceful enjoyment of her property and to the protection of it from injury. Its negligence had ceased to be innocuous. It was a tort-feasor and at once became liable for all ensuing damage of which the injurious act was the efficient cause. If the injury developed in the life time of the deceased and the damage followed in unbroken sequence as the direct and

proximate result of it, so that "the facts constituted a continuous succession of events, so linked together as to make a natural whole (*Railway v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256), without any intervening and independent act creating new damage or such as was not directly caused by the original wrong, the party to whom the first injury was done, and consequently the administrator in this case, is entitled to recover all the damage. The injury and the damage are one, and indivisible. The distinction between a single act of injury and continuing acts is clearly shown in *Spilman v. Navigation Co.*, 74 N. C. 675. If the wrong started in the lifetime of the deceased, we do not see how it can be said to have occurred after her death. It cannot be divided into parts; for it is an integral whole and so regarded in law. Everything that proceeds from it must have relation to the time of its commencement.

In *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, it appeared that the city had cut a ditch along the side of the plaintiff's lots and caused his lands to be overflowed, and it was held that the cause of action was complete when the unlawful act was committed, and that all the damages accruing from the original wrong must be included in one action. The idea is that the force of the negligent act is fully spent in producing the damage, without any additional fault of the wrongdoer, as is the case where he continues a nuisance or trespass. The damage is susceptible of immediate estimation; no lapse of time being necessary to develop it. It can be assessed, as in the case of injury from a permanent structure, once for all. The court in *Powers v. Council Bluffs* recognizes the distinctions taken and the principles laid down by this court in *Jones v. Kramer*, *supra*, and *Moore v. Love*, *supra*. In our case, when the wall of the reservoir was undermined and fell, the wrong was complete, and there is no similitude to a continuing nuisance or trespass for which successive actions will lie. As said in *Fowle v. N. & N. Co.*, 112 Mass., at page 388, 17 Am. Rep. 106: "As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable because every continuance of a nuisance is a new injury, and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance." *D. C. I. & W. Co. v. Middaugh* (Colo. Sup.) 21 Pac. 565, 13 Am. St. Rep. 234. The case of *Rockland W. Co. v. Tillson*, 69 Me. 268, is a very instructive case on this subject. It is there said that a second action cannot be maintained for damages resulting from a single act, as it is complete and ended, and it is the damage only which continues and is recoverable because it is traced back to the

original act; while in the case of a nuisance it is the act which continues and is renewed day by day. In the case at bar there was not and could not be any repetition of the original wrong after Mrs. Peoples' death, so as to give her heir a cause of action, within the principle of the case just cited; nor, indeed, was there in fact any damage after her death. It had all occurred in her lifetime or at the very instant she died. It follows from what we have said that the issue was improperly framed.

The question was not whether Mrs. Peoples survived the destruction of the property, but whether the injury was committed before or after her death, under the principles which we have attempted to lay down for the guidance of the court. In his complaint the plaintiff alleges that the destruction of the building and the death of the intestate occurred at one and the same instant of time. If this be true, no part of the injury, if we may use the expression, could have been inflicted after her death, and the title of the plaintiff's ward did not accrue until his mother died. Before that time he had a mere expectancy. Unless the wrong was done after her death, or, what is the same thing in effect, unless it occurred after the title vested in the plaintiff's ward, the latter surely cannot be entitled to the fund in dispute, as he was not in a legal sense injured by the wrong. The plaintiff, in order to make good his claim, must, therefore, show that his ward had already come to his inheritance when the wrong was committed and at its inception as it is not divisible. Otherwise, the mother's personal representative is entitled to the fund to be administered according to law; for either the one or the other must have it.

If the application of the foregoing principles will result in apparent hardship to the plaintiff's ward, we are reminded by Lord Campbell that "hard cases must not make bad law," and "we, as judges, cannot be wiser [or more liberal] than the law." It may be that the plaintiff can yet show a better case, but, if he fails, it cannot be attributed to any defect in the law, the rules of which are necessarily of general if not universal application, and not made for particular cases.

There was error in submitting the issue, as it was not sufficient to determine the rights of the parties. *Falkner v. Pilcher*, 137 N. C. 449, 49 S. E. 945. The case was not tried upon the right theory. Some of the instructions asked by the defendant to be given to the jury might have been correct and germane, if the issue had been properly framed.

New trial.

CLARK, C. J. (dissenting). If, as the complaint alleges, the destruction of the building and the death of the intestate occurred at one and the same instant of time, there was no moment of time during which

the right to recover damages vested in her. Hence no right to an action therefor could pass to her personal representative. If the same movement of matter and at the same instant swept her and her house out of existence, it swept the title to the realty simultaneously into the heir. The destruction being, therefore, damage to the realty, which at that same instant of time became the property of the heir, the damage accrued to him. If so, the charge of the court was correct when he told the jury that, "if they should find from the evidence that the falling of the house crushed the life out of Angeline Peoples, then she did not survive the destruction of the house, and they should answer the issue 'No.'" When parent and child perish in the same shipwreck, nothing else appearing, the modern decisions all hold (ignoring former presumptions based upon strength, age, etc.) that, it not appearing that the title vested for an instant in the child, the property goes to the heir and next of kin of the parent. If the damage to the realty and the death of the mother were simultaneous, by the same reasoning the right to recover damages is not shown to have vested in her for an instant, and, the realty at that same instant devolving upon the heir, the injury is done to his realty, and the compensation should go to him.

(140 N. C. 589)

FISHBLATE et al. v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Supreme Court of North Carolina. March 20, 1906.)

1. INSURANCE—REPRESENTATIONS BY INSURED—MATERIALITY.

Under 2 Revisal, § 4646, providing that all statements in an application for insurance, or in the policy, shall be deemed representations and not warranties, and no representation, unless material or fraudulent, shall prevent a recovery on the policy, a representation in an application for accident insurance as to the physical condition of the insured is material where it would naturally affect the judgment of the insurer in accepting the risk, though the injury for which indemnity is claimed is not affected by the matter referred to in the representation.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 548.]

2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In an action on an insurance policy, error in instructions as to warranties of the health of the insured was harmless where the jury found specially that the insurer knew of the mental and physical condition of the insured at the time the policy was issued.

3. PLEADING—REPLY—NECESSITY.

Under 1 Revisal, § 485, requiring a reply when the answer contains a counterclaim, and in other cases authorizing the court in its discretion to require a reply to new matter constituting a defense, and section 503, providing that the allegation of new matter in an answer not relating to a counterclaim is to be deemed controverted, the court's ruling, in an action on an accident policy, where the answer set up as a defense false representations in the application of the insured, that no reply was necessary to raise the issue whether the in-

surer's agent knew of the insured's condition at the time of the application, was not error.

4. INSURANCE—REPRESENTATIONS BY INSURED
—NOTICE TO AGENT OF INSURER.

Where the agent of an insurer was fully informed of the insured's physical and mental condition, a misrepresentation in the application relating to such condition does not affect the insured's right to recover under the policy, notwithstanding a provision in the policy that no notice or knowledge of the agent, or any other person, shall be *held* to effect a waiver or change in the contract or any part of it, in the absence of any allegation of actual fraud on the part of both the insured and the agent.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 968-974.]

Appeal from Superior Court, New Hanover County; W. R. Allen, Judge.

Action by S. H. Fishblate and others against the Fidelity & Casualty Company of New York. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The plaintiff, holding an accident policy in the defendant company, which, in terms, covers the injury, files his complaint alleging the loss of an eye by accidental injury received when crossing the streets in the city of Wilmington on or about February 12, 1904, and offered evidence tending to show that the injury so received resulted in inflammation of the eye which necessitated its removal by surgical operation; that notice was given and demand duly made on the company for the amount due on the policy. The defendant admitted the policy and the loss of the eye and demand duly made, but alleged that the loss of the eye resulted not from accidental and external injury but from pre-existent disease, and further resisted recovery on the ground that the plaintiff had made material misrepresentations, inducing the contract, as to his physical and mental condition at the time the policy was applied for. The plaintiff replied, claiming that no such misrepresentations or concealments had been made by him, and further that the defendant's agent with whom he dealt had full notice and knowledge of the plaintiff's exact physical and mental condition at the time the policy was taken out. This reply was not formally drawn out and made a part of the pleadings, but an issue addressed to this question was submitted, the court stating that in its opinion no formal reply was required in order to raise the issue, but if he decided otherwise he would permit the plaintiff to amend the pleadings in this respect. The defendant excepted. There was testimony on the part of defendant tending to show that some time previous to taking out the policy, the plaintiff's eye had been diseased and the same had thereby been weakened and left with a tendency to inflame, and there was some evidence tending to show that the plaintiff was not sound in some other respects, having rheumatic gout, etc. There was testimony from the plaintiff to show that 8 or 10 years ago the plaintiff's eye had become inflamed, causing ulceration and necessitating a surgical operation, but that the eye

had permanently healed, and while the sight was somewhat impaired, the eye was sound and well, and no longer gave any trouble. Experts testified that the eye was cured, but the sight somewhat impaired. There was evidence also to the effect that the defendant's agent, at the time the policy was applied for and taken out, was fully aware of the trouble the plaintiff had had with his eye and its present condition, and that he was also fully informed of the plaintiff's physical and mental condition. Issues were then submitted, and under the charge of the court, answered by the jury as follows: (1) Was the plaintiff's eye lost as a result directly and independently of all other causes from bodily injuries sustained through external, violent, and accidental means? Yes. (2) Did the plaintiff warrant in the contract of insurance that he was in a sound condition mentally and physically? Yes. (3) If so, was said warranty false? No. (4) If so, was it knowingly false? (There was no answer to this issue, it not being necessary.) (5) Did the defendant have knowledge of the mental and physical condition of the plaintiff at the time the policy was issued? Yes. (6) And it being agreed by both plaintiff and defendant that the amount of damage, if any, should be \$1,700 and interest, and be answered by the court, and the court so answered. Judgment on the verdict. Defendant excepted and appealed.

Meares & Ruark, for appellant. John D. Bellamy, Rountree & Carr, and W. J. Bellamy, for appellee.

HOKE, J. (after stating the case). The issues submitted and answered by the jury are determinative of the controversy in the plaintiff's favor, and we find no error which requires that a new trial should be awarded. In response to the first issue, the jury have answered that the plaintiff's eye was destroyed by external, violent, and accidental means directly and independently of all other causes. The verdict on the second issue established a warranty in the contract of insurance that the plaintiff was sound mentally and physically when the same was made, and, on the third issue, that this warranty has not been broken.

There is no exception to the charge of the court on the first and second issue. On the third issue the defendant excepts for that the court charged the jury among other things as follows: "So that it becomes material to inquire under that issue (the third) what is meant by sound physically and mentally. This does not mean that a person should be perfect both in mind and in body, but it means that he should not be so impaired in body and mind as to materially cause the injury complained of. If you find from the evidence that the condition of his eye was such that he would ultimately have lost sight without the interference of external and accidental causes, though not at the time he did lose it, then he would not be sound

physically and mentally within the meaning of the policy, although the loss of the eye—the loss of his sight—was hastened by external means, and although he would not have lost his sight at that time, and on the other hand, the eye was sound within the meaning of the policy if he would not have lost his sight, but for external, violent, and accidental means. I repeat that if you find from the evidence that the condition of the eye was such that he would ultimately have lost sight without the interference of external and accidental causes, though he would not have lost his sight at the time he did lose it, then he would not be sound physically and mentally within the meaning of the policy, although the loss of sight was hastened by external means and although he would not have lost his sight at the time he did lose it, and on the other hand, the eye was sound within the meaning of the policy if he would not have lost his sight, but for external, violent, and accidental means." This charge might be upheld on the first issue and is perhaps more favorable to the defendant on that issue than he could require. *Freeman v. Accident Ass'n*, 156 Mass. 357, 30 N. E. 1013, 17 L. R. A. 753; *Fetter v. Casualty Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560.

But on the third issue we are of opinion that the charge is not in accord with the authorities. This issue involves the question as to whether the plaintiff, in representing himself to be sound physically and mentally, made a false statement on a matter material to the contract, and the charge, as we interpret it, means that to constitute the breach of this stipulation, so far as the eye is concerned, it must have been affected with a disease that would in any event have destroyed the sight, and certainly involves the proposition that, to become material, a misrepresentation must be as to a defect which contributes in some way to the loss and damage for which the indemnity is claimed. But in the absence of some legislation, the term "material" in cases of this character is not restricted in the way here suggested. In 16 Am. & Eng. Enc. 933, it is said that "every fact untruly asserted or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium." To same effect is *Vance on Insurance*, 284. Our statute on this subject, 2 Revisal, § 4646, provides that "all statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties, nor shall any representation unless material or fraudulent prevent a recovery on the policy." This provision enters into and becomes a part of this and every policy issued and payable in this state, and, where the term "war-

ranty" is used, the statute operates and makes the same a representation and one which avoids the policy only in case it is false and also fraudulent or material. It will be noted that our statute does not undertake to define or limit the word "material." In several of the states the legislation is more specific and provides that a misrepresentation only avoids a policy when fraudulent or material to the risk. Even if our statute should be susceptible of this construction, it certainly does not go to the extent indicated in the charge that, to be material, the defect alleged must in some way have contributed to the loss for which indemnity is claimed.

While there was error in the charge on the third issue, we are of opinion that the verdict and judgment should not be disturbed on that account, for the reason that the response of the jury to the fifth issue establishes the plaintiff's right to recover—"that the defendant knew of the mental and physical condition of the plaintiff at the time the policy was issued." There is no error claimed in the charge of the judge below on this issue, and the only exception noted is that this issue was not raised by the pleadings. We agree with the trial judge that no reply was required in order to raise this issue. The answer of the defendant setting up a breach of warranty was by way of defense and not as a counterclaim. In such case, the court, in its discretion, may direct a reply, but this is not positively required by the statute. Revisal, §§ 485, 503. And in this last section it is provided: "But the allegation of new matter in the answer not relating to a counterclaim or of new matter in the reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require." The new matter in the answer being by way of defense and not a counterclaim, the statute therefore raised the issue. If the new matter, by way of avoidance, renders it desirable that a reply be made, the judge may require one as stated. If it be under circumstances that take the party by surprise, the judge may and should order a continuance, but, here, the issue being raised by the statute, no harm was done as all the witnesses to the transaction were in court, and no surprise or undue advantage was caused or suggested.

The fifth issue was then properly submitted, and having been answered in favor of the plaintiff, our authorities are decisive as to his right to recover the amount of the policy. There was evidence to the effect that the agent of the defendant was fully informed of the plaintiff's physical and mental condition both as to the eye and the other unsoundness suggested. In *Follette v. Accident Ass'n*, 110 N. C. 377, 14 S. E. 923, 15 L. R. A. 668, 28 Am. St. Rep. 693, it is held that: "Where the local agent of an insurance company has actual knowledge of the falsity of a statement made by the insured in his application, and forwards the application up-

on which the policy is issued, the knowledge of the agent is the knowledge of the company, and the false statement will not avoid the contract." In *Grabbs v. Insurance Co.*, 125 N. C. 389, 34 S. E. 503, it is held: "(3) The knowledge of the local agent of an insurance company is in law the knowledge of the principal. Conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer and such waiver may be presumed from the acts of the agent. (4) An implied waiver is in the nature of an estoppel in pais enforceable by a court of equity. An insurance company cannot be permitted to knowingly issue a worthless policy upon a valuable consideration." To like effect is *Continental Insurance Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; *Deltz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909; *Bawdin v. Insurance Co.*, L. R. 2 Q. B. Div. 534. And this is generally accepted doctrine, except under circumstances involving an element of fraud on the company, on the part of both the applicant and the agent, as in *Sprinkle's Case*, 124 N. C. 405, 32 S. E. 734; and there are no such circumstances shown to exist here.

There was evidence that the plaintiff informed the agent that his eye was cured and that the sight was not so good as it formerly was, but had healed from the first attack; and further that the agent knew all about the eye and its condition. The agent denied this, but the jury have determined the matter for the plaintiff. There is very little testimony of any other unsoundness—hardly enough for a jury to consider. It seems really to have amounted to this, that both the agent and the applicant were perhaps mistaken as to what kind or degree of unsoundness might have been regarded as material. But there was testimony to the effect that whatever unsoundness existed, the agent of the company was fully informed of it, and there is no evidence of any such glaring misstatements as would permit the inference of actual fraud on the part of either the agent or the plaintiff. This being true, the authorities cited are conclusive and there is no error that requires a new trial. We are not inadvertent to the clause in the policy which provides that "no notice or knowledge of the agent or any other person shall be held to effect a waiver or change in this contract or any part of it. . . . The effect of a clause of this kind has been very much discussed in the courts, and there is high authority for the position that to ignore such a stipulation would be to place an undue limitation on the right of contract, and to threaten the sanctity of written instruments by breaking down the rule that such contracts cannot be changed or varied by parol. But we think the great weight of authority, certainly in the state courts, favors the posi-

tion that a clause of this character is ineffective for the purpose designed, and that an insurance company shall not appoint an agent, use his services, accept the results of his work, and repudiate this essential and inherent feature of the law of agency, that a knowledge of the agent is the knowledge of the company. As stated in *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625: "While as a general rule parties have a right to make such contracts as they see fit, this right is restricted by legislation, by public policy and by the nature of things. They cannot stipulate that facts which the law declares establish a certain relation not only do not establish that relation, but establish directly the opposite." See, also, *Kausal v. Insurance Co.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776. *Ætna Live Stock Co. v. Olmstead*, 21 Mich. 246, 4 Am. Rep. 483; *Sternaman v. Insurance Co.*, supra; *Deltz v. Insurance Co.*, supra.

The principle is well stated by a recent writer on insurance as follows: "Again, a second incident of the relation of principal and agent is that any information material to the transaction, either possessed by the agent at the time of the transaction or acquired by him before its completion, is deemed to be the knowledge of the principal, at least so far as that transaction is concerned, even though in fact the knowledge is not communicated to the principal at all. It is here to be observed—and the importance of the principle is so great that it cannot be too strongly emphasized—that these incidents of agency are created by the law and not by the parties. The insurer is charged with the knowledge acquired by his agent in making or negotiating a contract of insurance, not because he has consented to be so charged, nor because he has authorized his agent so to bind him, but because, as a legal consequence of the relation he sustains to the agent, the latter's knowledge is imputed to him. It therefore follows that this incident, created by the law in response to the demands of public policy irrespective of agreement, cannot be destroyed or altered by the agreement of the parties. The parties cannot, by their contract, contravene the policy of the law in this instance any more than the husband, by contract, can escape his duty to support the wife, or the carrier can by contract exempt himself from liability for his negligent failure to carry safely his passenger. Those cases which ignore this principle and regard these legal incidents as powers conferred and subject to limitation, are much to be deplored." Vance, pp. 304, 305. And this we hold to be the better doctrine.

There is no error, and the judgment below is affirmed.

(141 N. C. 773)

STATE v. WHEELER.

(Supreme Court of North Carolina. March 20, 1906.)

1. TAXATION—DOUBLE TAXATION.

There is no constitutional prohibition against double taxation.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 104.]

2. SAME—LABOR ON HIGHWAYS.

Laws 1903, p. 931, c. 551, as amended by Laws 1905, p. 815, c. 667, requiring the improvement of highways by labor of citizens, is not objectionable as double taxation.

3. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—FEDERAL CONSTITUTION, FOURTEENTH AMENDMENT.

Const. U. S. Amend. 14, prohibiting a denial of equal protection of the laws, does not require equality in the levying of taxes by the state; the levy of state taxes being a matter solely within the legislative jurisdiction of the state.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 685.]

4. SAME—DISCRIMINATION.

Laws 1903, p. 931, c. 551, as amended by Laws 1905, p. 815, c. 667, requiring improvement of highways by citizen labor supplemented by a tax levied on both town and country property is not invalid as discriminating in favor of dwellers of towns against dwellers in the country; the dwellers in towns being required to keep their streets in condition at a greater expense than the value of the statutory labor required on the country roads.

5. TAXATION—POLL TAXES.

Laws 1903, p. 931, c. 551, as amended by Laws 1905, p. 815, c. 667, requiring citizen labor on country highways, does not impose a poll or capitation tax which Const. art. 5, §§ 1, 2, requires to be applied to purposes of education and the support of the poor.

6. SAME—PROPERTY TAX—TIME.

The time of a citizen is not property in the sense that it can be liable to a property tax.

Appeal from Superior Court, Wake County; Justice, Judge.

T. J. Wheeler was convicted of failing to work on the public roads, and he appeals. Affirmed.

R. H. Battle and S. G. Ryan, for appellant. The Attorney General and H. E. Norris, for the State.

CLARK, C. J. The defendant appeals from a conviction and sentence for failing to work the public roads of Wake county as required by chapter 667, p. 815, Laws 1905, amendatory of chapter 551, p. 931, Laws 1903. The appeal rests upon the alleged unconstitutionality of the statute. The defendant contends: (1) Time is money. Labor is a man's property, and therefore to exact his labor and time to work the roads is to levy a tax on property, and such is unconstitutional unless ad valorem. (2) that if working the road is a poll tax, the act is unconstitutional, because it exacts this labor only of "able bodied male persons between the ages of 21 and 45" and excepts "residents in incorporated cities and towns and such as are by law exempted or excused," whereas the poll tax (Const. art. 5, § 1) is to be laid on "every male inhabitant between the ages of 21 and 50." (3) That the requirement

to work the roads is not placed upon those living in incorporated towns and cities, and therefore there is a denial of the equal protection of the laws required by the fourteenth amendment to the Constitution of the United States. (4) That inasmuch as the roads are now worked partly by taxation, supplemented by labor exacted by the statute, and the latter is a property tax (a man's labor being his property), therefore this is double taxation.

These points have been repeatedly passed upon adversely to the contentions of the defendant. *State v. Sharp*, 125 N. C. 628, 34 S. E. 264, 74 Am. St. Rep. 663, which has been cited and approved in *State v. Covington*, 125 N. C. 641, 34 S. E. 272; *State v. Carter*, 129 N. C. 560, 40 S. E. 11; *Brooks v. Tripp*, 135 N. C. 161, 47 S. E. 401; *State v. Holloman*, 139 N. C. 648, 52 S. E. 408. But counsel ask us to reconsider them, and we have given the matter full deliberation. For nearly 250 years the roads of this state were worked solely by the conscription of labor. It may have been inequitable, but it was never thought by any one to be unconstitutional, nor has the idea been advanced heretofore that to work the roads by labor was to work them by taxation. The validity of working the roads by labor is sustained in *State v. Halifax*, 15 N. C. 345, and has been recognized in countless trials for failure to work the roads. Under this statute, Wake county works its roads partly by labor supplemented by funds raised by taxation and other funds and the work of its convicts. If the exaction of the labor of residents of the locality is, as counsel contend, a tax upon property, then we simply have a higher tax, but not double taxation. The tax does not seem to be more than enough to keep the roads in good order, but if it should so prove, the people themselves, acting through their elected representatives in the General Assembly and the board of county commissioners, will reduce it. The tendency of the times is to require better roads, which necessarily demands higher taxes for road purposes, which is more than offset, it is claimed, by the benefits derived from better roads. But that is a matter of legislation and administration. The courts cannot meddle with it. Nor is there any constitutional prohibition against double taxation. *Commissioners v. Tobacco Co.*, 116 N. C. 448, 21 S. E. 423; *Cooley*, Const. Lim. (7th Ed.) 738, and cases there cited. It exists in many instances that will readily occur to any one, as the taxation of mortgages and indebtedness in the hands of a creditor, and taxation at the same time of mortgaged property, and of the real and personal property of a debtor, without reduction by reason of the mortgage or other indebtedness; the taxation of the tangible property of a corporation and also of its capital stock and of its franchisees, and also of the certificates of shares in the hands of the shareholders. *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L.

Ed. 240; *Com'rs v. Tobacco Co.*, supra. There are many other instances, but this is a matter of legislation. Certainly this is not double taxation any more than taxing the dweller in town to keep up his streets (all of which falls upon him), and also laying a tax on his property to aid in working the roads.

Nor does the fourteenth amendment require equality in levying taxation by the state, if this exaction of labor be taxation. How a state shall levy its taxation is a matter solely for its Legislature, subject to such restrictions as the state Constitution throws around legislative action. If, on the other hand, working the roads by labor is a police regulation or a public duty, certainly it is not a matter of federal supervision. Besides, as the dwellers in the towns keep up their streets at a greater expense than the value of the statutory labor put on the roads, there is no discrimination of which the defendant can complain, especially as the tax money expended on the roads to supplement the statutory labor is levied on town property as well as upon that in the country. The requirement to work the roads is not a poll or capitation tax, which is a sum of money required to be paid by "every male inhabitant over 21 and under 50 years of age," which "shall be applied to the purposes of education and the support of the poor." Const. art. 5, §§ 1, 2. Certainly "four days' work on the public roads" in one's own township are not capable of being applied to education, or the poor or anything else except to the roads.

This brings us to the first ground urged. To say that "time is money" is a metaphor. It expresses merely the fact that time is of value, and that the use of a man's muscle, or of his skill, or of his mentality, will usually procure money in exchange. But time is not money, nor is labor property, in any other sense than that it is usually of some value, and its proceeds belong to the individual or to the parent or guardian if he is a minor, or to the state if he is a convict. But it is not property in the sense that it can be liable to a property tax. As already pointed out in *State v. Sharp*, 125 N. C. 634, 34 S. E. 264, 74 Am. St. Rep. 663, the conscription of labor to work the public roads is not a tax at all (*Cooley*, supra, 737; *Pleasant v. Kost*, 29 Ill. 494), but the exaction of a public duty like service upon a jury, grand jury, coroner's inquest, special venire, as a witness, military service, and the like, which men are required to render either wholly without compensation, or, usually, with inadequate pay, as the sovereign may require. *Guilford v. Com'rs*, 120 N. C. 26, 27 S. E. 94; *State v. Hicks*, 124 N. C. 837, 32 S. E. 957. Originally none of these received any pay whatever (*State v. Massey*, 104 N. C. 878, 10 S. E. 608; the duration of military service only having a time limit. And to this day, witnesses, above two, to each material fact, receive no pay (Revisal 1905, §

1300), and witnesses for the losing party receive none unless he is solvent, and talesmen summoned upon a special venire, unless chosen on the trial panel receive (except in a few counties) no pay; which was true, till recently, of witnesses summoned before the grand jury in all cases where "not a true bill" is returned; and witnesses for the state in criminal cases where the convicted are insolvent receive only half pay. Even when a witness or a juror receives a prescribed per diem, in most cases it is less, in many cases far less, than what his time was worth or he could have earned. If the state can take his services for less than their value, it is because it has a right to require them as a public duty, and hence it can, as of old, require them to be rendered without any compensation at all. Who will say that \$10 per month is compensation for the time of a citizen sent to the front in time of war, or to put down riots, and for the hardships and the exposures to weather, to disease, to danger, and to death? If the state can exact such services, it can exact labor to improve its public roads for the public benefit. The worker on the roads gets back some benefit therefrom. It was a crude and not very accurate calculation or balancing of benefits, but was a necessity, perhaps, in former times, when currency was scarce and difficult to be obtained even by taxation. It is still a matter resting in the legislative discretion. Justices of the peace and some other officials formerly discharged the public duties required of them without compensation. In the progress of time, we have gradually commenced payment, to a limited extent, for most public services exacted as a public duty. Justices of the peace receive fees. Some witnesses and jurors are paid, usually less than the value of their time, but many witnesses and special veniremen usually still go unpaid, and compulsory military service is paid only what the Legislature sees fit.

The public duty of the residents of any locality to work upon its roads has been reduced in Wake county by this statute to four days per annum, and such service is supplemented by the work of the force of county convicts, by a tax of 12½ cents upon the \$100 worth of property in the cities as well as in the country to hire labor and purchase labor-saving machinery, by the appropriation of four tenths of the net proceeds of the dispensary in Raleigh, and further by a special tax which any township shall see fit to vote for the benefit of the roads therein, and the four days' labor required can be commuted by the payment of \$2.50, with which the county will hire labor instead. This is a very great advance upon the still recent custom, which had been in force for more than two centuries, of working the roads entirely and solely by labor called out in the discharge of the public duty of the inhabitants of each locality to keep the highways

in order. Whenever, in the judgment of the people of Wake county, the four days' labor per annum still exacted should be reduced, or entirely abolished, they can send representatives to the General Assembly, who can doubtless procure such changes as the people may wish in the manner of working their public roads. As we said at last term, in *State v. Holloman*, 139 N. C., at page 648, 52 S. E., at page 410: "It is for the legislative department to prescribe by what methods the roads shall be worked and kept in repair—whether by labor, by taxation on property, or by funds raised from license taxes, or by a mixture of two or more of those methods—and this may vary in different counties and localities to meet the wishes of the people of each, and can be changed by subsequent Legislatures."

And there, after the fullest consideration, we again leave the matter. If the system of working the public roads in any locality is not satisfactory to the majority of its people, relief or change of method must be sought of the lawmaking department.

No error.

BROWN and WALKER, JJ., concur in result.

(140 N. C. 605)

BEASLEY v. SURLS.

(Supreme Court of North Carolina. March 20, 1906.)

1. APPEAL—WAIVER—FAILURE TO TENDER ISSUE.

Intimation of the court at the close of the evidence, after which the issues were drawn, that it would instruct, as it afterwards did, that there was no evidence of warranty, relieved defendant of the duty of tendering an issue or that question; so that there was no waiver by his not tendering the same, and the charge as given may be reviewed on his exception thereto.

2. SALE—WARRANTY—EVIDENCE.

Evidence that at the time of sale by plaintiff to defendant of a horse plaintiff, on defendant's saying that "she looked colicky," said he had known her ever since a colt and had never known her to be sick a day, is sufficient to go to the jury on the question of warranty.

Appeal from Superior Court, Johnston County; Justice, Judge.

Action by C. M. Beasley against D. H. Surls. Judgment for plaintiff. Defendant appeals. Reversed.

Plaintiff brought suit against defendant on account of a note for \$145 executed by defendant, payable to plaintiff; consideration being the purchase of one mare. Defendant admitted the execution of the note, and pleaded, by way of counterclaim and set-off, that defendant warranted the horse to be sound and in good condition, when in fact said horse was not sound, etc. Plaintiff, after introducing the note, rested. Defendant was introduced and testified: "I went to the lot where the horse was. Plaintiff brought

her out. Her hips were skinned. I said, 'she looks colicky.' He said he had known her ever since a colt, and had never known her to be sick a day in her life. This was on Friday. I relied on his statement, and bought her. Went back Monday, took her, and gave note; had never seen her before. She lived three weeks, and died of colic. Saw defendant next day, and he said he would do what was right." Plaintiff testified: "After some talk about buying the mare, defendant asked me if she was sound. I said I never had a thriftier horse since I had her; that Reaves said she had been sick from eating persimmons when Ennis had her. Told defendant when I got her." There was evidence in regard to the condition of the horse, etc., which is immaterial upon the exceptions presented on the appeal. Upon the conclusion of the testimony his honor intimated that he would charge the jury that in no aspect of the case was there any evidence to be considered by the jury of warranty of the horse by plaintiff at the time of the sale or prior thereto. The following issues were thereupon drawn and tendered by defendant: "(1) Was the horse sold by plaintiff to defendant unsound at the time of the sale? Yes. (2) Did the plaintiff represent the horse to be sound? Yes. (3) Did he at the time know, or have good reason to believe, that the horse was not sound? No. (4) How much damage is defendant entitled to recover for the unsoundness of said mare? Nothing." Judgment for plaintiff. Exception and appeal by defendant.

Pou & Brooks and W. A. Stewart, for appellant. Wellons & Morgan and Murray Allen, for appellee.

CONNOR, J. (after stating the case). Defendant, by way of a counter claim, alleged a warranty and breach thereof and deceit. At the close of the evidence, his honor having intimated that he would instruct the jury, which he afterwards did, that there was no evidence of warranty, defendant's counsel did not tender an issue upon that question. Among the exceptions to the charge are the following: "(1) That his honor erred in refusing to submit to the jury an issue as to whether the plaintiff warranted the mare to the defendant in making the sale. (2) That his honor erred in holding at the conclusion of the testimony in the case that there was no evidence of a warranty to be submitted to the jury. (3) That his honor erred in charging the jury that there was no evidence of a warranty of the mare at the time of the sale by the plaintiff to the defendant. (4) That his honor erred in failing to leave the question of warranty, with proper instructions as to the law, to the jury to find the facts as to whether the plaintiff intended to and did warrant the mare to the defendant at the time of the contract."

Plaintiff insists that the defendant, having failed to tender an issue in regard to the warranty, may not now urge his honor's failure in that respect as error. While it does not very clearly appear in the record, it was stated on the argument, and is in accordance with what we know to be the practice, that the issues were drawn at the conclusion of the testimony. Revisal 1905, § 548, contemplates that the issues shall be drawn before the introduction of testimony. A custom has grown up in the courts of drawing the issues after the conclusion of the evidence. The plaintiff's contention, that the failure on the part of the defendant to tender an issue and except to his honor's refusal is the orderly procedure, is sustained by the authorities cited in his brief. We think, however, that his honor, having intimated that he would charge the jury that there was no evidence to sustain the allegation of the warranty, relieved the defendant of the duty of tendering an issue upon that question. While it would have been entirely regular for him to have done so, we can see no reason why he may not present the exception to the charge as given by his honor. We can well understand how counsel would hesitate to tender the issue in the light of the judge's declaration that he would charge the jury that there was no evidence to sustain it. It is evident from the case on appeal that his honor did not understand that the defendant had waived the question; the exceptions being found in the case on appeal as settled by him. If the order in which the issues should have been tendered, as provided by the Code, had been followed, the defendant would have tendered his issues and his honor have ruled upon them, to which exception could have been noted. While we have no disposition to disregard, or in any manner weaken, the force of the rules of procedure which have been found conducive to the orderly administration of justice, we do not think they should be so construed as to unreasonably deprive parties of the right to present their controversies to this court. Upon examination of the case on appeal, we think that the defendant's exception is taken in proper time. The plaintiff, however, insists that his honor's ruling is correct. It is often difficult to say whether or not language used in connection with the sale of personal property constitutes a warranty.

In *Horton v. Green*, 66 N. C. 596, an instruction that the jury were to consider the testimony in the light of the language used, the spirit in which the parties met and all of the other circumstances, and to say therefrom whether it was the seller's intention to indemnify the buyer from all damage which might arise from unsoundness of the property, was correct. In *Baum v. Stevens*, 24 N. C. 411, Ruffin, C. J., says: "It is certain that warrant is not an indispensable term in contracts respecting personalty, as it is

in conveyances of freehold. It is also true that a representation simply of soundness does not impart absolutely a stipulation of the existence of that quality. But the representation may be made in such terms and under such circumstances as to denote that it was not intended merely as a representation, but that it entered into the bargain itself. * * * The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article, and that the vendee relied on what was passing as a stipulation. Among these circumstances would, of course, be the understanding at the time of the bystanders, who witnessed the transaction, and the facts on which the impressions of those persons were founded." After further discussion, he concludes: "These, we think, were all matters properly belonging to the jury, to whom they should have been submitted, with instructions that, if they collected, the defendant did not mean merely to express an opinion, but to assert positively that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negro as sound, then it would amount to a warranty; otherwise not." In *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. 840, Davis, J., says: "If the vendor represents an article as possessing a value which upon proof it does not possess, he is liable as on warranty, express or implied, although he may not have known such an affirmation to be false, if such representation was intended, not as a mere expression of opinion, but the positive assertion of a fact upon which the purchaser acts; and this is a question for the jury."

In the light of these authorities, we are of the opinion that his honor should have submitted the question to the jury as to the intent with which the words were used by the plaintiff and understood by the defendant, with proper instructions as to what constitutes a warranty.

For the error in refusing to submit the question to the jury, there must be a new trial.

(140 N. C. 550)

HUGHES et al. v. KNOTT et al.

(Supreme Court of North Carolina. March 20, 1906.)

SALES—CONTRACT—PERFORMANCE—BREACH.

Where defendants agreed to deliver certain tobacco on July 1st, and plaintiffs agreed to receive and pay for it on that day, plaintiffs could not subsequently recover the tobacco without a showing that they were ready and able to take and pay for the same on July 1st, by showing that if they had been, defendants would not have been able to deliver it on that day.

Appeal from Superior Court, Wake County; Cooke, Judge.

Action by W. T. Hughes and another against R. H. Knott and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Wm. H. Ruffin, for appellants. Pou & Fuller and B. M. Gatling for appellees.

CLARK, C. J. The defendants agreed to deliver a certain quantity of tobacco f. o. b. cars in Raleigh on 1st July to the plaintiffs who agreed to receive and pay for it at that time. It appears from the verdict and admissions that neither party was ready to comply on that day, that both were able to comply on 4th July, when the plaintiffs made a demand which was refused, and that there was no extension of time. On 6th July the plaintiffs began this action to recover the tobacco. It was held when this case was here before, *Hughes v. Knott*, 138 N. C. 109, 50 S. E. 588, "neither party can demand performance by the other without alleging and proving his own readiness to perform his part of the agreement" at the specified time and place. If the defendants had sued the plaintiffs for failing to take and pay for the tobacco on 1st July the latter could have set up as a defense that these defendants were not able and ready to deliver the tobacco on that day. Indeed the burden would be on them to prove such condition precedent. But the plaintiffs, who are suing for the possession of the tobacco, cannot dispense with the prerequisite of showing that they were ready and able to take and pay for the tobacco on 1st July by showing that if they had been, the defendants were not able to deliver on that day. Both having broken the contract, neither can sue the other for its breach. *Ducker v. Cochrane*, 92 N. C. 597.

The whole matter was so fully discussed on the former appeal, and the principle so clearly stated that the plaintiffs could not recover without showing that they were ready and willing to comply with the contract on 1st July, unless an extension of time was shown, that further discussion now would be "vain repetition."

No error.

(140 N. C. 574, 581)

A. F. JOHNSON & SON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. March 20, 1906.)

1. RAILROADS—OPERATION—FIRES—EVIDENCE.

In an action against a railroad company for setting fire to plaintiff's factory by sparks from an engine, testimony that witness rode on what he thought was the same train on the following day, and when it stopped at a station a car load of cotton seed hulls attached to the train was on fire, but not stating that the engine emitted sparks or set fire to the hulls, was not admissible.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1719-1723.]

2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where it is impossible for the Supreme Court to see what weight the jury attached to evidence improperly admitted, it will grant a new trial.

3. RAILROADS — OPERATIONS — FIRES — EVIDENCE.

Evidence that sparks came from the engine on the day after plaintiff alleged the train had set fire to his factory was admissible in an action therefor.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1719-1723.]

4. EVIDENCE—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

The court may take notice of the distance between station towns on a certain railroad.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 14.]

5. WITNESSES — IMPEACHMENT—COMPETENCY OF EVIDENCE.

Where, in an action against a railroad company for setting fire to plaintiff's factory, the evidence was circumstantial, and witnesses had testified to various facts introduced for the purpose of excluding the suggestion that the fire was caused by sparks from the engine, it was proper to impeach him by asking him if he had not stated that the fire was caused by sparks from the engine and to prove that he made such statements.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1247.]

6. DAMAGES—INJURY TO PROPERTY—PROSPECTIVE PROFITS.

In an action against a railroad company for damages for burning plaintiff's factory, plaintiff was entitled to recover definite prospective profits, and might give evidence of contracts calling for a certain output at certain profit.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 72-88.]

Appeal from Superior Court, Sampson County; W. R. Allen, Judge.

Action by A. F. Johnson & Son against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and both parties appeal. Reversed.

Civil action for the recovery of damages for the alleged negligent burning by defendant corporation of building used by plaintiffs A. F. Johnson & Son for the manufacture of crates, baskets, etc. Plaintiffs set forth in their complaint that "they had accumulated upon said premises valuable forms, tools, fixtures, office supplies, furniture, etc.; also large quantities of crates, baskets, etc., already manufactured; large quantities of crates, baskets, etc., in course of manufacture; and large quantities of raw material for the manufacture and completion of others crates and baskets. And plaintiffs further allege that, at said time, they had contracted and agreed to furnish to various persons, firms and corporations, an output of 75,000 completed crates from their said factory, upon which they would have realized a reasonable profit of \$3,500, but for the loss and destruction of the aforesaid property by fire," etc. Defendant, not having sufficient knowledge or information to form a belief, denied this allegation. The plaintiffs, upon the issue in regard to damages, offered to show that they had a contract with the East Carolina Fruit Packing Company to deliver 75,000 berry crates at a fixed profit of \$3,500; that they had accumulated the material to complete this contract, and had the same on hand on Nov-

ember 29, 1904, when they were burned out; that it was impossible to replace this material in any of the markets of the country and they lost the year's work; their laborers and servants were, for a long time, idle upon their hands, at heavy expense. This testimony was, upon defendant's objection, excluded. Plaintiffs excepted, and assigned as error upon the issue in regard to damages the rejection of the proposed testimony.

Grady & Graham, for plaintiff. Junius Davis and Stevens, Beasley & Weeks, for defendant.

Plaintiffs' Appeal.

CONNOR, J. (after stating the facts). His honor, we presume, was of the opinion that the anticipated profits to be derived from completing the contract made by plaintiffs with the fruit packing company for the manufacture and delivery of the crates were too speculative and conjectural to form the basis of a claim for damages. While this court has uniformly adhered to the rule in *Hadley v. Baxendale* prescribing the measure of damages recoverable for breach of contracts, we find no decision controverting the proposition, held by other courts and laid down by many text-writers, that in actions founded upon a pure tort a different rule prevails. Mr. Sutherland, after discussing many decided cases, says: "The correct doctrine, as we conceive, is that if the act or neglect complained of was wrongful, and the injury sustained resulted in the natural order of cause and effect, the person injured thereby is entitled to recover. There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or non-action." 1 *Damages*, 18. "A tort-feasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been seen by him. * * * The real question in these cases is, did the wrongful conduct produce the injury complained of? and not, whether the party committing the act could have anticipated the result." *Hale on Damages*, 36; 8 *Am. & Eng. Enc.* 625.

Sledge v. Reid, 73 N. C. 440, was an action of trover, for the wrongful taking of plaintiff's mule. Bynum, J., said: "Consequential damages to be recovered in an action of tort must be the proximate consequence of the act complained of, and not the secondary result thereof." The court in *Welch v. Piercy*, 29 N. C. 365, thus states the same doctrine: "Every man, in law, is presumed to intend any consequences, which naturally flow from an unlawful act, and is answerable to private individuals for any injury so sustained." Whatever distinctions may be recognized between actions founded

upon tort, pure and simple, and those in which the cause of action is tort growing out of a breach of contractual duty, such as actions by passengers for wrongful ejection, shippers for failure to deliver freight, or parties in interest for failure to deliver telegrams, it is well settled that when the cause of action is based upon a wrongful invasion of plaintiff's rights of person or property, he may recover all such damages, either direct or consequential, as flow naturally and proximately from the trespass. When the action is for breach of contract, the damages recoverable are such as naturally flow from the breach and such special or consequential damages as are reasonably presumed to have been with the contemplation of the parties at the time they made the contract as the probable result of a breach of it. In ascertaining what damages come within the rule, it is proper to examine, not only the terms of the contract, the subject-matter, etc., but also to inquire whether such circumstances or conditions as produced special damages were communicated to the defendant. We apprehend that the same rule prevails when an action in the nature of tort is brought for the breach of a duty arising out of contract. *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559; *Dayvis v. Telegraph Co.*, 139 N. C. 79, 51 S. E. 898. In *Lee v. Railroad* (N. C.) 48 S. E. 809, it is said: "It is immaterial whether we treat the cause of action as for a breach of contract, or for a negligent omission to perform a public duty arising out of contract." We were then considering the measure of damages for failure to deliver freight. When a party commits a trespass, he must be held to contemplate all the damages which may legitimately follow from his illegal act. In *Brown v. Chicago, etc., Railroad Co.*, 54 Wis. 354, 11 N. W. 361, 41 *Am. Rep.* 41, it is said: "The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the result of the act done." Judge Christlancy in *Allison v. Chandler*, 11 Mich., at page 561, says: "It is urged by counsel for the defendant that damages for the loss of profits ought not to be allowed, because they could not have been within the contemplation of the defendant. Whether, as a matter of fact, this is likely to have been true, we do not deem it important to enquire. It is wholly immaterial whether the defendant in committing the trespass actually contemplated this, or any other species of damage, to the plaintiff. It is a consideration which is confined entirely to cases of contracts, when the question is, what was the extent of the obligation in this respect, which both parties understood to be created by the contract. But when a party commits a trespass he must be held to contemplate all

the damages which may legitimately flow from his illegal act." *Stevens v. Dudley*, 56 Vt. 158.

We are thus brought to a consideration of the question whether the proposed testimony was competent to be considered by the jury in assessing plaintiffs' damages. "It was at one time laid down as a general rule that damages could not be recovered for the loss of profits. It was thought that profits were in their nature too uncertain to be considered." *Hale on Dam.* 72. The rule is subject, however, to the modification that if the profits lost by defendant's tortious conduct, proximately and naturally flow from his act and are sufficiently definite and certain, they may be recovered or at least evidence in respect to them may be heard and considered by the jury in fixing such damages as will compensate plaintiff." Profits which would certainly have been realized, but for the defendant's fault, are recoverable; those which are speculative and contingent are not." *Id.* Judge Christianity in *Allison v. Chandler*, supra, says: "But whatever may be the rule in actions upon contract, we think a more liberal rule, in regard to profits lost, should prevail in actions purely of tort (excepting, perhaps, the action of trover). Not that they should be allowed in all cases without distinction; for there are some cases where they might in their nature be too entirely remote, speculative or contingent to form any reliable basis for a probable opinion * * *. But generally, in an action purely of tort, when the amount of profits lost by the injury can be shown with reasonable certainty, we think they are not only admissible in evidence, but that they constitute, thus far, a safe measure of damages." *Sutherland*, vol. 1, § 70, says: "If a regular and established business is wrongfully interrupted, the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of. *Schlie v. Brokahus*, 80 N. Y. 614; *French v. Lumber Co.*, 145 Mass. 261, 14 N. E. 113. In *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 845, 37 N. E. 14, 23 L. R. A. 588, it is held that evidence is admissible showing anticipated profits, not remote or speculative, not as the measure of damages, but to aid the jury in estimating the extent of the injury sustained." *Fibre Co. v. Electric Co.*, 95 Me. 318, 49 Atl. 1095; *Gwaltney v. Timber Co.*, 115 N. C. 579, 20 S. E. 465; *Jones v. Call*, 96 N. C. 337, 2 S. E. 647, 60 Am. Rep. 416. *Willis v. Branch*, 94 N. C. 142, was an action for a trespass upon a public hall leased by plaintiff and removing an oil tank used for lighting. Plaintiff claimed as special damage loss of profits on contracts made with theatrical companies. This court said: "If plaintiff had existing engagements for theatrical entertainments, that were disappointed by the injury, damages sustained on that account might be embraced, but not for such as he might probably have had." Mr. *Sutherland* quotes with approval the language used by

the court in *Allison v. Chandler*, supra: "When, from the nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, there is no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, or as may tend to prevent the allowance of such damages as may be merely possible, or too remote and fanciful in their character to be safely considered as the result of an injury." 4 *Sutherland*, § 1029.

In the light of the principles announced in the foregoing authorities, we are of the opinion that the testimony in regard to the contract with the fruit packing company was competent to be heard by the jury upon the question of damages sustained by plaintiffs *A. F. Johnson & Son*. It is by no means certain that the jury should fix the damages in that respect at the profits which plaintiff would have made on the manufacture and delivery of the crates, but they may take into consideration the terms of the contract, the position of plaintiffs in regard to its completion, the solvency of the packing company and all other competent and relevant testimony casting light upon the value of the contract to plaintiffs at the time of the fire. While in all human affairs there is of necessity an element of uncertainty, the law, which seeks to deal as far as practicable with conditions in a practical way and as near as may be give compensation for injuries sustained, only demands, as the basis of the claim, reasonable certainty. If plaintiffs had been considering a proposition to sell their factory with its outstanding contracts, it would have been entirely practicable to measure with reasonable certainty its enhanced value by reason of the existence of the contract with the packing company. In doing so, the cost of the material on hand, the cost of manufacturing and delivering, the contingencies usually attendant upon and incident to the business, the solvency of the packing company, etc., would have been considered. The jury having found that plaintiffs' factory was destroyed by the negligence of defendant, they are entitled to recover all such damages as naturally and proximately flow from the trespass. The value of the contract in the light of the facts proposed to be shown by the question asked the witness should be considered as coming within the rule. This, of course, excludes any evidence in regard to profits not covered by contracts. They would be speculative. There might be no demand for crates, prices might decline, a short crop of berries might decrease the demand, or a large crop enhance it. These and many other contingencies, not remote, would enter into

the problem which would render any conclusion unreliable and unsatisfactory. For the rejection of the proposed testimony there must be a new trial. In several of the cases cited in this opinion the term "injury" is used. The term as used must be understood as synonymous with "damages." The authors are discussing the character of damages for which a party guilty of negligence, resulting in injury, is liable and not the question of proximate cause. It is only in this view that the word "injury" is to be understood. The jury have, under instructions to which there are no exceptions, found that defendant is guilty of actionable negligence. The exception is pointed only to the exclusion of evidence in regard to damages. The costs should be divided equally between the parties.

New trial.

Defendant's Appeal.

Plaintiffs allege that their crate and basket factory was burned by the emission of sparks from defendant's engine, the result of defective construction or negligent management. For the purpose of showing that the engine used by the defendant on the day of the fire emitted sparks, plaintiffs introduced testimony to the effect that defendant used the same engine on its road from Warsaw to Clinton, several days before, and after, and on the day of, the fire. They thereupon introduced R. B. Faison, who testified, after objection by defendant: That he was at Turkey, a station between Warsaw and Clinton, the distance between the two points being about 12 miles, on the day of the fire and next day thereafter. That on the last-named day he came to Clinton on the train. Thought it was the same train which went to Clinton on the day of the fire. Did not see the engine on the day of the fire, nor the day before. When train reached the Y it stopped. There was a car load of cotton seed hulls attached to the train or making a part thereof, second car from the engine. The hulls were on fire. Employees were carrying water from the engine to put on the fire. Saw smoke coming out of the top of the car. Defendant insists that, in the absence of any evidence tending to show that the hulls were fired by the engine, the testimony was irrelevant and incompetent. The plaintiffs contend that it is competent for them to show that the same engine, shortly before or after the fire in question, emitted sparks. In this we concur. The proposition is well stated and sustained by abundant authority, being entirely consistent with the reason of the thing, in 11 Am. & Eng. Enc. 512. The decision of this court in *Ice Co. v. Railroad Co.*, 126 N. C. 797, 36 S. E. 279, is not in conflict with this principle. In that case it was held incompetent to show that engines, other than the one which set fire to the property, emitted sparks. In *Cheek v. Lumber Co.*, 184 N. C. 225, 46 S. E. 488, 47 S. E. 400, it was proposed to show that

the engine alleged to have set fire to the wood, 12 months before the fire in question and at another place, emitted sparks. This was held to be irrelevant.

The defendant's exception, however, is based upon the contention that, assuming the fact testified to by Faison to be true, that on the day after the burning of plaintiff's factory a car load of hulls attached to the engine which it was alleged set fire to the factory was seen on fire, it did not tend to prove the fact in issue—that the engine by the emission of sparks set fire to plaintiff's factory. The witness does not say that the hulls were set on fire by the engine or that the engine emitted sparks. The evidence relied upon by plaintiffs to show that defendant's engine set fire to their factory is circumstantial. No witness says that he saw the fire communicated to the factory. There is evidence other than that of Faison, both competent and relevant to be considered by the jury, tending to sustain plaintiffs' contention. Was the testimony of Faison relevant? That is, did it tend to prove the plaintiffs' allegation? If the witness had testified that the cotton seed hulls were fired by sparks from the engine, or that the engine emitted sparks at or about the time that they were found to be on fire, such condition would have been relevant upon the question whether the engine emitted sparks at the time of the fire. The question, therefore, resolves itself into this. Does the condition described by the witness Faison reasonably tend to show that the fire was communicated to the hulls by the engine? If suit had been brought by the owner of the hulls, charging that they were burned by the negligence of defendant, he would, in the absence of any explanation in regard to the origin of the fire, have been entitled to recover; not, however, because any inference would have been drawn that the engine communicated the fire, by emitting sparks, but because the carrier was an insurer and could only escape liability by showing that the fire was caused by the act of God or the public enemy. The principle upon which the relevancy of proposed testimony depends has been frequently announced by this court and the authoritative writers on the law of evidence. The difficulty is frequently found in its application. Pearson, J., in *Bottoms v. Kent*, 48 N. C. 154, approving the language of Best on Evidence, says: "The rule, that evidence which is too remote is inadmissible, may be stated thus: That as a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires an open and visible connection between the principal and the evidentiary facts, whether ultimate or subordinate. This does not mean a necessary connection that would exclude all presumptive evidence, but such as is reasonable, and not latent or conjectural." Henderson, J., in *Hart v. Newland*, 10 N. C. 122, says: "Evidence is of two kinds: That which, if true,

directly proves the fact in issue; and that which proves another fact, from which the fact in issue may be inferred. The rules regarding competency only apply to the first kind of evidence, and relevancy to the second. * * * That the fact to be inferred often accompanies the fact proven is not sufficient, it should most usually accompany it; and I would say, in the absence of all circumstances, that it should rarely otherwise happen." In that case the action was for deceit in the sale of a slave. For the purpose of showing a scienter the plaintiff was permitted to show that the slave was a runaway and while hiding out defendant's wife had been seen carrying food to him. The learned justice, of whom Pearson, C. J., said, "His power of reflection exceeded that of any man who ever had a seat on this bench, unless Judge Haywood be considered his equal," said, by way of illustration, in regard to the testimony: "But the strong objection in this case is that there must be two inferences drawn, to wit: The wife saw and fed the slave; ergo she knew he was diseased; that the wife knew it, ergo the husband knew it, being informed by her. An error in either inference, which might very well happen, would introduce a falsehood, which * * * is an object of more solicitude than the exclusion of the truth." Hall, J., dissented, showing that two learned judges drew entirely different inferences from the same fact. The language of Judge Henderson is cited with approval by Rodman, J., in *State v. Vinson*, 63 N. C. 335, in which he approves Roscoe's statement of the law. "When the fact itself cannot be proved, that which comes nearest the proof of the fact is the proof of the circumstances that necessarily and usually attend such fact. If the fact offered to be proved be equally consistent with the existence or nonexistence of the fact sought to be inferred from it, the evidence can furnish no presumption either way, as in such a case the one fact does not most usually attend the other."

The principle upon which the admissibility of this class of testimony, with its limitations, is discussed by Ruffin, J., in *State v. Brantley*, 84 N. C. 766. He says: "Amongst other hazards and inconveniences, it was found that to allow evidence to be given touching every collateral matter that could be supposed, however remotely, to throw any light upon the main fact sought to be established, had the effect to render trials complicated, and to confuse and mislead, rather than enlighten, the juries, and at the same time to surprise the party on trial, who could not come prepared to disprove every possible circumstance, but only such as he might suppose to be germane and material. And therefore the main rule was adopted of restricting the inquiry to such facts as, though collateral to the matter at issue, had a visible, reasonable connection with it; not such a connection as would go to show that the

two facts, the collateral one and the main one, sometimes—or, indeed, often—go together, but such as would show that they most usually do so." Thayer on Ev. 264, 265. The general rule is much modified by the occasion of its application. As, when the intent, knowledge, etc., is the fact in issue, conduct of the defendant in other transactions of like character is admitted. *State v. Murphy*, 84 N. C. 742, and numerous illustrative cases. Applying the general rule to their record, we are of the opinion that the testimony of Faison was not relevant. To give it any probative value, the jury must infer that the hulls were fired by the engine. While it does not clearly appear, it would seem that they were in a box car. Witness said that he saw "smoke coming out of top of the car." So far as we can see, the jury had no information in that regard. It can hardly be said that the fact shown that the hulls were on fire, had a visible, reasonable connection with the fact in issue, that the engine emitted sparks. More than one conjecture could be reasonably advanced as to the origin of the fire in the car. It does not appear whether the doors were open when the fire was discovered. The fact that smoke was seen coming from the top of the car would seem to indicate that the doors were closed. We do not find any evidence tending to explain the origin of the fire in the car, and we are unable to see how the jury could do so. As was said in *Armstrong v. Railroad*, 130 N. C. 64, 40 S. E. 856, "But none of the evidence connects the origin of the fire with any sparks or cinders emitted from the engine." If there is no evidence that the hulls were fired by sparks from the engine, of course, the fact that they were seen on fire had no visible connection with the condition of the engine, which is the condition from which it is sought to show the fact in issue—that plaintiffs' property was fired by sparks from the engine. We would not be understood as saying that it was necessary to show, by an eyewitness, that the hulls were fired by sparks from the engine. Conditions may have been shown reasonably pointing to that conclusion, in which case the jury may have reasonably inferred that the same engine on the day previous emitted sparks at or near the plaintiffs' factory. The hiatus in the process of reasoning is the absence of evidence that the hulls were fired by the engine and without this the entire structure is without foundation. As was said by Ruffin, J., in *Brantley's Case*, supra: "We fully recognize the difficulty which a judge presiding on the circuit must experience when called hastily to determine between that which amounts to slight evidence and that which constitutes no evidence." *Cheek v. Lumber Co.*, 134 N. C. 225, 46 S. E. 488, 47 S. E. 400. It is impossible for us to see what weight the jury attached to Faison's testimony. The rule which we find pursued by this court in such cases is to grant a new trial.

For the reasons stated we are of the opinion that the testimony of McKinnon was competent. He testified that he saw sparks coming from the engine the day after the fire. He does not locate the place, but we take notice of the fact that the distance between Warsaw and Clinton is only 12 miles. He was in the rear car. He says that the sparks which he saw did not set fire to anything.

We have examined the defendant's other exceptions, and do not think that they can be sustained. Both witnesses, Duncan and Hodges, had testified to facts which tended to show, and, if believed, did show, that plaintiffs' factory was not fired by defendant's engine. They were asked whether or not they had made contradictory statements, thus laying the basis for introducing impeaching evidence. It therefore became competent to show that they had made statements contradictory to their testimony. His honor confined such testimony to proper limits, as impeaching the witnesses. *State v. Wright*, 75 N. C. 439; *State v. Goff*, 117 N. C. 755, 23 S. E. 355. We concur with defendant's counsel that the statements of the witnesses would not be competent as substantive evidence. We do not think that testimony in respect to which contradictory statements were admitted, was opinion evidence. They had testified to substantive facts. For instance, the witness Duncan testified that when he saw the house, the fire was flaming from the top of the crates; that the whole thing was on fire; that the fire was on top of the block, which was setting in a ditch; that there was no grass around that block—nothing but sand. This and similar testimony was for the purpose of excluding the suggestion that the factory was fired by sparks from the engine. He was asked on cross-examination whether he had not told Fred Owen that the engine set the factory on fire. This he denied. It was competent to contradict him in that respect. The same is true as to the testimony of Len Hodges.

For the error pointed out herein there must be a new trial.

(73 S. C. 254)

DUNCAN v. GREENVILLE COUNTY.

HANDY v. SAME.

(Supreme Court of South Carolina. Feb. 19, 1906.)

HIGHWAYS—DEFECTS—CONTRIBUTORY NEGLIGENCE.

Where plaintiff sues the county to recover for injuries received by a defect in a highway under Civ. Code 1902, § 1347, providing that any person so injured may recover the actual damages sustained if he has not contributed to the injury, plaintiff must show that he is not guilty of any negligence which was a probable cause of the injury.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 498.]

Appeal from Common Pleas Circuit Court of Greenville County; Prince, Judge.

Action by Rosa Duncan and by W. H. Handy against Greenville county. Judgment for defendant, and plaintiffs appeal. Reversed.

Blythe & Blythe, for appellants. Haynesworth & Patterson and B. M. Shuman, for respondent.

GARY, A. J. This is the second appeal in these cases, which were heard together, as they involve the same question. The opinion in the former appeal is reported in 71 S. C. 170, 50 S. E. 776, 777. The actions arose under section 1347 of the Code of Laws, which provides that "any person who shall receive bodily injury or damage in his person or property, through a defect, or in the negligent repair of a highway, causeway or bridge, may recover in an action against the county, the amount of actual damage sustained by him by reason therefore: Provided, such person has not in any way brought about such injury or damage by his own act, or negligently contributed thereto." His honor, the presiding judge, charged the jury that "the plaintiff must show that the injury was not the result of any act of his, or that he did not bring about the injury, or contribute thereto, by any negligence on his part, nor that his negligence is a proximate cause. He has to go further and show, before he is entitled to recover against the county, that he did not, through any negligence, contribute in any way to his injury." The sole question presented by the exception is whether there was error in the charge as to the proximate cause of the injury.

This statute was construed in the case of *McFaul v. Barnwell County*, 57 S. C. 294, 302, 35 S. E. 562, and Mr. Chief Justice McIver, who delivered the opinion of the court, used this language: "To maintain this action it was necessary for the plaintiff not only to allege and prove that the injuries of which he complains against the county were 'occasioned by its neglect and mismanagement,' but also that he 'has not in any way brought about such injury or damage by his own act, or negligently contributed thereto.' If, therefore, the injury complained of was in any way brought about by the negligence of the plaintiff, or if he negligently contributed thereto, then the plaintiff, under the express terms of the statute, could not recover. The Legislature, by the use of the language above quoted, manifestly intended to declare that in either one of two contingencies the plaintiff could not recover: (1) If the injury was in any way brought about by his own act. (2) If he negligently contributed thereto. Now, if the statute had stopped after declaring the first of these contingencies, then possibly the conclusion might have been that the negligence of the plaintiff, in order to bar a recovery, must be the efficient cause of the injury, or, to use the language of the

circuit judge, must be the immediate proximate cause of the injury, as the words "brought about" seem to imply. But the statute does not stop there, but goes on to declare another contingency upon which the plaintiff's right of recovery would be barred—if he negligently contributed thereto. The use of the word 'contributed' necessarily implies that there was another cause to which plaintiff's negligence might contribute; and although plaintiff's negligence might not alone be sufficient to cause the injury, yet if it contributed to some other cause—for example, the defendant's negligence—then the plaintiff could not, under the second contingency declared by the statute, recover." (Italics ours.) The words which we have italicized show that this court did not rule that the charge was erroneous in so far as it was applicable to the first of said contingencies; and the opinion shows that the decision rested upon the interpretation of the word "contribute," as defined in the case of *Wragge v. Railroad*, 47 S. C. 105, 25 S. E. 76, 33 L. R. A. 191, 58 Am. St. Rep. 870. Mr. Chief Justice McIver stated that there was nothing either in the statutes construed in *Wragge v. Railroad*, or *McFall v. Barnwell Co.*, to indicate that the word "contribute" was used in any other than its ordinary and popular signification, and that the only inquiry was as to such signification.

In the case of *Burns v. Railway*, 65 S. C. 229, 234, 43 S. E. 679, the question under consideration was before the court, which then settled the principle as follows: "It is true, the requests conformed to the principle announced in *Wragge v. Railway Co.*, 47 S. C. 105, 27 S. E. 76; but a different rule is laid down in the case of *Bowen v. Railway Co.*, 58 S. C. 222, 36 S. E. 590, which is subsequent to the case of *Wragge v. Railway Co.*, and in which the member of the court, who wrote the opinion in *Wragge v. Railroad Co.*, concurred. The appellant's attorney, however, was granted permission to review the case of *Bowen v. Railway Co.*, in which the court says: 'When the law speaks of an act of negligence as contributing to an injury, it means as a direct and proximate cause thereof.' * * * This court, after mature deliberation, has determined to adhere to the rule stated in *Bowen v. Railway Co.*, for otherwise there would be no legal test for the guidance of the jury, in determining whether the act of the party contributed to the injury." The following definition of contributory negligence was approved in that case: "Contributory negligence is a want of ordinary care upon the part of a person injured, by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." As the principles upon which the case of *McFall v. Barnwell Co.* was decided have

been overruled, it can no longer be regarded as authority.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(73 S. C. 222)

BRYANT v. THIGPEN.

(Supreme Court of South Carolina. Feb. 1, 1906.)

On petition for rehearing. Stay of remittitur vacated.

For former opinion, see 51 S. E. 535.

PER CURIAM. On hearing the petition for rehearing in the foregoing action, we fail to find that any material facts were omitted, or any provisions of law were overlooked. The manifest purpose of the statute for recording was to provide a ready and expeditious method for said recording, and it was intended that the character of the debt should be stated in brief and general terms. The use of the letters "L" and "M" were to show that the debt was a lien and mortgage debt, and, taken in connection with the property described, indicated an agricultural lien debt. We must refuse the petition for a rehearing.

It is ordered that the order for the stay of remittitur herein be vacated.

(73 S. C. 227)

HALL et ux. v. McBRIDE et al.

(Supreme Court of South Carolina. Feb. 15, 1906.)

APPEAL—WHEN LIES—ORDER OF REFERENCE.

In an action in which it was sought to have a statute declared unconstitutional, an order referring a case to take testimony is not appealable, though defendant admits the unconstitutionality.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 735.]

Appeal from Common Pleas Circuit Court of Florence County; Aldrich, Judge.

Action by M. N. Hall and wife against James B. McBride and others. From an order of reference to take testimony, defendants appeal. Dismissed.

The circuit judge made the following order:

"This is an action for permanent injunction and other relief, instituted on August the 6th, 1902, and now comes before this court upon the motion of the plaintiffs, after notice for an order of reference. Briefly stated, the action is to obtain a judgment in favor of the plaintiffs, adjudging that the general stock law is of force in townships described in the complaint, and that the acts excepting said townships are unconstitutional, or have ceased to be operative, for the reasons alleged in the complaint. The acts alleged to be unconstitutional are acts of 1900 and 1885. And it is also alleged that the act of 1885, if unconstitutional, is, for the facts stated in

the complaint, now inoperative, and no longer of force. The answer, after admitting certain allegations of the complaint, to which it is not necessary to further specifically refer, alleges: 'The defendants have been advised and believe that the provisions of the said act 1900, levying a tax on live stock within said exempted district, is in conflict with article 10, §§ 1, 5, of the Constitution of 1895,' but 'deny, on information and belief, each and every other allegation of the complaint,' and join the prayer of the complaint, 'that the levy and collection of said tax be enjoined.' The prayer of the complaint is no part thereof, and the prayer of the answer is of no greater importance. The defendants did not demur to the complaint, or move in any way to strike out any part of the complaint. The objection to the order of reference by the defendants was that the defendants had admitted and consented to all the relief to which the plaintiffs were entitled as against plaintiffs, and yet defendants deny emphatically all of the other material allegations of the complaint.

"His honor, Judge R. O. Purdy, by his order of April 14, 1904, refused a motion to submit certain issues of fact to a jury for trial. I am very much in the position in which Judge Purdy was. The action is not before me upon its merits. I only have the motion for reference to consider. A motion to refer the case to take testimony is a matter in the discretion of the court. While I cannot make a final judgment in this case upon this motion, I am of the opinion that the plaintiffs have the right to be heard upon the constitutionality of the act of 1885, and also upon the issue joined by the pleadings, whether or not the act of 1885 has, for the facts alleged in the complaint, ceased to be operative or of force and effect. These last allegations depend upon the facts to be decided by the court, should these issues be reached. In my judgment this testimony should be had, and an order of reference is best calculated to expedite the cause, because it is seldom in the stress of court work that testimony can be taken; there is so little time.

"Wherefore it is ordered. That this action be referred to J. W. McCown, Esq., as special referee, to take the testimony and report the same to the court with convenient speed; that the said special referee, along with the other evidence, do take and report the testimony as to whether or not the fence provided for by the act of 1885 has been maintained in such condition as to prevent the escape of live stock to or from the territory described in the complaint, as exempted from the operation of the stock law, whether or not the fence provided by the act of 1885 has been removed from its original line or any part thereof, and such other testimony as may by either party be submitted."

Defendants appeal on following exceptions:

53 S.E.—24

"(1) The court below erred in making and passing the order of reference in this cause, dated the 16th day of June, 1904, but the said court should have held that under the pleadings no order of reference was proper.

(a) The answer having admitted unconstitutionality of the act of 1900 and the invalidity of the tax authorized to be levied thereunder, and having joined with the complaint in asking that the only acts or threatened acts of the defendants complained of be enjoined, the plaintiffs are entitled to the full relief incident to their cause of action, and there was no material or relevant issue of facts to be referred. (b) The defendants, being parties to the action, only as officials and only official acts or threatened acts being alleged, and the defendants having admitted that the sole authority of the said official acts, to wit, the act of 1900, is unconstitutional, there was no issue to be tried by the court or a reference.

"(2) The court below erred in holding that this is 'an action to obtain judgment in favor of the plaintiffs adjudging that the general stock law is of force in townships described in the complaint, and that the acts excepting said townships are unconstitutional or have ceased to be operative.' But the court below should have held that the action was for the purpose of enjoining certain official acts or threatened official acts of the defendants, to wit, the levy and collection of the tax under the act of 1900, and that the unconstitutionality of the said acts was a mere incident to said cause of action.

"(3) The court below erred in holding that the plaintiffs have a right to be heard on the constitutionality of the act of 1885, but the said court should have held that the defendants had and claimed no authority under the act of 1885; that the same conferred no duties on them, and that said act was irrelevant to the said cause of action.

"(4) The court below erred in holding that the plaintiffs had a right to be heard upon the issue joined by the pleadings whether or not the act of 1885 has, for the facts alleged in the complaint, ceased to be operative or of force and effect; but the said court should have held that, there being no valid acts to sustain the levy and collection imposed by the act of 1900, and this being the sole authority for the alleged acts or threatened acts of the defendants, the question whether the fence had been kept up or the act become inoperative has become irrelevant and immaterial to the cause of action.

"(5) There being no issue of fact material to the cause of action or necessary to the complete determination of the cause raised by the pleadings, the court below abused its discretion in ordering the taking of testimony in the cause."

J. W. Ragsdale, Geo. Galletly, and J. P. McNeil, for appellants. W. F. Clayton, for respondents.

GARY, A. J. This is an appeal from an order of reference to take testimony. The facts are stated in the order, which, together with the exceptions, will be set out in the report of the case. The case of Insurance Ass'n v. Berry, 53 S. C. 129, 31 S. E. 53, shows conclusively that such order is not appealable.

It is the judgment of this court that the appeal be dismissed.

WOODS, J. (concurring). I concur in dismissing the appeal. In an ordinary case, when the defendant admits the material allegations of the complaint and consents to the relief demanded, I think it would be error of law for the circuit court to put the parties to the expense of a reference; but no court is bound to decree an act of the General Assembly unconstitutional and adjudge the rights of the parties accordingly, merely because the plaintiff has alleged, and the defendant has admitted, the unconstitutionality of the statute. Because of the public interest involved, it is a well-recognized duty of courts not to declare a statute unconstitutional if the facts fairly admit of any other legal solution of the issues. It was, therefore, within the discretion of the circuit court to order a reference to take the testimony, for it may appear from the facts that the question of the constitutionality of the statutes referred to in the complaint and answer is not necessarily involved in the decision of the case.

(73 S. C. 236)

STATE v. PHILIPS.

(Supreme Court of South Carolina. Feb. 15, 1906.)

1. INDICTMENT — DEMURRER — MOTION TO QUASH.

Where an indictment charges the stealing of a cow, "the property of A., agent for estate of B.," the question whether the language quoted was mere surplussage, or was intended to show that A. had only a qualified right in the animal, should be raised by demurrer or motion to quash under Cr. Code 1902, § 57, and not by motion for new trial.

2. LARCENY—INDICTMENT.

An indictment for larceny is sufficient where it lays the title to the property in one having only a lawful possession.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 81-93.]

3. CRIMINAL LAW—INSTRUCTIONS.

A charge stating a rule of evidence is erroneous as a charge on the facts.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1731-1765.]

4. SAME—DECLARATIONS OF CO-CONSPIRATOR.

After a common enterprise is at an end, the declarations of a co-conspirator are not binding on the other conspirator unless assented to.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1002-1011.]

Appeal from General Sessions Circuit Court of Berkeley County; D. E. Hydrick, Special Judge.

Hampton Phillips and John Heyward were

convicted of larceny, and Phillips appeals. Dismissed.

The following are the exceptions: "(1) Because his honor erred as matter of law in not granting the defendant appellant a new trial, for that the undisputed evidence in the case produced by the state showed that the property alleged to have been stolen was not the property of the person in whom ownership was laid in the indictment, but, on the contrary, was the property of the estate of one Cornelia Bates. (2) Because his honor erred in charging the jury with respect to matters of fact, in violation of article 5, § 26, Const. 1895, whereby and wherein he instructed the jury that where two parties are charged with crime, as in this case, and where a statement is made by one of such parties in the presence of the other, the jury may consider such statement as evidence against both defendants. (3) Because his honor erred in charging the jury: 'In the consideration of the testimony, in this case, you are not to consider against the absent defendant, unless the statement was made in the presence of both parties. If the statement was made in the presence of both parties you can consider it as against both; that is, if Phillips said anything about this matter when Heyward was present, then you can consider it as against one or both of them'—the error being that the judge clearly indicated to the jury that they could consider such statement, and thus invade the province of the jury as to what evidence they could consider in a case of this character. (4) Because his honor erred in not instructing the jury that a statement or confession of an accomplice could not be taken as evidence against any other person than himself, and that his honor therefore committed error of law in charging that, if Heyward made a statement in regard to the case in the presence of Phillips, such statement was binding on Phillips, and could be considered by the jury in determining the question of his guilt. (5) Because his honor erred in charging the jury that a statement or confession made by an accomplice in crime is binding upon any person other than himself; and in this case his honor misled the jury by instructing them that they could take a statement or confession by Heyward, if made in the presence of Phillips, as evidence against him. (6) Because his honor erred in instructing the jury that, as to any statement or confession made by Heyward in the presence of Phillips with reference to the larceny of the property set out in the indictment herein, such statement would be binding upon Phillips and could be received by the jury as evidence in this case; whereas, his honor should have charged that any statement made by Heyward could not bind Phillips, or be used in evidence against him. (7) Because his honor erred in charging the jury with reference to matters of fact, in violation to article 5, § 26,

Const. 1895, wherein he impressed upon the jury that the reasonable doubt must be a strong, well-founded, substantial doubt, and in so charging advised the jury as to the rule of evidence to be applied in weighing the testimony as to the reasonable doubt. (8) Because his honor erred in charging the jury as follows: 'In the consideration of this testimony, Mr. foreman and gentleman, the facts in the case are for you to decide. It is my duty to charge you that the state must make out its case beyond a reasonable doubt; that is, a strong, well-founded, substantial doubt, arising from the facts as gathered from the testimony in the case'—the error being in advising the jury how to weigh the testimony and in impressing them with the view that the reasonable doubt must be strong and well-founded."

Legare & Holman and Geo. B. Davis, for appellant. P. T. Hildebrand, Sol., for the State.

GARY, A. J. The defendants were found guilty upon an indictment charging them with stealing a cow, the proper goods and chattels of W. J. Bates, agent for the estate of Cornelia Bates. They made a motion for a new trial on the minutes of the court on two grounds, to wit: "First, that under the evidence in the case the defendants should not have been convicted, for that the state had failed to make out its case beyond a reasonable doubt; secondly, that under the undisputed evidence in the case it appeared that the property alleged to have been stolen was not the property of W. J. Bates, in whom ownership was laid in the indictment." The motion was refused, and the defendant Hampton Phillips appealed under exceptions which will be set out in the report of the case.

1. First exception: Section 57 of the Criminal Code of 1902 provides that "every objection to any indictment for any defect apparent on the face thereof, shall be taken by demurrer or on motion to quash such indictment, before the jury shall be sworn, and not afterwards." The question whether the words "agent for the estate of Cornelia Bates" should be regarded as *descriptio personæ*, and therefore mere surplusage, or as intended to show that W. J. Bates had only a qualified right in the property, and that the estate of Cornelia Bates was the real owner thereof, should have been raised by demurrer or motion to quash the indictment, before the jury was sworn.

2. But, even if those words had been struck out of the indictment, the testimony tended to show that W. J. Bates had the lawful possession of the property, and such possession was sufficient to sustain the indictment. W. J. Bates testified as follows: "Did you know Mrs. Cornelia Bates? Yes; I did. She was my mother. What business relation did you hold towards her? I was her agent before her death; that is, the agent for her

estate. Did that estate have any cattle? Yes; it did. About last June what happened to those cattle? About the 20th June I was informed that one of them had been driven off the range." In the case of *State v. Ad-dington*, 1 Bailey, 311, it was held that in an indictment for larceny the property may be laid in one who had merely the lawful possession.

3. Second and third exceptions: The only error assigned by these exceptions is that the charge was in violation of the provision of the Constitution prohibiting judges from commenting on the facts. The charge merely stated a rule of evidence, and therefore does not come within the inhibition of the Constitution.

4. Fourth, fifth, and sixth exceptions: The general rule is that "after the common enterprise is at an end, whether by accomplishment or abandonment is not material, no one is permitted by any subsequent act or declaration of his own to affect the others. His confessions, therefore, subsequently made, even though by the plea of guilt, is not admissible in evidence, as such, against any but himself. If it were made in the presence of another and addressed to him, it might in certain circumstances be receivable on the ground of assent or implied admission. In fine, the declarations of a conspirator or accomplice are receivable against his fellows only when they are either in themselves acts, or accompany and explain acts, for which the others are responsible, but not when they are in the nature of narratives, descriptions, or subsequent confessions." *Greenleaf on Evidence*, § 233; *State v. James*, 34 S. C. 49, 12 S. E. 657; *State v. Brown*, 34 S. C. 41, 12 S. E. 662.

When a defendant makes a declaration in the presence of his codefendant, such statement is not binding upon the latter unless he assents to it. While the charge without this qualification stated the rule too broadly, the error was not prejudicial, for the reason that the defendant John Heyward (who did not appeal) did not make any declaration in the presence of Hampton Phillips, except to deny statements made by his codefendant. Furthermore, both the defendants went upon the stand as witnesses and reiterated their former declarations.

5. Seventh and eighth exceptions: In properly defining a reasonable doubt, it cannot be successfully contended that the presiding judge charged upon the facts.

It is the judgment of this court that the appeal be dismissed.

(73 S. C. 261)

WHITE v. WHITE.

(Supreme Court of South Carolina. Feb. 19, 1906.)

WILLS — CONSTRUCTION — DEMONSTRATIVE LEGACIES.

Where a will provided that the executors should collect certain insurance policies, and

from the amount pay certain legacies, there being no words evincing an intention to relieve the general estate from liability in case the insurance fund proved insufficient, the legacies are demonstrative.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1947, 1948.]

Appeal from Common Pleas Circuit Court of Sumpter County; Watts, Judge.

Action by Anthony White and others and Mary A. White against Elizabeth White and others. From a decree for plaintiffs, defendants appeal. Reversed.

Lee & Moise, for appellant. Cooper & Fraser, for respondent.

GARY, A. J. The question presented by the exceptions is whether his honor, the circuit judge, erred, in construing the legacies mentioned in the following provisions of the testator's will to be specific, to wit: "I will and ordain that my executors shall collect the insurance policies on my life. And from this said amount, pay the sum of two hundred dollars each to Wm. J. Corbett, Henry Corbett and L. George Corbett, children of my deceased sister, Agnes W. Corbett. The sum of three hundred dollars to be divided among the children of my deceased sister, Hannah B. Kirven; three hundred dollars to be divided among the children of my deceased sister Sarah Haynesworth. That they pay the sum of one hundred dollars each to J. Grier White, and his sister, Mary White, children of my old friend and partner, A. White, deceased, and one hundred dollars each to Margie White and her brother Purvis White, children of J. Knox White."

The rules for determining whether a legacy is specific or demonstrative are clearly stated by Mr. Justice Jones, in the recent case of *Rogers v. Rogers*, 67 S. C. 168, 45 S. E. 176, 100 Am. St. Rep. 721. General, specific, and demonstrative legacies are thus defined in 18 Enc. of Law, 711, 714, 721: "A general legacy is one which is payable out of the general assets of the testator's estate, being a gift of money or other thing in quantity and not in any way separate or distinct from other things of the like kind." "A specific legacy or devise is a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other things of the same kind, and which may be satisfied only out of the particular thing." "A demonstrative legacy is a gift of money or other fundable goods, charged on a particular fund, in such a way as not amount to a gift of the corpus of the fund or to evince an intent to relieve the general estate from liability in case the fund fails." In *Crawford v. McCarthy* (N. Y.) 54 N. E. 278, the principles are thus stated: "A demonstrative legacy is a bequest of a certain sum of money, stock or the like, payable out of a particular fund or security. For example, the bequest

to an individual of the sum of \$1,500 is a general legacy. The bequest to an individual of the proceeds of a bond or mortgage, particularly describing it, is a specific legacy. A bequest of the sum of \$1,500, payable out of the proceeds of a specific bond or mortgage is a demonstrative legacy. A demonstrative legacy partakes of the nature of a general legacy, by bequeathing a specific amount, and also of the nature of a specific legacy, by pointing out the fund from which the payment is to be made, but differs from a specific in the particular that if the fund pointed out for the payment fails, resort may be had to the general assets of the estate."

Courts are averse to declaring a legacy specific unless the language of the will clearly shows that such was the intention of the testator. Our construction of the foregoing provision of the will is, that the proceeds arising from the collection of the policies of insurance, were not bequeathed, but, on the contrary, the bequests consisted of the several sums of money therein mentioned, with the direction that they be paid out of the proceeds to be derived from the collection of said policies; that there are no words in the will evincing an intention to relieve the general estate from liability, in case the fund failed, and that the legacies are, therefore, demonstrative.

It is the judgment of this court, that the judgment of the circuit court be reversed.

(59 W. Va. 209)

**BURKHEIMER v. NATIONAL MUT.
BUILDING & LOAN ASS'N
OF NEW YORK.**

(Supreme Court of Appeals of West Virginia,
March 6, 1906.)

**1. BUILDING AND LOAN ASSOCIATIONS —
CHANGE OF PLAN—RIGHTS OF BORROWER.**

Suspension by a building and loan association of the payment of dues on its stock by its members for an unreasonable time, so as to work a material departure from its general plan and scheme of satisfying loans made to its members of the ultimate value of their shares of stock by maturing the stock, affords ground for dissolution of the contractual relations existing between it and a member to whom such loan has been made.

2. SAME—ESTOPPEL.

A borrower is not estopped from demanding such dissolution, under such circumstances, by his having voted for an amendment to the by-laws of the association conferring upon its directors power to suspend payment of dues.

3. SAME—SETTLEMENT WITH WITHDRAWING MEMBER.

When, by reason of gross mismanagement of a building and loan association, a member, who has borrowed from it the ultimate value of the stock subscribed by him, has the right to sever his relations with it and elects to do so, he is to be charged with the amount of the loan and legal interest thereon from the date on which he received the money, and credited with the interest and premium paid, until the date on which his right to withdraw accrued, and the value of his stock as of said date, as nearly as the same can be ascertained, making due deductions for his share of the expenses

and losses sustained up to that date; and on the balance thus found to be due from him he is to be charged with interest and credited with all payments thereafter made by him, whether on account of dues, interest, or premium; and, in applying credits before, on, and after said date, the rule governing partial payments is to be observed and followed.

4. SAME—LOAN—MONTHLY PREMIUMS.

A building and loan association contract of loan, stipulating for the payment of a monthly premium, limited to a certain number of payments, is not violative of the provision of section 26 of chapter 54 of the Code of 1899, relating to the premium in such contracts.

5. SAME—FOREIGN ASSOCIATIONS.

Failure of a foreign building and loan association to comply with the provisions of section 30 of chapter 54 of the Code of 1899 does not preclude it from transacting business in this state.

6. EQUITY—BILL—VAGUE ALLEGATIONS.

An allegation in a bill, which by reason of its vagueness and uncertainty fails to show materiality of its subject-matter, need not be answered.

Sanders, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill by William Burkheimer, Jr., against the National Mutual Building & Loan Association of New York and others. Decree for plaintiff, and the building association appeals. Reversed and remanded.

Wyatt & Graham, for appellant. Simms & Enslow and L. D. Isbell, for appellee.

POFFENBARGER, J. On a bill in equity, filed by William M. Burkheimer, Jr., against the National Mutual Building & Loan Association of New York, for a settlement and adjudication of the amount due on the loan made by said association to him, on the basis of a simple, straight loan, by application to the debt of all sums paid as dues, interest, and premiums, under the rule of partial payments, on the theory that the contract between the plaintiff and said association never was a legal building and loan association contract, or, if it ever was such, that by misconduct on the part of the association or departure from its plan the contract has ceased to be a building and loan association contract, and for the cancellation of the deed of trust by which payment of the loan is secured, the circuit court of Cabell county adjudged and decreed, in conformity with the prayer of the bill, that there was due said association the sum of \$1.50, which amount, with interest thereon from the date of the decree, was decreed in its favor, and it has appealed, claiming a much larger amount.

In *Thompson v. National Mutual Building & Loan Association* (W. Va.) 50 S. E. 756, the validity of the contracts of the appellee was assailed, because of the provisions of its by-laws and form of contract respecting payment of the premium, and an effort was made to defeat the enforcement of its contract, under the principles announced by this court in *Gray v. Baltimore Building & Loan Association*, 48 W. Va. 164, 37 S. E. 533, 54 L. R.

A. 217; *Floyd v. Loan & Investment Co.*, 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805, and other similar cases. But, on examination of the contract, this court concluded that, as the premium stipulated for was not payable indefinitely and until maturity of the stock, as in the other contracts, held to be usurious for that reason, but was limited to 96 payments, it was sufficiently definite and certain, being a fixed premium payable in installments, and therefore was not violative of the building and loan statute of this state. This ground of invalidity, though set up in the bill, is not relied upon here.

Failure of the appellee to record in the Secretary of State's office its articles of association and by-laws, as required by section 30 of chapter 54 of the Code of 1899, is alleged as ground for holding the contract invalid, on the theory that the appellee has not acquired the right to do business in this state as a building and loan association. In *Thompson v. National Mutual Building & Loan Association*, cited, this precise question was raised, and it was expressly held, on principles announced in *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925, that such failure did not deprive the corporation of the right to do business in the state as a building and loan association. No reason is perceived why, in respect to this requirement, a building and loan association should be regarded as standing otherwise than as other foreign corporations. It is not the purpose of this statute to discriminate between foreign corporations on the ground of their character or the nature of their business. It has no special application to building and loan associations. It is a general statutory regulation, applicable to all foreign corporations, not denying to them the right to do business in the state, but subjecting them to fines and penalties for noncompliance therewith.

Another ground of attack is failure of the association to comply with the laws of the state of New York. Just what is meant by this allegation is not very clear. It is both general and uncertain. It reads as follows: "The plaintiff now, however, alleges and charges that said association has not complied with the statutory requirements of the state of New York, so as to permit said association to come within the benefits granted by the statute of the state of New York to building and loan associations, but that it has failed to properly file and record its articles of association as provided by the laws of the state of New York, which is a prerequisite before it is permitted to do business as such building and loan association in the state of West Virginia." It is not alleged that there has been a failure to file and record the articles of association, but only that they have not been properly filed and recorded. The bill does not charge that any law of the state of New York requires arti-

cles of association to be filed and recorded as a prerequisite to the right to do business as a building and loan association in the state of New York, or to the right of a New York building and loan association to transact business in another state, but only that it is a prerequisite to the right to do business as a building and loan association in the state of West Virginia. No statute of this state, so far as we are able to see, denies to a foreign corporation the right to do business here because of failure to strictly comply with every regulation prescribed by the laws of its own state. But, if we had such a statute, this allegation is too indefinite and uncertain. The bill admits the corporate existence of the defendants. It is sued as such, and the only fault found with it is its failure to file and have recorded its articles of association in some office or place not specified or indicated. Where and how are they to be filed? In alleging failure to perform duty, the bill must show what that duty is. "It may be affirmed as an elementary rule of the most extensive influence that the bill should state the right, title, or claim of the plaintiff with accuracy and clearness, and that it should in like manner state the injury or grievance of which he complains." Story, Eq. Pl. § 241. If it alleged that by the laws of the state of New York such articles of association are required to be filed in a particular office, and that they have not been so filed, then the court could look to the laws of that state as evidence to sustain the allegation, and the defendant would be apprised of what is relied upon as a failure of duty, working fatal infirmity in its organization or contract. Can it be forced by such a general allegation to produce evidence of strict and full compliance with every statutory provision of the laws of New York, relating to corporations? How can it know whether the omitted act is material, without an indication as to what it is? Some statutes are mandatory, and some directory. What is the character of the one which is said to have been violated? How can anybody tell? The opposite party is entitled to notice. He is not required to respond to a drag-net allegation. Certainty is one of the essentials of pleading. Story's Eq. Pl. §§ 28, 240, 241; Wellsburg, etc., R. R. Co. v. Traction Co. (W. Va.) 48 S. E. 746, 750; Billingsley v. Menear, 44 W. Va. 651, 30 S. E. 61; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553; Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. 611; Pyles v. Furniture Co., 30 W. Va. 123, 2 S. E. 909; Newberger v. Wells, 51 W. Va. 624, 639, 42 S. E. 625. That quality is wholly wanting in so much of the bill as relates to this matter.

A serious matter is presented, however, by the charge that the building and loan association has practically abandoned its whole plan and scheme, by an indefinite suspension of dues, continued for the long period of nearly seven years, to wit, from the

1st day of June, 1898, until the 29th day of April, 1905, when its answer was filed in this cause. The loan was made in 1893, from which date the plaintiff paid dues, interest, and premiums until May 31, 1898, but not regularly and promptly. On the 20th day of April, 1898, the by-laws of the association were amended, so as to confer upon the directors authority to suspend payment of dues on all shares at any time, by a two-thirds vote, for such period of time as to them might seem best. Under the authority thus conferred, they did suspend payment of dues on all shares, borrowed and unborrowed, from the 1st day of June, 1898, and, so far as this record shows, have never resumed the collection thereof. But they required the payment of interest and premium on the loan during the period of suspension, and gave to the borrowers the right to make such payments, on account of the principal of their debts, as they might wish to pay, and represented that there should be a consequent reduction in the interest and premium to be collected. Under this arrangement the plaintiff continued to pay interest and premiums until the 17th day of July, 1900, and also to pay money in lieu of dues until the 9th day of June, 1900, amounting to the sum of \$180. He having ceased to make further payments, the directors, on the 12th day of June, 1900, ascertaining the value of his stock to be \$456.44, applied said sum as a credit on the loan of \$1,200, and claimed a balance due the association on that date of \$864.49. Being of the opinion that by the suspension of the payment of dues the association had forfeited its right to enforce the contract as a building and loan association contract, the circuit court treated the whole transaction as an ordinary loan, giving the plaintiff credit on the debt for all sums paid.

As the contract was originally a valid one, it is difficult to see how a breach thereof on the part of the building and loan association could make it void ab initio or change its character. Up until the 1st day of June, 1898, the association, for anything that appears in this record, literally and strictly complied with all the terms of the contract. All payments made prior to that date were confessedly made under the contract, and under a valid contract. The effect of a breach of the contract or failure of duty by the association on that date would be, not to divest rights which had already attached, nor to undo things which had been done in conformity with the contract, but only to vest in the injured party a right of action for damages or specific performance, if he wished to stand upon his contract right, and, if he did not, to demand a rescission of the contract or a settlement by way of withdrawal. These are elementary principles of law, which the courts cannot disregard, however harsh their operation may be. Relief from a contract cannot be given by the courts

merely because it is a hard one, or an improvident one, or to punish somebody for wrongdoing. Courts of equity have large powers, it is true; but they are limited to the effectuation of equity and justice, not in disregard of contracts or contractual rights, but upon certain equitable grounds, springing out of the conduct of the parties or fortuitous circumstances. But in all such instances, they are careful not to do injustice, not to ignore vested rights and interests, and never to depart from the letter of a contract, further than is necessary to the effectuation of right and justice, as they spring out of inequitable conduct of some of the parties. Their office is not to execute vengeance or punish the wicked.

In becoming a stockholder in the association and borrower from it, the plaintiff entered into contractual relations, not only with the association as a distinct corporate entity, but with all its other members, and these may have been numerous. There were expenses to be borne, losses to be sustained, and profits anticipated. All those who took stock, paid in their money, and borrowed money, put themselves in the same situation as the plaintiff, and have rights and equities as meritorious and sacred as his. He may be one of a thousand men who stand in practically the same situation. To give him back all the money he has paid in by way of credit on the amount borrowed by him would relieve him from the burden of all the expenses of the association and from liability to contribute to its losses, and, if one after another of the stockholders and borrowers should be permitted thus to withdraw, the fund would be exhausted in a short time. Five hundred of the 1,000 would come out whole, while the remaining 500 would lose everything. The association management may have been corrupt or inefficient, and the losses may be heavy by reason thereof. But can a court of equity say that, because this man has been wrongfully treated, his money wasted and squandered by inefficient or corrupt directors, he shall be permitted to throw the whole loss upon his associates? That is not the basis of settlement adopted by this court in the case of the insolvency of building and loan associations, in consequence of which a similar state of affairs exists. *AH* are required to contribute proportionately to the loss sustained. In *Young v. Building Association*, 48 W. Va. 512, 38 S. E. 670, this court laid down the following rules applicable to such a situation: "Upon the insolvency of a building association the dues paid on stock by borrowing members are not to be credited on the debts of such members. Upon insolvency of a building association, in winding up its affairs a borrowing member must be charged with his debt and interest, and credited with all moneys paid in by him except dues on stock. After payment of debts he gets his share of residue, in the final distribution of what re-

mains after payment of expenses of winding up and debts. If it be safe to all interests and practicable to ascertain the present value of the stock, the court may, for the present relief of a borrowing member, credit that value of his stock on his indebtedness, without deferring its application till the final value."

Whether the plaintiff may sever the relations existing between him and the association, otherwise than in the manner provided by the by-laws, depends upon the nature of his contract and his conduct in reference to the matter of which he complains, namely, the suspension. At the time of the amendment of the by-laws, somebody held his proxy and voted for the amendment. Assuming that the holder of his proxy had authority to vote for an amendment so materially affecting the contract, it does not follow that the plaintiff assented to all the consequences which have resulted from that amendment. The vesting of authority in the directors to suspend the payment of dues, and the suspension itself, may have been entirely proper and promotive of the best interests of the association and all its stockholders, including the borrowers. That the directors should have such power may be altogether proper and wise. The possession of that power by the directors is the remote, not the immediate and direct, cause of the injury of which complaint is made. The suspension covers a long period of time, and there is no suggestion in the record of any intention or purpose to resume payment of dues. For aught that appears here, it is a permanent suspension, with a view to winding up and dissolving the corporation. It has been held that a temporary suspension affords the borrower no ground of defense against the enforcement of the obligation of his contract. *Johnston v. Building Association*, 104 Pa. 399; *Thomson v. Building Association*, 56 Ga. 350. But this could hardly be deemed a mere temporary suspension. The effect of it is to cause the borrower to pay a large amount of interest not contemplated at the time of entering into the contract. It also denies him the privilege of reducing his debt in the manner contemplated, postpones for years the maturity of the stock, and renders it doubtful as to whether it will ever mature. The directors in this instance have not only required the borrowers to pay interest on the debt, but the premium in addition thereto. These items amount to \$12 a month, \$72 a year, nearly \$500 for the period of nearly seven years. This is a considerable amount of money to exact on a small transaction like this in a manner not contemplated at the inception of the contract, and there is no suggestion that there will be any cessation of it. The continuance of the business and the execution of the contract substantially, according to its terms, was expected and relied upon by the plaintiff in entering into it. He supposed that at the end of the eight years his stock would mature

and thereby satisfy the debt. In this way he could, by small periodical payments extending over a considerable period of time, pay what was to him, no doubt, a considerable debt, without greatly burdening himself. Twelve years have passed, and during more than one-half of that period there has been an abandonment of that part of the contract which it was supposed would largely contribute to the satisfaction of the debt at the end of the contemplated period. This is material, and ought to afford ground of relief. 7 Thompson on Corporations, § 8796, says: "In return for the undertakings of the borrower in the transaction of loan or advancement as they have been pointed out, there is an implied undertaking on the part of the association scheme in the liquidation of the whole of his indebtedness; i. e., that it shall be by means of gradual payment, and that he shall participate, and have the opportunity of reducing his liability by his participation, in the profits of a continuing business, to be carried on to a fixed end. Where, through bad management, financial misfortunes, loss of membership, or any other cause, the career of the association is brought to a premature close, the borrower is compellable forthwith to pay the balance due from him on his security, although in terms only given for installments. He is therefore deprived of some proportion of the advantages, the prospect of which induced him to assume the burden of his original obligation. There remains nothing to compensate him for his liability to make up the premiums, to keep up stock payments, to pay fines, etc. The consideration of the liability failing, the liability itself must, in a proportionate degree, fail also."

As a case of dissolution or inability to carry out the contract is not here fully disclosed, what has just been quoted may not be applicable in its full extent to this case; but it asserts a principle within which the case falls. There has been such a departure from the plan, and such an abandonment of some of its essential features for so long a time as to deprive the borrower of a substantial part of the original consideration, in consequence of which he is entitled, upon well-settled principles of law, to a severance of his relations with the association on some equitable and just basis. Though there may be no cause for dissolving the corporation and winding up its affairs, there is ample cause for dissolving the relations subsisting between him and the corporation, just as one partner may, for cause, dissolve a copartnership or withdraw from it, leaving it subsisting as between the other partners, if they desire to carry it on. In such case it may be that there is a technical dissolution, since the settlement must be made on the same basis as in the case of final dissolution and distribution of all the assets. But in every practical sense it may be a mere withdrawal by one member of the copartnership, and no reason is perceived why such withdrawal cannot be effect-

ed in a corporation, when the circumstances warrant it. Many of the principles of copartnership enter into the relations subsisting between the members of a corporation. On dissolution and settlement the same principles apply, except that ordinarily there is no liability for unpaid debts, and the legal title to the assets is not in the members of the corporation as it is in the members of a copartnership. A dissolution of a partnership for cause puts an end to it, but its termination does not imply that it never had any existence. When the cause which gives right to a dissolution arises, it does not vitiate the contract from the beginning. On settlement it is treated as having been a valid binding obligation from the beginning until the date of dissolution.

In the application of general principles, some variation must always be made to accommodate them to the nature of the case and its peculiar circumstances. This is not a copartnership, nor is it an ordinary corporation. The borrowing stockholder sustains a dual relation to the corporation, and, through it, to his corporate associates. In one aspect he is a debtor, the amount due from him constituting part of the assets of the corporation to which its creditors may look for satisfaction of their demands and to which, after the satisfaction of the claims of creditors, payment of expenses, and deduction for losses, all the stockholders, he included, may look for their distributive portions on dissolution or consummation of the enterprise. In another aspect, he is a stockholder, contributing to the capital stock of the corporation, along with his corporate associates, all in some form sharing the burden of expenses and the risk of losses and dividing the profits earned. But a peculiar feature of the arrangement is that each borrowing member hopes and expects that his stock, with the profits earned, will ultimately pay the debt he owes. Each borrower pays an enormously high rate of interest, but knows that every other borrower is doing the same thing, and that their money, kept continually loaned at a high rate of interest, collected weekly or monthly, and reloaned, and thus compounded, will produce large profits to the association to be apportioned to the stockholders as additions to the stock values, thus accelerating and hastening the maturity of the stock and consequent payment of the debt. The statute allows such collection of interest for the very reason that the borrower profits by the arrangement. It hastens the day of maturity of the stock and comes back to each stockholder in proportion to the amount of his stock. Though not the ordinary legal rate of interest, it is a lawful rate which the law permits the members of building and loan associations to establish among themselves for their mutual benefit.

Upon these considerations, it might be just and fair to give the association the benefit

of the premiums paid, or which ought to have been paid, up to the date of the suspension, and allow the borrower to take, as a credit on his debt, the full actual value of his stock at that date. But he agreed to pay that premium as a consideration for the opportunity given him to satisfy the loan by maturing the stock within the time contemplated. He did not agree to pay, as premium, 50 cents per share for such length of time as the association might be solvent or properly conduct its business, but for the whole period of eight years, as consideration for the satisfaction by the association of his debt at or near the end of that period by maturing the stock. The premium is not, in a legal sense, additional interest, though it practically amounts to that. Legally, it is the purchase money of the right to take from the association as a loan the ultimate value of the borrower's stock, to be paid and satisfied by the maturing of that stock. When the association becomes insolvent, or, by its misconduct, makes it necessary or proper for the borrower to dissolve his relations with it, the consideration for the agreement to pay that premium falls, and the borrower may elect to withhold it, and to claim, as a credit on his debt, such portion of it as has been paid. In some jurisdictions the premium is apportioned according to the time which has elapsed; such part of the premium as is proportionate to that time being called the "earned premium," and the residue the "unearned premium." In other jurisdictions the reasonable view of a total failure of the consideration for the premium is adopted, and the borrower is allowed credit for all the premium paid. This court, in *Young v. Building Association*, followed that line of decisions which allows the borrower credit for all the premiums paid. Here, inasmuch as the borrower has shown himself to be entitled to go out of the association, not by way of withdrawal, in the manner prescribed by the by-laws, but as of right, as in the case of a dissolution, the same principle ought to be applied.

Endlich on Building Associations, after reviewing the decisions in the different states, says, at section 531: "Upon the basis of all the decisions examined, it may be safely laid down that the clear weight of authority rejects the enforcement of any part of the premium. And in reason and fairness this must be so. The premium is not a payment in advance. The contract concerning it is that it shall be made up by the borrower in the association's hands, and that, upon his final settlement with the association, when the work of both shall be accomplished and their reciprocal duties fulfilled, it shall be relinquished to and appropriated by the association. The contract, therefore, is an entire one. It does not contemplate a stoppage at any intermediate point and an apportionment of the premium accordingly. No part of it is earned until the whole

scheme has been carried out. Hence, if at any stage the society, breaking down, fails to perform its part of the bargain, the promise to pay it the premium loses the consideration upon which it was based, and ought to be regarded as wholly abrogated. To attempt to apportion the premium is simply to treat it as additional interest. To regard it as something with which the borrower has parted, as something which the society has earned, as assets in its hands before it has done that which entitles it to retain the premium, is to misconceive its true character and office. It must be true, therefore, that the basis of the borrower's indebtedness is to be taken to be the amount of money actually passing into his hands with legal interest thereon. But it cannot be true that he is to be allowed as deductions therefrom all that he has paid into the society. That would be overlooking his duty as a member to contribute to the losses and expenses of the common enterprise. What he has paid as interest is to be allowed him as paid upon interest. If he has paid interest upon the premium bid by him, he has overpaid his interest, and the excess ought to go in reduction of his debt. * * * When a building association's affairs are in the hands of a receiver, acting under the direction and supervision of a court of equity, there can be no difficulty in determining, or at least approximating, what its receipts, profits, and losses have been, what its liabilities are, and what is the value of every share of stock presently held advanced or unadvanced in it, and how much every member must lose upon every dollar paid in by him upon his stock, making a proper allowance for the expenses of settlement. If that can be ascertained, the amount per share to be credited upon the borrower's indebtedness—that is, upon the amount actually received by him originally—has been found, and if he pays the balance, with interest (being credited with interest payments), he has discharged all he owes the society or his fellow members. If these preliminary calculations can be made to yield only an approximately correct result, a corresponding credit ought to be allowed for the borrower's stock, and his right preserved to reclaim what, on a final settlement, he shall appear to have overpaid."

This law seems to be justly and fairly applicable to the present case, but at what time ought the application of it to be made? Since June 1, 1898, nothing appears to have been done but receiving interest and premium on the loans and collecting assets. The plaintiff has not paid, nor been permitted to pay, any dues, and it seems to be admitted that none had been paid by any person. He has made payments corresponding in amount to the dues, but with the understanding that these payments were to be credited upon his debt. Hence it appears that there has been a cessation since June 1, 1898, of some of the most important func-

tions of the association. What disposition has been made of the collections does not appear. Whether they have been reloaned and profits made, or have been consumed in the payment of withdrawals, nothing in the record indicates. It is fair to presume that, had the association regained its normal and healthy condition, this state of affairs would not exist. It would be exercising all its functions and working towards maturity of the stock. Something must still be radically, and perhaps incurably, wrong. All this argues that such was the condition at the date of the suspension. The logic of the situation and circumstances disclosed by the record is that a process of liquidation has been carried on for all these years by the directors. Hence the adjustment between the plaintiff and defendant ought to be made as of June 1, 1898. He should be charged with the amount of the loan and interest thereon from the time at which it was received, and all payments made by him as interest and premium should be credited and applied on the debt and interest thereon, according to the rule governing partial payments, and the actual value of his stock, as nearly as it can be ascertained, as of June 1, 1898, should be credited also. Then, starting with the balance thus ascertained, he should be charged with interest thereon, and credited with all payments of interest and dues, or sums paid in lieu of dues, under the rule governing partial payments, and required to pay the amount remaining due as thus ascertained, and, upon the payment of said amount, the association should be required to execute a release of the deed of trust. How far the result, so to be determined, will differ from that at which the court below arrived in treating the loan as an ordinary one, depends largely upon the value of the stock. The dues paid up to June 1, 1898, amounted to \$388.80; but it seems that several payments were omitted, in consequence of which the value of the stock at that date would probably be considerably less than that of other shares, the dues on which were kept promptly paid. The incompleteness of the record respecting the status and value of the stock at the time aforesaid may render it necessary to conduct an inquiry in respect thereto. It may also appear, upon full investigation and disclosure of all the facts, that credit for the full book value of the stock on that date would not be equitable and just. Therefore the matter of what should be credited as the value of the stock at the time aforesaid will be left open for determination by the circuit court upon ascertainment of the necessary facts.

For the reasons above given, the decree complained of will be reversed, and the cause remanded for further proceedings, in accordance with the views herein expressed and the principles and rules governing courts of equity.

SANDERS, J. (dissenting). The decree of the circuit court is based upon the theory that at the time the defendant became a member of the association, and at the time the loan was made to him, certain by-laws of the association were in force, providing that monthly dues should be collected from all members and stockholders of the association, and that some time thereafter the by-laws were changed, so as to permit the directors to indefinitely suspend the payment of such dues, which they did, in pursuance thereto, thereby changing the contract entered into between the plaintiff and the association, and defeating the entire purpose and object thereof, and destroying its features as a building and loan association, and that, this being done, the loan made should be treated as a simple loan, bearing the legal rate of interest. This conclusion of the circuit court, I think, is eminently correct, and I would affirm the decree.

The conclusion reached by the court in its majority opinion and that reached by the circuit court differ only in respect to the basis of settlement; it being held here that the indefinite suspension of dues amounted practically to a dissolution of the association, and that the settlement should be governed by the principles announced in the case of *Young v. Building Association*, 48 W. Va. 512, 38 S. E. 670. It does not appear from the record that the association, at the time of the suspension of the payment of dues, was insolvent, or that it is now insolvent, or has been dissolved; nor is there any such claim, but, so far as the record shows it is perfectly solvent and continuing. Therefore it is improper to hold that the settlement made with the plaintiff should be upon the theory that the association is not a going concern. So far as we know, this plaintiff is the only member complaining of such suspension, and the only one who seeks a settlement and desires to withdraw. This being so, the question arises, must he be required to fulfill the contract on his part by paying dues upon his stock until the time of such suspension? The association, by the indefinite suspension of dues, has entirely changed the contract of the plaintiff, by necessarily extending the maturity of his stock to a time far beyond that at which it would have matured, if the contract had been carried out as entered into, and had been continued upon the plan and scheme of a building and loan association. This being so, the plaintiff should only be required to repay to the association the amount of the loan, with 6 per cent. interest, giving him credit upon the plan of partial payments for all payments he has made. It is said that he should be required to pay dues up to the time of the suspension, because to hold otherwise would be a hardship on the other stockholders and members of the association. Why is this so? He repays to the association the sum of money which it advanced to him, as a loan,

with 6 per cent. interest. It is in no worse condition. The money that it advanced has been repaid, with its legal interest. When the plaintiff entered into his contract, the by-laws of the association entered into and formed a part of it, and these provided for the payment of dues, premium, and interest in monthly installments until the maturity of the stock, but premium not to exceed eight years. By this plan there was a chance that the association, if its affairs were honestly administered, would mature its stock within this term from the earnings of the company. This the suspension of dues effectually prevents. The association disabled itself to perform its contract. It does not appear from the record but that the other stockholders have assented to and acquiesced in the change. The plaintiff cannot be bound by their acquiescence, nor is he required to contribute to the support of the association the dues paid by him to the time of the change, on the assumption that to hold otherwise would be a hardship on the other, and, so far as we know, assenting stockholders. The consideration for his contract has failed absolutely, and he has the right to treat it as abrogated, which he has done. This being so, nothing more should be required of him than the interest on the money received; but that, together with the principal, he should pay.

(124 Ga. 386)

JENKINS v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Feb. 19, 1906.)

NEGLIGENCE—INJURY TO LICENSEE.

Under the facts alleged in the plaintiff's petition, he entered the premises of the defendant railway company as a volunteer and mere licensee, and the injuries he received were attributable, not to an omission by the company to perform any duty which it owed to him as such, but to his own voluntary act.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 42-44.]

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action by G. B. Jenkins against the Central of Georgia Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

S. L. Craven, W. R. Hutcheson, and C. G. Janes, for plaintiff in error. J. B. Branham and McHenry & Maddox, for defendant in error.

EVANS, J. The railway company demurred to the plaintiff's petition; he amended it, and the result produced was substantially as follows, so far as the setting forth of a cause of action is concerned: During the month of January, 1903, the defendant company operated a steam shovel within half a mile of plaintiff's home near Felton, in Haralson county, which was used for the purpose of hoisting dirt and loading the same on cars, to be transported to vari-

ous points along the company's railway. On or about January 12th an employé of the company came to plaintiff's house and told him that "Mr. Clint Morgan, who was conductor on the train of cars which transmitted the dirt from the steam shovel," wanted plaintiff to come up to where the shovel was located for the purpose of giving him some information as to where the lines of certain land lots were, etc. As the company's employé in charge of the steam shovel knew, the plaintiff was familiar with the location of the land lines and the numbers of the land lots in the vicinity, and the desired information was sought by defendant's employé in order that they might not raise dirt with the shovel from lands other than those from which they had a right to take soil. In response to the message thus delivered to him, plaintiff went to the steam shovel, though the day was very cold and ice was to be found where water had stood upon the surface of the ground. When he arrived, he was informed by one Mr. Turner, one of the company's employés, that the conductor in charge of the dirt train had gone off with a train load of dirt and would be gone 30 minutes. Upon hearing this, plaintiff started down towards a fire burning on the ground near the shovel, with a view to warming himself, whereupon Turner told him to get up in the box or car which enclosed the boiler and engines, as the boiler was hot and this was a much better place to warm. He assisted plaintiff up the steps attached to the car enclosing the boiler, the steps being very small, hard to ascend, and extending from a point near the ground to the floor of the car, a distance of $5\frac{1}{2}$ or 6 feet from the ground. Turner told plaintiff "it would be perfectly safe for him to ascend the steps and to come down same, as he would assist him in doing so.

The reason for Mr. Turner's saying it would be perfectly safe for petitioner to ascend said steps to said box enclosing said boiler and engines, as aforesaid, was because petitioner objected to ascending said steps on account of his age and had not good use of himself, and told said Mr. Turner he was afraid he would fall and hurt himself in doing so, but said Mr. Turner assured your petitioner that he would assist him up into and down from said box, * * * and did assist your petitioner up into said box safely." Within 25 or 30 minutes thereafter, and before Morgan, the conductor, had returned, an employé remarked that Mr. C. B. Wilburn, superintendent of the Chattanooga division of the defendant's railway, was coming, Turner immediately left the scene, as did all the rest of the employés, leaving plaintiff alone in the box or car, and without offering him any assistance in getting out. All of them went out of his sight and hearing. After he had waited a considerable time, about an hour, and until it was growing late in the afternoon, expect-

ing Turner or some other employé to return to assist him to the ground, he undertook to get out by himself, as none of them had returned, using all precaution to get out of the box without hurt. When he put his foot on the top step, he slipped, fell to the ground, and was seriously injured, the step having ice and dirt on it which caused his foot to slip as he stepped thereon. The ice and dirt had been allowed to there accumulate during the day, which fact was known to Turner and other employés at the steam shovel, but of which fact plaintiff was ignorant. Having been invited by Turner to ascend the steps, and having received his assistance in doing so, plaintiff did not detect the condition of the steps in ascending them, and he could not readily have done so, because he was old and his eyesight was bad, he being at the time some 65 years of age. "Turner was the superintendent and person in charge of said steam shovel, and had the management, working, and operating thereof; * * * was authorized to invite and permit, and did invite, permit, and assist your petitioner to go upon said steam shovel." On account of plaintiff's feeble condition, and because "he could not see in the dark sufficiently well to safely travel from said steam shovel to his home after dark on said evening, it then growing late and colder as night grew nearer, he became anxious and uneasy, and it was necessary for him to get off of said shovel and go to his home before it grew darker or colder, * * * a reasonable time having elapsed in which he had awaited the return of said Turner," and plaintiff having "then and there loudly as he could called to said Turner to return and assist him in alighting from said shovel." Plaintiff was entirely free from fault, but the defendant company was grossly negligent (1) in allowing ice to accumulate on the steps, and (2) in not complying with the contract to assist him safely from the box to the ground, as its employés had promised to do, it being the duty of the company and its agents to see that he reached the ground safely, he being its guest by the invitation of its agents and employés, and having called at the steam shovel upon a mission of interest to the railway company but not to himself. It was incumbent upon the company to see to it that he arrived safely at the steam shovel, that he received no injury while he remained there on this mission, and that he departed safely.

After the plaintiff had amended his petition, the defendant company renewed its demurrer to it, and the court ruled that it set forth no cause of action, and accordingly dismissed the action. We are called on to decide whether or not this was the proper

direction to give in the case. At the outset it is pertinent to remark that even were the plaintiff a guest of the railway company, it was not an insurer of his safety, as the pleader apparently assumes in stating his conclusions of law and fact. We cannot undertake to judicially say that, under the facts alleged, the plaintiff came upon the premises of the railway company upon its express invitation and as its welcome guest. To do so would be to hold, as a matter of law, that the conductor of a dirt train is to be regarded as having implied authority to invite and transmit invitations to friends or strangers to visit and consult with him on matters of moment incident to his business. No such authority can be implied from the official designation given to the employé who invited the plaintiff to call. *Central Ry. Co. v. Morris*, 121 Ga. 496, 49 S. E. 606, 104 Am. St. Rep. 164. He came not as a guest, therefore, though he may have been welcomed as one by Mr. Turner, "the superintendent and person in charge" of the steam shovel, who "was authorized to invite and permit" the plaintiff to get upon the car in order to warm himself while waiting the return of the conductor of the dirt train. At best, this authority was limited to extending to visitors calling upon employés license to enjoy the comforts afforded by the compartment into which Mr. Turner "did invite, permit, and assist" the plaintiff. Relatively to the company, the plaintiff was a mere licensee, and it was under no duty to point out to him the obvious fact that the steps were covered with dirt and ice. Nor was it under any obligation to render him any assistance in entering or departing from the car into which he was invited by Turner, nor does it appear that he was acting within the scope of his duties in rendering the proffered assistance and promising to assist the plaintiff in alighting. The courtesy and kindness with which this employé treated this elderly and infirm gentleman imposed upon the company no duty of holding itself in readiness to assist him whenever he might choose to leave the safe and comfortable quarters he was permitted to occupy while awaiting the return of its conductor. The plaintiff had the alternative of patiently waiting till Turner returned and was ready to perform his purely gratuitous and distinctly individual undertaking to render him the promised assistance, or voluntarily assuming the risk of leaving the car in safety without such assistance, despite his infirmities. He chose the latter, the hazardous course, and was injured. The company is not bound by his election, whether he did or did not act with ordinary prudence.

Judgment affirmed. All the Justices concur.

(124 Ga. 315)

SUTTON v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. INDICTMENT—DIFFERENT COUNTS.

Where an indictment or special presentment contained four counts, charging respectively that a man was guilty of fornication with a named woman, both of them being alleged to be single; that he was guilty of adultery with the same woman, both of them being alleged to be married; that he was guilty of adultery and fornication with her, he being alleged to be married and she to be single; and that he was guilty of adultery and fornication with her, he being alleged to be single and she to be married, the court was not bound to require the state to elect on which of these counts it would try the accused.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 438-447.]

2. SAME—TIME FOR ELECTION.

In such a case, after the evidence for the state had been partly introduced and a motion had then been made to require the state to elect on which count it would proceed, if the court granted such motion, there was no error in not requiring the election to be made until the evidence for the state was closed.

[Ed. Note.—For cases in point see vol. 27, Cent. Dig. Indictment and Information, § 427.]

3. ADULTERY — FORNICATION — CRIMINAL PROSECUTION—EVIDENCE.

Where the evidence showed that on several occasions the defendant, who was a married man, visited the house where the woman lived with whom he was charged to have committed adultery and fornication, and that he had once or twice been seen lying in or on the bed with her, it was competent to prove that her general reputation was that of a prostitute, and that the house at which she lived was generally reputed to be a bawdyhouse.

4. SAME—SUFFICIENCY.

The evidence authorized a conviction, and none of the grounds of the motion for new trial require a reversal.

(Syllabus by the Court.)

Error from Superior Court, Miller County; E. J. Reagan, Judge.

Arthur Sutton was convicted of crime, and brings error. Affirmed.

A special presentment, was returned against Sutton, containing four counts. The first charged him with the offense of fornication with one Annie Ethridge, it being alleged that he was a single man and she a single woman; the second charged him with adultery with the same woman, alleging that both were married; the third charged him with the offense of adultery and fornication, alleging that he was a married man and she was a single woman; the fourth charged him with the offense of adultery and fornication, alleging that he was a single man and she was a married woman. Each of the counts charged that the offense was committed with the same woman and on the same day. The jury found the defendant guilty on the third count. He moved for a new trial. It was overruled, and he excepted.

Wm. I. Greer, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

LUMPKIN, J. (After stating the foregoing facts). 1. One ground of the motion for a new trial was that after the jury had been impaneled and sworn, and some of the evidence had been submitted to them, the state offered evidence to prove that Annie Ethridge was a single woman. The defendant objected to this, on the ground that the special presentment alleged that she was a married woman. The solicitor general replied that it contained four counts. The defendant requested that the state be required to elect on which it relied for conviction. The court held that the state would not be required to elect until all the evidence was in. There was no demurrer to the presentment. It appears in another part of the record that at the close of the evidence for the state, an election was required.

In *State v. Hogan*, R. M. Charl't 474, it was said: "Where two distinct felonies are charged upon the prisoner in one indictment, the court may before plea quash the indictment, or, after plea compel the prosecutor to elect on which charge he will proceed. But this rule is to be exercised by the court in its discretion, and will be enforced, when the prisoner may be confounded in his defense, or prejudiced in his challenges, or where the attention of the jury will be distracted by such joinder. And it does not apply, unless the charges are actually distinct, and grow out of different transactions. The court will not compel the prosecutor to elect upon an indictment charging prisoner with larceny, and receiving stolen goods, etc., when it appears by the indictment that the charges relate to the same transaction, modified to meet the proof." In 1 Bish. New Crim. Proc. § 454, subsec. 2, it is said: "We have seen that this compelling of an election pertains rather to judicial discretion than to absolute law. So that in most of our states the determination of the judge thereon will not ordinarily be revised by the higher tribunal. In some states it will; perhaps under special circumstances in all." In sections 457 and 458 it is said: "In felony in states wherein the combined counts are restricted to one felonious transaction, the prosecution will be required to confine its evidence to some particular transaction which it selects. Where the counts are for different felonies really or supposed to be connected with the one transaction, as, larceny and receiving stolen goods, or larceny and abetting the same, or embezzlement and larceny, or making a forged writing and uttering it, or one felony in different degrees, and, a fortiori, where one felony is set out in various ways in the different counts to meet diversities in the proofs, no election of counts will ordinarily be required, but all will be left open for the jury to pass upon in their verdict. In misdemeanor, or in any grade of crime, if by a statute or usage there can

be a conviction for only one offense in fact, rules like those just stated prevail the same as in felony. But commonly in misdemeanors, though not quite without exception, two or more congruous offenses may be charged in different counts, and punished substantially the same as though they were different indictments." In *Lynes v. State*, 46 Ga. 208, it was said: "In cases of misdemeanors, the joinder of several offenses in the indictment will not, in general, vitiate the proceedings at any stage of the prosecution." And in the opinion of Chief Justice Warner (page 210) it was said that "in offenses inferior to felony, the practice of quashing the indictment, or calling upon the prosecutor to elect on which charge he will proceed, does not exist." See, also, *Davis v. State*, 57 Ga. 67; *Dohme v. State*, 68 Ga. 339; *Williams v. State*, 107 Ga. 693, 33 S. E. 641. In *Johnson v. State*, 26 Ga. 611, it was held that "if an indictment contains two counts varying the charges against the defendant for the commission of the same act, when, on the conviction of the defendant on either, the grade of punishment may be the same, the Attorney General cannot be compelled to elect on which count he will put him on trial." *Johnson's Case* is cited approvingly in *Jackson v. State*, 76 Ga. 568. See, also, *Stewart v. State*, 58 Ga. 577 (3); *Memmler v. State*, 75 Ga. 576. In *Long v. State*, 12 Ga. 293, it was said that "two distinct offenses cannot be joined in the same count in an indictment." In *Gilbert v. State*, 65 Ga. 449, it was held, that "it is a general rule that a defendant cannot be charged with separate and distinct offenses in the same indictment; but offenses which are of the same nature, and differ only in degree, may be joined in an indictment. Further, there are some offenses, though not of the same nature, which may be incorporated in the same indictment, if they constitute but one transaction, but not otherwise." In that case the indictment contained but two counts, by the first of which the accused was charged with burglary and larceny from the house, and by the second with receiving stolen goods. In illustrating the general rule which he announced, that distinct and separate offenses cannot be charged in the same indictment, Justice Crawford referred to larceny and perjury, but added that "the same offense; that is, the same species of offense, may be charged in different ways in several counts to meet the evidence." See, also, *Hoskins v. State*, 11 Ga. 92; *Stephen v. State*, 11 Ga. 225; *Williams v. State*, 72 Ga. 180; *Sims v. State*, 110 Ga. 290, 34 S. E. 1020; *Walker v. State*, 118 Ga. 772, 45 S. E. 621; *Cody v. State*, 118 Ga. 784, 45 S. E. 622; *Welborn v. State*, 119 Ga. 429, 46 S. E. 645; *Bashinski v. State*, 123 Ga. 508, 51 S. E. 499.

As to counts varying the allegations in regard to the same transaction in a civil case, see *Gainesville Railroad Co. v. Austin*, 122

Ga. 823, 50 S. E. 983. In *Wasden v. State*, 18 Ga. 264, it was held that an indictment for adultery and fornication against a single person is good; and it was said that "the offenses here prohibited are all joint offenses. Each is the offense of a man and a woman acting jointly. The remedy here provided is, however, a several remedy, is a separate indictment against each—the man and the woman." In *Foster v. State*, 41 Ga. 582, it was held that under the Code, the man and woman could not be jointly indicted; but must be indicted severally. There was no question of the form of the indictment against one. In *Kendrick v. State*, 100 Ga. 360, 28 S. E. 120, it was held that under the Penal Code there are three distinct kinds of indictable sexual intercourse; and that if a man was indicted for adultery alleged to have been committed with a married woman, and the proof showed that she was not married, the verdict of guilty could not be upheld. In that case there was only one count, charging adultery, and it was held that the proof must correspond to the charge; but there was no ruling that there could not be different counts to adapt the indictment to the result of the proof. See, also, *Heath v. State*, 91 Ga. 126, 16 S. E. 657; *Bennett v. State*, 103 Ga. 66, 29 S. E. 919, 68 Am. St. Rep. 77; *Nell v. State*, 117 Ga. 14, 43 S. E. 435. In *Bish. Stat. Cr.* (3d Ed.) § 701, after stating that on a statute in alternative words, as "adultery or fornication," it would not be good pleading to charge the offenses in the alternative, nor conjunctively in one count, the author adds: "A ready method of escape from this dilemma where it is desirable to adapt the indictment to either result of the proofs, is to insert two counts; the one for living in adultery, and the other for living in fornication;" and after referring to a decision in Alabama to the effect that under a single count charging adultery there could not be a conviction for fornication, he further says: "On principle, while this doctrine may be correct under some forms of the indictment, it would seem perfectly practicable to draw a count in such terms as to avoid all objections, whereon the conviction would be for living in adultery if the marriage was proved, or in fornication if it was not." Whether this could be done in a single count or not, we see no reason why it could not be accomplished in two counts. *Clark on Crim. Proc.* 289; 9 *Encyc. Pl. & Pr.* 645.

It would be of little avail to draw an indictment with different counts, so as to be adjusted to the evidence showing whether the parties were married or single, if the defendant could immediately quash it or require an election. The offenses of adultery, fornication, and adultery and fornication are all included in section 381 of the Penal Code of 1895. The thing which the Legislature was declaring to be a crime was illicit sexual intercourse. When committed by a single person or a married person it may be a dis-

tinct offense, but not necessarily of a different character or referring to a different transaction. That this is so is indicated in the very name of the offense of which this defendant was found guilty, for it is equally "fornication and adultery" whether the man is married and the woman single, or vice versa. In *Camp v. State*, 91 Ga. 8, 16 S. E. 379, the presiding judge required an election to be made, but there was no ruling by this court as to whether this was necessary. It is apparent that the illicit sexual intercourse charged in different counts of the indictment now under consideration does not refer to distinct and separate transactions. It was not necessary for the court to have required the state to make any election at all; but the verdict could have determined on which count the defendant was found guilty. This being so, the defendant obtained more than he had a right to legally demand.

2. As to the time when the motion to require the state to elect should have been made, Justice Crawford, in *Gilbert's Case*, 65 Ga. 451, said it would "hardly be denied that the right of election existed, even with demurrer waived, in an indictment joining a felony and a misdemeanor; if not before testimony offered, certainly afterwards, when it appeared that the larceny proved showed that it was only a misdemeanor, the goods stolen being less than \$50 in value." See, also, 1 Bish. New Crim. Pro. (4th Ed.) §§ 461, 462. Mr. Bishop's opinion as to the time when the state will be required to elect is that "on the whole, while it is believed that there are some rules of law controlling all cases, in most the question of election is properly and best left to the discretion of the presiding judge, to be exercised with reference to the special facts." Although he adds that "whatever is done at the early stages of the trial, plainly, as a general rule, the election should be required before the prisoner opens his defense."

3. Objection was made to the admission of evidence that a witness had seen the defendant several times at the house of Kate Ethridge, where Annie Ethridge lived. The ground of this objection was, "that the defendant was not charged with going to the house, but was charged with adultery and fornication." Complaint was also made that evidence was admitted that Annie Ethridge bore the reputation in the community of being a prostitute, and that the house which was visited by the defendant was reputed to be a bawdyhouse. This evidence was objected to as irrelevant. It is seldom that the act of adultery or fornication can be proved by direct evidence. Usually it must

be established by circumstantial evidence or inferred from a chain of circumstances proved. Whichever form the proof may take, it is sufficient if the offense is proved beyond a reasonable doubt. Among the circumstances from which it has been held that guilt may be inferred is where the proof shows that a married man associated with a known prostitute. *Clocchi v. Clocchi*, 26 Eng. Law & Eq. R. 604 (a civil case). Or when a married man is seen to enter a house of prostitution, and is known to be in the room with a common prostitute for a sufficient time to commit the act, adultery may be inferred. *Commonwealth v. Gray*, 129 Mass. 474, 37 Am. Rep. 378. Of course, these circumstances are subject to explanation; the jury ultimately determining what was the fact. Professor Wigmore (1 Wig. on Ev. § 68) says: "Where the character offered is that of a third person not a party to the cause, the reasons of policy (noted ante, § 64) for exclusion seem to disappear or become inconsiderable; hence, if there is any relevancy in the fact of character; i. e., if some act is involved upon the probability of which a moral trait can throw light, the character may well be received." In *Clement v. Kimball*, 98 Mass. 535, it is said that "such testimony often becomes competent when there is other evidence in the case to show relations of an equivocal character." See, also, *Blackman v. State*, 36 Ala. 295, 297; *Marble v. Marble*, 36 Mich. 386; *State v. Mecum*, 95 Iowa, 433, 64 N. W. 286; *Com. v. Clifford*, 145 Mass. 97, 13 N. E. 345; 2 Gr. Ev. (16th Ed.) § 44; *Starke v. State*, 97 Ga. 193, 23 S. E. 832; *Eldridge v. State*, 97 Ga. 192, 23 S. E. 832; *Johnson v. State*, 119 Ga. 446, 46 S. E. 634; *Gossett v. State*, 123 Ga. 431, 437, 51 S. E. 394 (4). A contrary rule is held in Texas (*Guinn v. State* [Tex. Cr. App.] 65 S. W. 376). In the case at bar it was shown that on several occasions the defendant visited the house where Annie Ethridge lived, and that he had once or twice been seen in bed with her after dark; he being a married man and she a single woman. After this proof, the court admitted evidence of general reputation as to the character of the woman, and of the house in which she lived.

4. The conviction was in accordance with the evidence, and there was no error requiring a new trial. One ground complains of the appointment of a solicitor general pro tem. to assist the grand jury, but no objection appears to have been made or ruled on in the trial court.

Judgment affirmed. All the Justices concur.

(124 Ga. 801)

POPE v. STATE.

(Supreme Court of Georgia. Feb. 15, 1906.)

1. CRIMINAL LAW — VENUE — DIVISION OF COUNTY.

If a county is divided, and a portion of its territory enters into the formation of a new county, a criminal case pending in a court of the original county which involves an offense committed before the division in the territory embraced within the limits of the new county, cannot be properly tried in the court of the original county, over a timely objection made by the accused raising the question of jurisdiction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 231.]

2. SAME—TRANSFER OF CAUSE.

The Constitution declares that criminal cases shall be tried in the county where the offense was committed; and one accused of crime cannot be deprived of this constitutional right by the creation of a new county while the case is pending against him. Such a person has a right to demand a trial in the county which embraces the territory where the offense was committed, and, although the act creating the county and the general law of the state may be silent upon the subject of the transfer of criminal cases, under such circumstances the court in which the case is pending has the inherent power to order a transfer of the case to a proper court in the new county, and that court has like power to take jurisdiction of the case and carry the same to judgment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 231.]

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

C. P. Pope was convicted of assault and brings error. Reversed.

Pope was tried on December 5, 1905, in the city court of Vienna, upon an accusation charging him with assault and battery. The accused filed a plea to the jurisdiction upon the ground that the alleged offense was committed on June 8, 1905, in the tenth district of Dooley county; that Crisp county was created August 17, 1905, and organized on November 22, 1905, and that the tenth district of Dooley county thereafter became a part of Crisp county; and that therefore the city court of Vienna, which had jurisdiction only of offenses committed in Dooley county, had no jurisdiction over the alleged offense. The plea further alleged that the accused resided in Crisp county. The accused also entered a plea of not guilty, and this plea, together with the plea to the jurisdiction, were submitted to the jury. The allegations of the plea to the jurisdiction were admitted by counsel for the state to be true. The accused moved for a judgment of not guilty, and for a dismissal of the case against him. Both motions were overruled, and the accused was convicted, and to these rulings he excepted.

Whipple & McKenzie, for plaintiff in error. E. F. Strozler and F. A. Hooper, Sol. Gen., for the State.

COBB, P. J. (after stating the foregoing facts). From 1777 until 1877 the General

Assembly was authorized to lay out new counties whenever in its judgment it was necessary for the public welfare. The power to lay out new counties was expressly recognized in the earlier Constitutions of this state, and was never taken away by any of the later Constitutions until 1877. The last exercise of this power prior to the adoption of the present Constitution was the creation of the county of Oconee in 1875, just two years before the convention assembled which declared that no new counties should thereafter be created. In 1904 the Constitution was amended so as to authorize the creation of eight additional counties. The General Assembly, in 1905, exercising the power granted to it, created the number of counties authorized by the amendment. As the power of the General Assembly to create new counties existed for 100 years, it would seem that there would be many cases involving questions arising out of the creation of new counties, but they are few in number. Less than 10 have been called to our attention, and these seem to be all that are contained in the Reports of this court. The first case arising out of the creation of the eight new counties above referred to is now before us for consideration, and involves the question as to the venue of a criminal case pending at the time that the new county was created, when the offense was committed in the territory embraced in the limits of the new county.

The provisions of the Constitution fixing the venue in all cases, both civil and criminal, was intended to be exhaustive. It is therein declared that divorce cases shall be brought in the county where the defendant resides if a resident of this state, and if the defendant be not a resident of this state then in the county where the plaintiff resides; that suits against the maker and indorser of a promissory note, or drawer, acceptor, or indorser of a foreign or inland bill of exchange, or like instrument, residing in different counties, shall be brought in the county where the maker or acceptor resides. Civ. Code, 1895, §§ 5869-5873. It is to be noted that in the provisions just referred to the Constitution fixes the venue by the use of the words "shall be brought." The Constitution declares that cases respecting titles to land shall be tried in the county where the land lies. Equity cases shall be tried in the county where the defendant resides against whom substantial relief is prayed. Suits against joint obligors, etc., may be tried in either county, and all other civil suits shall be tried in the county where the defendant resides, and all criminal cases shall be tried in the county where the crime was committed, except where the judge is satisfied an impartial jury can not be obtained. Civ. Code 1895, §§ 5870-5872, 5874.

The county of Crisp was created by an act approved August 17, 1905. It provided that the first election for county officers should be

held on the first Wednesday in October, 1905. There is nothing in the act relating to cases pending in the courts of Dooley county, from which the new county was carved. Acts 1905, p. 52. On August 21, 1905, an act was approved providing for the organization of new counties. Acts 1905, p. 46. The only provision in that act relating to pending cases is the first section of the act, which is in the following language: "When a new county is organized the jurisdiction of all suits pending in the county or counties from which said new county has been laid off, of which, under the Constitution and laws of this state, the new county shall have cognizance, is transferred immediately to the corresponding courts in said new county, and the jurisdiction of suits then pending in the county or city courts of the old counties is conferred upon the superior court of said new county, together with all the court papers pertaining thereto to which shall be attached the certificate of the clerk of the court from whose office they came that they are the proper papers of the suit, and the amount of cost accrued therein, and the amount then due, and on the final disposition of said transferred cases, it is hereby made the duty of the clerk of the court, or, in case of no clerk, of the presiding justice, to collect the costs due the officers of court in the county from which said case was transferred, and to account to such officer for all costs collected by them; and in event of their failure to account for such costs to the officers of the court from which said cases were transferred, they are hereby made liable to attachment for contempt." A provision somewhat similar to this is found in Code 1863, § 31, and in subsequent Codes, but was omitted from the Code of 1895 for the obvious reason that at the time that Code was adopted there was no power in the General Assembly to create new counties.

The term "suit" cannot, without serious strain, be construed to include a criminal case. The act is therefore silent in regard to the status of criminal cases involving offenses committed in the territory of the new county, which were pending in the old county at the time the new county was created. While the act provides for the transfer of civil cases, an investigation of the authorities as to the effect of the creation of a new county upon such cases may throw some light upon the status of a pending criminal case. When an act providing for the creation of a new county provides for the future election of county officers, the territory embraced within the limits of the new county does not become a county until the organization of the new county is perfected. As was said by Sander-son, J., in *People v. McGuire*, 32 Cal. 143: "In constituting a county something more is required than defining its boundaries. A local government must be provided, and the creation of a county is not accomplished until both these things have been done in the ap-

pointed mode. To hold otherwise would lead to very absurd consequences." And see 7 Am. & Eng. Ency. Law (2d Ed.) 923.

In *Perkins v. Patten*, 10 Ga. 241, a suit was commenced against two defendants residing at the time in Marion county, and before trial and judgment the new county of Macon was created, embracing that portion of the territory of Marion in which the defendants resided. There was no provision in the act for the transfer of suits pending from the old to the new county. It was held that by operation of law under the provisions of the Constitution the new county was the proper county for the trial of the case, that being the county in which the defendants resided, and that the judgment rendered in the new county was a good and valid judgment. In that case Judge Warner said: "By the new organization of the counties the defendant resided in Macon county, without any change of his location. By operation of law he becomes a citizen of the county of Macon, and is bound, with his neighbors, to perform all his civil duties in that county. His neighbors perform jury duty in the courts of the new county, and not in the old, so that, if his legal rights are to be determined by a jury from the vicinage, the trial must be had in the new county. But, in our judgment, the Constitution settles the question that the trial of the cause was properly had in the new county of Macon, for the reason that was the county wherein he resided. If the Constitution did not give the right to have the cause tried there, an enactment of the Legislature transferring the cause from the old to the new county could not confer it. The jurisdiction for the trial of the cause is fixed by the Constitution to be in the county wherein the defendant resides. The suit was properly commenced in Marion county, as the defendant resided there at that time; but the new county of Macon being organized, in which the defendants resided, the suit was necessarily transferred, by operation of law, from the county of Marion to the new county of Macon for trial, in accordance with the provisions of the Constitution."

In *Murdock v. Little*, 18 Ga. 719, a recovery in ejectment was had in Crawford county, and at a subsequent term a motion was made to set aside the judgment and execution issued thereon, because no process was annexed to the declaration. Pending this motion the land in dispute was cut off into Taylor county, and it was held not error for all the record in the case to be transferred to Taylor county. Judge Lumpkin, in the concluding sentence of the opinion, says: "At any rate, as the proceeding is yet incomplete, it would seem to be more symmetrical, and more in conformity to the spirit of our Constitution that further litigation springing out of the ejectment should be conducted in the county where the land lies."

In *McBain v. Wimbish*, 27 Ga. 259, a will was propounded for probate in Sumter

county, in which the testator had resided at the time of his death. A caveat was entered and an appeal taken by consent to the superior court. At this stage of the case a division of the county took place, and the record in this case, with that of others, was transferred to Schley county. When the case came on for trial in Schley county a motion was made that the case be returned to the superior court of Sumter county, and the court declined to grant this motion. It was held by this court that the motion was properly overruled. There was nothing in the act creating the new county which controlled the matter, nor was there any general law on the subject; but it was nevertheless held that the case was properly transferred to the new county.

In *Knight v. Knight*, 27 Ga. 633, the testator died in Henry county. His will was probated and admitted to record in that county. An application was then made to revoke the letters testamentary on account of the birth of a posthumous child unprovided for. In the meantime that part of Henry county including the testator's residence at the time of his death was cut off into Spalding. It was held that Henry county had jurisdiction of the proceeding, and that the right to transfer to Spalding county was a personal privilege. It was said by Judge Lumpkin: "This right to transfer is a question of privilege, rather than of constitutional law, and may be waived by the party; and all done up to that time will be adjudged to be recte acta." And Judge Benning in a concurring opinion said that, while it was doubtful if the act of the Legislature, "Cutting off the part of Henry and making it a part of Spalding, did per se deprive the court in Henry of jurisdiction," . . . the effect of the act was at least to give to any of the parties interested in the estate the privilege to have the case transferred to Spalding." Judge McDonald dissented, but filed no dissenting opinion.

In *McDougald v. Maitland*, 30 Ga. 703, it was held that where a case is to be transferred from an old to a new county, and the papers are lost, copies should be established in the old county before the transfer of the case is ordered.

In *Kelly v. Tate*, 43 Ga. 535, an action of ejectment was brought in Sumter county, and while the case was pending a change in the county line was made, by which the land in controversy was made a part of Macon county. It was held that the act changing the county line deprived the superior court of Sumter county of jurisdiction of the case, and that the process of the court should not have been enforced, and a judgment refusing to grant an injunction restraining its enforcement was reversed. Mr. Chief Justice Lochrane in the opinion said: "For after the act of the Legislature changed the territorial limits of the county, and the land, the subject of the suit, fell within a differ-

ent county, the court was deprived of all jurisdiction over the subject-matter of the litigation, and, upon these facts being shown, ought to have granted the injunction sought."

The case of *Brown v. Bleckley*, 26 Ga. 328, did not involve the question of venue at all, but simply the lien of the officers of the old county upon fines and forfeitures realized in the new county upon cases transferred from the old county. In *Smith v. Dees*, 92 Ga. 549, 17 S. E. 925, the question of venue was not involved, but whether the right of the county to tax was lost by an erroneous acquiescence of nearly 40 years in which the land was not embraced within the limits of the county.

The foregoing embrace all of the cases that we have been able to find in the Reports of this court relating to the venue of civil cases pending at the time of the creation of a new county or the change of a county line. We will now call attention to some of the rulings made by the courts of other states.

In *Security Co. v. Kauffman*, 108 Cal. 214, 41 Pac. 467, it was held that a suit to foreclose a lien on land was triable in the old county, notwithstanding the fact that the land upon which the lien was claimed was embraced within the limits of a new county since the suit was begun. Particular emphasis was laid upon the fact that the Constitution of that state required only that such cases should be "commenced" within the county in which the land was situated, and did not require that the action should be tried in that county.

In *Spalding v. Kelly*, 66 Mich. 693, 33 N. W. 803, it was held that the Legislature had authority to provide that a pending ejectment suit should be tried in the old county, and not in the new county, which embraced the premises in controversy. It does not appear that there was any constitutional provision requiring suits involving titles to land to be tried in the county where the land was situated.

In *McNew v. Williams* (Ky.) 36 S. W. 687, it was held that the fact that a new county was formed and courts established therein did not authorize the courts of the county where the action was pending to transfer it to the new county because the parties resided or the subject-matter was located in the new county. It does not appear that there was any constitutional provision requiring the trial of actions in the county where the party resided or the subject-matter was located.

In *Bookwalder v. Conrad*, 15 Mont. 464, 39 Pac. 573, an action concerning land was commenced in a county in which the land was then situated, and before the appearance of defendant a new county was formed out of that part which embraced the land in controversy. The Constitution simply declared that actions concerning land should be commenced in the county in which the

land was situated, but there was a statute which provided that such actions should be tried in the county where the land was situated. It was held that the defendant was entitled to have the case transferred to the proper court of the new county, if he applied for such transfer at the time of his appearance.

In *Cornell University v. Railroad Co.*, 49 Wis. 158, 5 N. W. 329, it was held that, when ejectment was brought in a named county for lands then situated therein, the subsequent inclusion of the land in another county by an act of the Legislature did not divest the jurisdiction of the court of the first county, in the absence of a provision in the act to that effect. It does not appear that there was any provision in the Constitution of Wisconsin regulating the trial of actions. There was a ruling to the same effect in *Blake v. Freeman*, 13 Me. 130. See, also, *Miller v. Kent*, 60 Ind. 226; *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743. And see, in this connection, 48 Cent. Dig. tit. "Venue," §§ 11, 69.

It may be deduced from these decisions that, where there is no constitutional provision regulating the place at which the trial of a civil action shall be had, the cutting off into a new county of land involved in pending suits in the old county, or the change of residence of defendants against whom suits are pending, will not oust the jurisdiction of the courts of the old county, and, in the absence of a provision for the transfer of such cases to the new county, that they are triable in the courts of the old county, but where there is a constitutional provision that cases respecting land shall be tried in the county where the land is situated, and that cases against defendants shall be tried in the county where the defendant resides, the defendants in the latter character of cases, or either party in the former class of cases, may have such cases transferred for trial to the proper courts of the new county. However, if a timely motion for a transfer is not made, and the case is actually tried without objection as between the parties, it would seem that an estoppel would arise to prevent them from questioning the jurisdiction of the court after judgment. See *Tolman v. Smith*, *supra*. In a preceding part of this opinion we have called attention to the fact that the Constitution of this state simply requires that certain actions shall be brought in a given county, and that certain other actions shall be tried in a given county. The act of 1905, providing for the organization of new counties, simply provides for the transfer of pending suits of which, under the Constitution and laws of this state, the new county shall have cognizance. It may be that a proper construction of this act would have the effect to transfer only these cases which the Constitution declares should be tried in the county where the defendant resides or where the land is situated, etc.,

and would not have the effect to transfer those cases where the Constitution simply declares that the cases shall be brought in the county where the defendant resides.

As has been seen, the Constitution declares that criminal cases shall be tried in the county where the offense was committed. The effect of the creation of a new county upon the venue of a criminal case has been the subject of only one adjudication in this state. In *Jordan v. State*, 22 Ga. 546 (2), it was held that when a new county was formed from an old one, and an offense had been committed in the old county prior to the division in territory subsequently embraced in the new county, the accused could be indicted in the new county, and that an indictment by the grand jury of the new county was good, when it charged that the offense was committed in that portion of the old county which was taken to form the new county. In the opinion Judge McDonald said: "The Constitution fixed the place of trial, for the benefit of the defendant or parties accused, in the county where the offense was committed, as the locality at which he could most conveniently secure the attendance of witnesses. The change in the name of the county cannot operate to his detriment in any way, nor can the change of a county line." In *State v. Donaldson* (Tenn.) 3 Helsk. 48, it was held that if a county is divided, and a portion of its territory goes into the formation of a new county, a criminal act done before its division in the ceded territory can be prosecuted only in the new county, and the indictment may, as to the place, aver the offense to be committed in the new county. See, also, *State v. Jones*, 9 N. J. Law, 443, 17 Am. Dec. 483; *State v. Bunker*, 38 Kan. 737, 17 Pac. 651; *McElroy v. State*, 13 Ark. 708; *State v. Jackson*, 39 Me. 291; *Murrah v. State*, 51 Miss. 675; *People v. Stokes*, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102; *State v. Fish*, 26 N. C. 219; *State v. Hart*, 26 N. C. 222; 7 Am. & Eng. Enc. Law (2d Ed.) 924; 12 Cyc. 241; 14 Cent. Dig. tit. "Crim. Law," § 231.

The Constitution of the state, in fixing the venue of criminal cases, recognizes the political division of the state into counties, and fixes the place of trial at that particular subdivision in which the crime was committed. The accused is not only entitled to a jury of the vicinage, but he is also entitled to the convenience resulting from a trial where the witnesses are more than apt to reside. The county where the crime is committed is, in the meaning of the Constitution, that political subdivision of the state, styled "county," which embraces the place where the crime was committed. The General Assembly can no more deprive the defendant of this right by the creation of a new county than it can by the change of a county line. The fact that the case is pending against him at the time the new county is created does not deprive him of the right to demand

that he be tried in the county in which the crime was committed, although the county, as such, was not in existence at the time the offense was perpetrated. What the Constitution guarantees is a trial in the county where the offense was committed, not the beginning of a prosecution in that county. We will not at this time go to the extent of holding that the creation of the new county absolutely deprives the courts of the old county of jurisdiction of criminal cases pending therein, where the offense was committed in the territory embraced in the new county; for it may be that if the accused went to trial in the old county without objection, or if he made an express waiver of his right to insist upon a transfer to the new county, a judgment in the old county would be conclusive both upon him and the state. Upon this question we now express no opinion. What we hold is that the accused, if he sees fit to insist upon it, is entitled to be tried in the new county, and when he raises an objection to the jurisdiction of the courts of the old county by a timely plea, or in any other proper way, he is entitled to have the case transferred to the new county for trial.

At the time the accused was arraigned in the city court of Vienna the organization of the county of Crisp had been completed. The county officers had been elected and were discharging the duties of their office, and the courts of that county were open and discharging the functions that the law imposed upon them. In other words, Crisp county had become one of the organized counties of this state, and its courts had jurisdiction of all offenses committed in the territory embraced within its limits, whether the offense was committed before the county was organized or after that date. The defendant, under the Constitution, was entitled to be tried in a court of competent jurisdiction in that county. Upon the filing of the plea, the facts therein averred having been admitted to be true by the solicitor, the trial of the case should have been suspended, and an order passed transmitting all of the papers in the case to the superior court of Crisp county for trial; there being no city court in that county. Whether the case should be tried in the superior court of Crisp county, or transferred to the county court, is a question to be decided when the case reaches the superior court of Crisp county.

Judgment reversed. All the Justices concur.

(124 Ga. 853)

COLLINS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Feb. 16, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

"An employé [of a railroad company], being in the discharge of his duty, has the right to rely upon other employées doing their duty. Any omission of ordinary and reasonable care by the co-employées of the plaintiff would be a violation of his right to the safety and security

which the observance of such diligence would afford." Hopkins on Personal Injuries, § 218, citing Parker v. Railway Company, 10 S. E. 233, 83 Ga. 539.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 363.]

2. SAME—NONSUIT.

There was evidence from which the jury would have been authorized to find that at the time of receiving the injury complained of the plaintiff was in the exercise of due care and diligence, that he was free from fault, and that he was injured in consequence of a failure of his co-employées to exercise proper care and diligence; and awarding the nonsuit was error.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1000, 1057.]

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by J. A. Collins against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Fouche & Fouche, M. B. Eubanks, and E. P. Treadway, for plaintiff in error. Shumate & Maddox and G. A. H. Harris & Son, for defendant in error.

BECK, J. Collins brought suit for damages against the Southern Railway Company, alleging in substance as follows: He was engaged by the defendant at its yards and shops as a car repairer, and, on the morning of the injury on account of which this suit was instituted, he was directed by one Walker, defendant's chief car inspector, to assist two other employées of the defendant in placing a pair of wheels under a car which was on the "repair track" in the yard of the defendant. Plaintiff and his co-laborers pushed the wheels across part of the yard to the "roundhouse track," and were endeavoring to place them thereon in order to roll them to the repair track; "petitioner had looked along the track to see if anything was moving on it, and, seeing nothing, he got upon the track and put his shoulder on a lever to raise up the axle and wheels and turn them around and let them down on the track. After petitioner and his immediate helpers had raised the axles and wheels and were supporting them on their shoulders, an engine of the defendant came suddenly backwards along the track without giving any signal of its approach, and without any one looking out from said engine, and without ringing the bell or sounding the whistle on said engine, and said engine ran rapidly and violently against petitioner and struck him on the small of the back and hips. The blow was so violent that it threw petitioner forward and astride the axle he was in the act of moving. Petitioner clung to said axle, and the engine, after striking him, continued to move backwards, pushing the wheels and axle along the track, and did not stop until the wheels and axle had been pushed about 75 feet from the point of collision; but petitioner, being in great danger and believing that he would be killed, with great effort

succeeded in getting off the axle and clear of the track, after being carried some 10 or 12 yards, but he dropped on the ground and was unable to get up or to walk. He remained prostrate on the ground unable to walk until a hack was brought, and he was helped up and lifted into said hack and carried to his home." Petitioner supported his petition by proof, testifying that the track upon which he was injured was the proper track on which to place the wheels in order to run them to the repair track, and that this custom was known to the engineer in charge of the engine. He also testified that about 50 engines crossed over said track every day, and that he was aware of the fact that the engine which struck him would probably be along about the time he placed the wheels on the track; but he said that, "by the universal practice with reference to bringing engines from the main lines on to the side tracks there, there generally came a man right along behind them if they were backing in, or ahead of them if they were heading in, to throw the switch and carry them into the roundhouse." He further testified that he looked up the track just before he put the wheels on it and saw no engine; he could see up the track about 100 yards; that the engine which struck him was running at a rate of 15 miles an hour, which was an unusual and unreasonable rate of speed; "if the engine was coming with any reasonable speed, from the time I looked, it could not have hit me." At the conclusion of plaintiff's testimony the court granted a nonsuit, and he excepted.

1, 2. Taking the evidence most strongly in favor of the plaintiff, as we must do in fixing upon the question as to whether or not the court rightfully awarded the nonsuit, we hold that the court erred in holding as a matter of law that under no reasonable view of the evidence was the plaintiff entitled to recover. As the case is to go back for another trial, we will not discuss the evidence further than to say that there was sufficient testimony to have warranted the jury to have found that the plaintiff, at the time of sustaining the injuries complained of, was rightfully on the roundhouse track and engaged in the discharge of duties that devolved upon him by virtue of the task that he was properly undertaking to perform; furthermore, that a co-employee of the plaintiff was guilty of negligence, and of a failure to exercise ordinary care and diligence which a proper regard for the safety of other employees demanded that he should exercise in running the engine backward at an unreasonably high rate of speed over tracks where workmen engaged in the railway's service might be expected at any time to be employed. The question as to whether or not the plaintiff was in the exercise of ordinary care and diligence at the time of his injury was a question of fact for the jury, under proper instructions from the court, and the

question as to whether the mere fact that he did not keep his eyes fixed or constantly turning in the direction from whence the engine came which inflicted the injury amounted to a lack of ordinary care and diligence must also be left for determination by the jury. It certainly cannot be decided by a court, as a matter of law, that it is negligence upon the part of a laborer, who has upon him an immense physical burden that taxes his strength to the uttermost, if, for a few moments, or "a minute or two," he permits himself to become engrossed in his task and oblivious to possible dangers. The court would have no more right, under such circumstances, to hold that one thus becoming engrossed in his task was not in the exercise of diligence than it would to say, as a matter of law, that becoming so engrossed and absorbed in his work as to forget the dangers that surround him in such employment is not negligence, or does not constitute lack of diligence and care. Instead of deciding these facts the court must refer them to the jury. "Laborers engaged in track work are not held to the same degree of care as to approaching trains as governs travelers crossing railways. A track repairer required to keep a constant lookout for approaching trains in both directions would have little time to devote to his duties, and this degree of diligence is not required. On the contrary, it has been held that he has the right to become ingrossed in his labor to such an extent that he may be oblivious to the approach of a train." 5 Thomp. Neg. § 5522. The plaintiff in this case was not a track hand; but, if his version of the occurrence is to be received as true, he was as rightfully on the track where he received his injuries as if he had been engaged in repairing the track. The fact that he was frequently at or near this same place was generally known, according to his testimony, which was in the following language: "They have a signal flag for the repair track, * * * but on this track [roundhouse track] we sent nobody out to put up any signal, and it never has been done since I have been there; that is our usual place to work, and they look out for us generally. We had to roll trucks across that track, sometimes as high as six or seven times a day, and sometimes nary one. We worked right around there and across there all the time; we couldn't get the wheels out no other way; it was usually known and everybody knowed it." Certainly we cannot agree with the trial judge that the jury would not have been authorized to have found, under all the testimony that had been submitted when the plaintiff closed, that the plaintiff himself was in the exercise of due care and diligence; that he was free from fault; and that his injury was brought about by the negligence of his co-employees and a want of due care and caution upon their part.

Judgment reversed. All the Justices concur.

(124 Ga. 849)

ROOD v. WRIGHT.

(Supreme Court of Georgia. Feb. 16, 1906.)

HUSBAND AND WIFE—CONTRACTS OF WIFE—VALIDITY.

A married woman may voluntarily, upon her own responsibility, and in good faith borrow money for the purpose of paying a debt of her husband and give her notes therefor, and such a contract will be binding upon her although the lender may know, at the time it is made, that she is borrowing it for this purpose, if he is not the husband's creditor who is to be thus paid, and is no party to any arrangement or scheme between the husband and wife of which the borrowing of the money by her for such purpose is the outcome.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 616.]

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Flite, Judge.

Action by S. R. Wright against A. J. Rood. Judgment for plaintiff. Defendant brings error. Affirmed.

W. H. Odell and R. J. & J. M. McCamy, for plaintiff in error. W. E. Mann, for defendant in error.

FISH, C. J. Wright sued Mrs. Rood upon certain promissory notes executed by her and payable to his order. She admitted the execution of the notes by her, but pleaded that the purpose for which the notes were given "was to get money with which to pay debts owed by her husband, and that this fact was known to the plaintiff at the time of the creation of the debt," and "that she received no part of the money for which the notes were given and that none of it was applied to her own use and benefit, but the whole amount was paid on her husband's debt; all of which was known to the plaintiff at the time the notes were given and money loaned." By an amendment to her answer she alleged, that plaintiff was interested in letting her have the money for the payment of the debt of her husband, in that he "married a daughter of one E. W. Beall, who was a surety for defendant's husband on a debt which had to be paid. And "plaintiff was the guardian of the minor children of E. W. Beall, including his wife, and * * * was interested in order to protect his wife and other wards, in getting [it] arranged to pay off the debt for which the estate of E. W. Beall was liable, and knew that defendant was not in any way interested in getting money to pay off said debt due by her husband, and said E. W. Beall." And "the money advanced [was] money of the estate of E. W. Beall and going to his children and plaintiff's wife." Upon the trial of the case the plaintiff moved to strike the plea, as amended, which motion was sustained by the court. The court then directed a verdict for the plaintiff for the full amount sued for. The defendant excepted to each of the rulings.

We think this case is clearly controlled by the principle laid down in *Johnson v. Leffler Company*, 122 Ga. 670, 50 S. E. 488, and

previous cases there cited. It was there held that, "While a wife can not bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, nor sell her property in extinguishment of his indebtedness, she may nevertheless, upon her own responsibility and voluntarily, enter into a contract for borrowing money and give her note therefor and a mortgage upon her property to secure its payment, and such a contract will be binding on her though the party with whom she contracts may know that she intends to use the borrowed money for her husband's benefit. But a contract based on a mere colorable transaction to which the lender is a party, the purpose of which is to make the wife the husband's surety, will not be enforced against her."

It will be observed that there was nothing in the defendant's answer which negated the idea that she voluntarily, upon her own responsibility, and in good faith, borrowed the money from the plaintiff for the purpose of paying her husband's debt, without being influenced to do so by any solicitation or inducement of the lender, and without there being an arrangement or transaction between her and her husband, to which the lender was a party, of which the borrowing of the money by her for this purpose was the outcome. Indeed, it was not even alleged in the answer that the defendant was, in any way, induced by her husband to borrow the money for the purpose of paying his debt. The mere fact that the lender might have been, for the reason stated in the amended answer, somewhat interested in letting the defendant have the money for the purpose of paying her husband's debt does not alter the case, for the mere existence of this fact is not at all inconsistent with the idea that he was no party to any scheme to induce her to pay this debt. This fact might have been the reason which induced the defendant to apply to the plaintiff for the loan, rather than to make the application to some one else; but it by no means shows that the contract which she entered into with him was not binding upon her. The more amplified statement of this fact contained in the allegation, that the plaintiff, as guardian of his wife and other minor children of Beall, "was interested, in order to protect his wife and other wards, in getting [it] arranged to pay off the debt for which the estate of E. W. Beall was liable," does not show that the plaintiff was a party to any arrangement for this purpose. It might have been to the plaintiff's interest that an arrangement of this kind should be made, and yet if he was no party to any scheme to bring it about, by inducing the defendant to assume the debt of her husband, the mere fact that what she did was to his interest would not affect her liability. One would naturally expect that, in a plea of this character, the statement that the lender was interested in getting it arranged to pay off the husband's debt, would be followed by an

allegation as to what he did to bring such an arrangement about, but there is no such allegation in this plea.

We do not think that the allegation that the money loaned by the plaintiff to the defendant was the money of the estate of E. W. Beall, who was surety on the debt of the defendant's husband, is material. The money was loaned by the plaintiff to the defendant in his individual capacity, and not as the representative of the estate of Beall, with which, so far as the plea shows, he had no official connection, and it matters not from what source he procured the money for this purpose. Who the creditor of the defendant's husband was, to whom she paid the money which she borrowed from the plaintiff, does not appear; but it does appear that such creditor was neither the plaintiff nor the estate of Beall. In this connection, the decision rendered in *Chastain v. Peak*, 111 Ga. 889, 38 S. E. 967, is pertinent. It was there held: "If a married woman voluntarily and upon her own responsibility borrowed money and gave therefor a note and mortgage, she was bound by her contract, although her object in obtaining the loan was to raise money for the purpose of paying a debt due by her husband, and although this fact was known to the lender, if the latter was not the creditor to be thus paid, and had nothing to do with any arrangement or scheme between the husband and wife, looking to the accomplishment of the result intended."

There was no error in striking the defendant's answer, and as this left her without any defense to the suit, there was, then, no error in directing the verdict in favor of the plaintiff.

Judgment affirmed. All the Justices concur.

(124 Ga. 836)

**CENTRAL OF GEORGIA RY. CO. v.
HARPER.**

(Supreme Court of Georgia. Feb. 16, 1906.)

**1. WRIT OF ERROR—INSANITY OF DEFENDANT—
GUARDIAN AS PARTY.**

When it is made to appear that a defendant in error has been formally adjudged insane since the signing of the bill of exceptions, the guardian appointed by the ordinary, under Civ. Code 1895, § 2570 et seq., may be made a party to the record.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1841.]

**2. MASTER AND SERVANT—INJURIES TO SERV-
ANT—NONSUIT.**

In a suit for personal injuries by an employé against a railroad company, a nonsuit should be refused unless the evidence reasonably leads to the conclusion that the plaintiff was negligent. The nonsuit was properly denied in this case.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

**3. TRIAL—MOTION TO DISMISS—MENTAL IN-
COMPETENCY OF PLAINTIFF.**

When, during the progress of a case, a motion is made by the defendant to dismiss the case, based on the contention that the evidence adduced on the trial showed the plaintiff to be absolutely non compos mentis when the suit was

filed and also at the time of the trial, and the evidence is not conclusive on the subject, it is proper for the court to refer this collateral issue of fact to the jury, under appropriate instructions.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 820; vol. 27, Cent. Dig. Insane Persons, § 176.]

4. SAME—REMARKS OF JUDGE.

In ruling on the motion to dismiss because of the mental incapacity of the plaintiff to sue without a next friend or guardian, the remarks of the judge, assigning his reason for the ruling, and the reference of the issue thus raised to the jury, were neither expressions of opinion upon the facts nor upon the credibility of the plaintiff, who had testified as a witness.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 81.]

**5. RAILROADS—CROSSING HIGHWAYS—SIG-
NALS.**

In his charge the court recognized the statute regulating the checking of the speed of trains at public crossings would not be applicable to a train started at or upon a public crossing, and submitted the issue of fact as to distance from the starting point of the train to the public road crossing, with the instruction that, if the distance was so short that the statutory requirement could not be met, the statute would not apply. This charge was adjusted to the facts of the case and was not error.

6. DAMAGES—PERSONAL INJURIES.

The verdict was not excessive, and was warranted by the evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 374.]

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by R. L. Harper against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lawton & Cunningham, for plaintiff in error. Arnold & Arnold and Osborne & Lawrence, for defendant in error.

EVANS, J. A suit for damages was instituted in the name of R. L. Harper against the Central of Georgia Railway Company; he having sustained a personal injury while in its service in the capacity of "order clerk." It appears from the petition that he had duties to perform in the company's general yard office at Savannah, being employed to carry messages and to do like service, but having no connection whatever with the operation of trains. Several tracks belonging to the company cross Bay street. On one side of this crossing is located its general yard office, while on the opposite side is a smaller building, also used as an office. On the night of September 27, 1904, Harper, who was subject to the orders of the trainmaster, was directed to go from this building to the general yard office for the purpose of there using a telephone and procuring certain information with reference to the handling of cars. He started to cross the Bay street crossing, and while undertaking to do so was run over and seriously

injured by a switch engine, which he alleges did not have a proper headlight and which crept noiselessly upon him in the dark before he was aware of its presence. He further complains that the company's watchman at the crossing negligently failed to take any steps to protect him; that the employés in charge of the engine failed to check it as it approached the crossing, or to give any signal of its approach, or to maintain a proper lookout; that the engine was run at a speed of from 12 to 15 miles an hour, in violation of a city ordinance; that an employé on the footboard of the engine observed his perilous situation on the crossing, but wantonly failed to take any measures to save him; and that after he was stricken the company's servants continued to move the engine, and he was dragged some 40 or 50 feet, notwithstanding the engine could have been stopped within a much shorter distance. He alleged that as a result of the injuries received his mental functions had been greatly impaired. The truth of this allegation was shown at the trial by the testimony of physicians who had attended him since his injury.

Upon this testimony, as well as upon that of Harper himself, and his general appearance and conduct in court, the defendant based a motion to dismiss the case on the ground that he was non compos mentis and without legal capacity to maintain his suit, and upon the further ground that this mental condition existed at the time the suit was instituted and he therefore did not have legal capacity to sue. The court overruled this motion, holding that, if Harper had become insane after filing the suit, this would afford no cause for dismissing the action, since it could be prosecuted by a guardian ad litem appointed to represent him in the litigation; and that the evidence adduced touching his mental capacity at the time the suit was brought was not such as to authorize the court to say, as matter of law, that he was at that time non compos mentis; the evidence in this regard presenting a question of fact which could only be determined by a jury. The defendant also made a motion for a nonsuit, but it was overruled by the court, and the jury, after both sides had announced closed and the case was submitted to them for consideration, returned a verdict in favor of the plaintiff for \$15,000. The company thereupon made a motion for a new trial, upon the ground that the verdict was excessive and without evidence to support it, and also upon other grounds, presenting the complaint that the charge to the jury was in certain particulars inapt, and that the presiding judge, in announcing his ruling on the motion to dismiss the case, made use of language in the presence of the jury which was calculated to work to the defendant's prejudice. The motion for a new trial was overruled, and the case was brought to this

court by a bill of exceptions sued out in behalf of the railway company.

1. The motion for a new trial was heard and disposed of in the trial court on July 21, 1905. On July 31st Harper was formally adjudged insane, in the court of ordinary of Chatham county, and committed to the State Sanitarium. The bill of exceptions in this case was certified on July 24th. Subsequently, upon a petition presented to the trial court by counsel for Harper, the defendant in error, the judge of that court passed an order, dated November 14, 1905, appointing Mrs. Myrtle Harper, who appeared as his wife and next friend, as his guardian ad litem to represent him in the further progress of the litigation; it having been made to appear to the court that he had been adjudged insane before the court of ordinary. Upon this showing counsel for the railway company, on the call of the case in this court, made a motion to have Mrs. Harper substituted as a party defendant to the writ of error, as the legal representative of her husband and in his stead. This motion was taken under advisement by this court, and argument was heard upon the merits of the case. The court afterwards passed an order granting leave to the plaintiff in error to proceed to have a guardian of the property of Harper appointed according to law, and to make such guardian, when appointed, a party defendant. Proper steps were taken by counsel to comply with the terms of this order, and Mrs. Harper, after being regularly appointed guardian of the property of her husband, was allowed as such to become a party to the case.

2. When the plaintiff closed his evidence the defendant moved the court to nonsuit the case, which motion was refused. The evidence submitted by the plaintiff tended to show that he was employed by the defendant company as a clerk in its yard office in Savannah. He worked in the yardmaster's office under the superintendency of Mr. Champlon. On Bay street near the yard was the general yardmaster's office. Between these two offices were several yard tracks, running north and south, which intersected Bay street, and Bay street at this point was a public road crossing. There was an electric light a little below the crossing. On the night of the injury plaintiff was ordered by his superior officer to go to the general yardmaster's office and send a telephone message. The plaintiff testified that just before he started over the crossing he looked down the tracks, and neither saw nor heard any train or engine. There was no obstruction to prevent him from seeing up and down the tracks. While on the public road crossing and in the act of passing over the last track, he was struck by an engine and dragged to a point beyond the crossing. He had good hearing and sight at the time, but neither heard any bell nor saw any headlight. He received several injuries the na-

ture of which was described in the testimony of the surgeons who had treated his wounds. Plaintiff's age, physical condition, and earning capacity at the time of receiving the injuries were proved. The plaintiff's employment related to the movement of the trains in the yards of the railroad company, and the trial judge properly treated him as a co-employé relatively to the employés in charge of the train which inflicted the injury. Being an employé, it was incumbent on him to prove either that he was free from negligence, or that the servants or agents of the railroad company were negligent, before he could recover for the injury. *Central R. Co. v. Nash*, 81 Ga. 584, 7 S. E. 808. The measure of diligence exacted by the law of this plaintiff was the exercise of that care which a prudent man should have observed under like conditions and circumstances. *Central R. Co. v. McClifford*, 120 Ga. 90, 47 S. E. 590. Unless the evidence reasonably leads to the conclusion that the plaintiff was negligent, the case should go to the jury. The question of negligence belongs particularly to the jury, and except in a clear case, where there is no conflicting evidence, the court should not withhold the case from the jury by awarding a nonsuit. Where the evidence upon this point is doubtful, it should be submitted to the jury, and to grant a nonsuit is error. 4 *Michie's Enc. Dig. Ga. Rep.* 556; *Steinhauser v. Ry. Co.*, 118 Ga. 195, 44 S. E. 800. When the plaintiff approached this series of tracks for the purpose of crossing, he surveyed the situation, looked up and down the tracks, and there was no appearance of danger within the range of his vision. He was upon a public street, which the engineer of an approaching train was forbidden by law to cross, except with his engine under control and with warning signal from the engine bell. The plaintiff was an active, robust man, who had worked for a year in the employment in which he was engaged at the time of receiving the injury. From a consideration of these facts could it be said, as a matter of law, that the conduct of the plaintiff could have amounted to negligence? I apprehend not. If the evidence does not clearly demonstrate negligence, then the court did right in refusing a nonsuit. In a recent case, it was held to be error to charge the jury that the failure of the plaintiff to stop, look, and listen before going on a railroad track was such negligence as to defeat a recovery. *Columbus R. Co. v. Peddy*, 120 Ga. 589, 48 S. E. 149. It was for the jury to say whether proper prudence would have required the plaintiff to look up and down each track as he approached it, and whether the lookout for trains which the plaintiff observed immediately before passing over the first track showed proper diligence. Photographs of the scene of the injury, which were introduced on the trial below and which appear in the record before us, disclose that the distance across the tracks at the Bay

street crossing was short, and that the view up and down the tracks was unobstructed; the country being level, and there being along or upon the right of way no structure which cut off the range of vision of one standing upon the sides of the crossing from which the plaintiff testified he started after looking up and down the railway tracks and seeing no engine or train within sight or hearing.

3. During the progress of the trial and after the defendant had introduced in evidence two of its witnesses, the defendant made a written motion to dismiss the case, on the ground that it affirmatively appeared from the evidence that the plaintiff was non compos mentis and not possessed of sufficient capacity to bring or maintain a suit, and that it appeared from the evidence that this condition existed, not only at the time the suit was brought, but also at the time of the trial. This motion was denied by the court. At the time of bringing the suit the plaintiff had not been legally adjudged a lunatic. If in point of fact he was a lunatic the suit could have been instituted by some competent person as his next friend. *Reese v. Reese*, 89 Ga. 645, 15 S. E. 846. Admitting, for the sake of the argument, that one absolutely non compos mentis could not prosecute a suit, except by next friend, where there has been no adjudication of insanity, let us inquire whether there was any error in the ruling complained of. Every person is presumed sane until the contrary is made to appear. The question of sanity or insanity is one of fact. *Hunt v. Formby's Guardian*, 43 Ga. 87. A plaintiff with an impaired or weak mind, with capacity to understand the nature of a particular cause of action, and with will enough to desire to bring suit thereon, may do so without a next friend or guardian. *Calhoun v. Mosley*, 114 Ga. 641, 40 S. E. 714. While both the physicians who testified pronounced the plaintiff non compos mentis, it is evident from their testimony that this term was used by them in contradistinction to a normal mental condition in every respect. One of these witnesses said the plaintiff after his injury would not allow any clothes to remain on him at all, and imagined several foolish things, such as cutting off little nigger heads and putting them in a bottle. He would drink nothing but a patented preparation called "vitogen," and would persist in wearing a clamp on his nose. This same witness also testified that he did not think the plaintiff's mind so weak that anybody could impose on him; that as to some things he seemed to be perfectly rational, but as to others he was not. "Outside of one or two things he seems to be at himself. I have found him able to remember incidents which have happened. He seems to know. I do not see any reason why he should not be accurate upon other subjects." The other physician testified that the plaintiff was afflicted with amnesic aphasia—forgetfulness

of words—which had no relation to any hallucination; that paralysis of his tongue made his articulation less distinct. The plaintiff testified before the jury. He gave intelligent responses to questions propounded, and a rational and connected narrative of the circumstances attending his injury. He was called on to explain a diagram purporting to represent the scene of his collision with the engine. He pointed out what he considered an inaccuracy in the diagram. The plaintiff was partially paralyzed, and the injury to the brain made it difficult for him to readily find words with which to express his meaning. The jury saw the plaintiff, observed his manner of testifying, heard the opinion of expert witnesses as to his mental condition, and the court pursued the proper course in refusing to determine this collateral issue of fact. The mental capacity of the plaintiff to bring and maintain his suit was referred to the jury under an instruction concerning which no complaint is made.

4. In ruling on the motion to dismiss the case because of the mental capacity of the plaintiff, the court made these remarks in the presence of the jury: "The difficulty about the motion is that it is one of law, addressed to the court on a matter of fact. There is no testimony by which it appears judicially that he was a lunatic. Every man is presumed to be sane until the contrary appears, and that very frequently appears judicially by a proceeding to show the man is insane. We very frequently say men are insane, when it is a matter of opinion—general consensus of the public. When we say a man is insane, it is received as evidence of his insanity, as matter of public opinion; but in this case there was no judicial determination of that question before this suit was brought, nor do I remember that there was any evidence elicited to show that at the time this suit was brought these physicians said that he was non compos mentis. They state, generally, he is non compos mentis. I do not understand that he was non compos mentis from the time that he received this injury up to this date; so that I would have to infer as a legal proposition that he was non compos mentis at the time he brought this suit, and, therefore, incapable of appearing in court in propria persona. It not appearing affirmatively that he was so at the time he brought this suit, the question comes up, it seems to me, upon a motion to dismiss the suit, that the man since the bringing of the suit has become non compos mentis. That motion would not prevail, because it would be the duty of the court, if a man was sane at the time he brought his suit and had become insane since, to appoint a guardian ad litem and let the case proceed. Now, as to whether the evidence shows that he is incapable of bringing suit, as I said a while ago, there are men who are insane on certain subjects and perfectly sane upon others. The books are full of instances

of that kind, and some have come within my own experience. There was a man who came down here 20 years ago from the North, named Bell. He went out here in Liberty county and he stirred the negroes up out there by proclaiming himself as Jesus Christ. He broke up two negro congregations. They followed him, and he insisted that he was Jesus Christ. I was employed to prosecute him as a vagrant; could not make that out, because the only evidence was that he was not doing any work and the negroes were supporting him. He was just in the position of a great many other preachers—was supported by the congregation—and we had to take out a writ of lunacy. I conversed with him, and he was perfectly sane upon any other subject; knew more about the Bible than any man I ever saw. He could quote it from one end to the other. If you gave him a text, in a few seconds he would turn to the text in the book; but he was absolutely wild on the subject that he was Jesus Christ. A case of a witness who was brought to testify that another man was insane, and went on in a perfectly rational manner as to proving that the man was insane because that man had claimed that he was Jesus Christ, and he demonstrated to the satisfaction of the court and jury that the man was absolutely insane. Finally, one of the jurors said: 'Well, why do you say that he is insane?' 'He says that he is Jesus Christ, and I say it because I am Jesus Christ myself.' That was his hallucination, but perfectly rational upon other subjects. Now, this man has evidently a hallucination about the negro children and one or two other things. But I cannot say, there being no evidence of this fact until this trial, that he was so insane that he could not bring a suit, when the physicians testified that he is rational. His memory is good upon other subjects, and in narrating events that occurred before this transaction took place; and therefore it is not, it seems to me, a legal question that I can pass on, and that it would be more a matter of argument to the jury by counsel to show from the facts of the case that this man was incapable of making a correct statement; that he must be wrong in his statement to the jury in the facts of the case, for the reason that his mind was so far impaired that he is incapable of making a correct statement. It seems to me it would be more a matter for the jury than a question of law for me to determine that the man is absolutely incapable of making a contract; there being no evidence elicited upon the subject, and no evidence elicited that at the time he brought this suit he was non compos mentis. So I will have to overrule the motion." Plaintiff in error complains that this language was an expression of opinion upon the facts of the case and the credibility of the plaintiff, who had testified as a witness. The statute forbids a judge to express or intimate his opinion as to what

has been proved. Civ. Code 1895, § 4334. But when an objection is made to evidence offered, the judge has a right, if he deems proper, to give the reasons for his decision on the objections, and such reasons so given, if pertinent to the objection made, do not constitute such an expression of opinion as to violate the Code section above cited. *Oliveros v. State*, 120 Ga. 242, 47 S. E. 627; *Perry v. Butt*, 14 Ga. 699. The judge was asked to dismiss the case because it was contended by the movant that under the evidence the right of the plaintiff to bring and maintain his case was a question of law for decision by the court. The judge ruled that the question was one of fact for the jury, and gave the reasons which impelled him to this conclusion. We do not think the remarks of the court open to the criticism made on them.

5. The second, third, and fourth grounds of the amended motion complain that the evidence did not warrant a charge on Civ. Code 1895, § 2224, in reference to the checking of speed and ringing of the bell in approaching a public road crossing; it being the movant's contention that the uncontradicted evidence showed that the engine started at a point so near the crossing as to make it impossible to comply with the law in this respect and to reach the crossing. And if such a charge was proper, movant further contends, the jury should have been instructed that the duty to check and keep checking would not apply if the engine started toward the crossing at a point so close as to make it impractical to comply with the statute as to checking and continuing to check and yet reach the crossing. The plaintiff located the place of receiving his injuries on Bay street, a public road crossing. The defendant's witnesses varied in locating the place from whence the engine started just before striking the plaintiff. The engineer testified: "I suppose I was just about a car length, 25 or 30 feet, from the crossing when I started in the direction of the crossing—may be not this far." The conductor testified: "Immediately before the accident happened, my train started from five or six car lengths north of Bay street crossing. I remember the fact because I know how many car lengths it was from the crossing to where the engine was standing." The fireman fixed the distance from 5 to 6 car lengths, and testified that cars vary in length from 36 to 40 feet. With this evidence in mind the court charged the jury as follows: "On that point I charge you, at the same time, that while that is true, that the law is that the engineer must check and keep checking as he approaches a public crossing; that that is modified in this way, according to the facts of the case: If the train should be approaching the crossing after stopping at a point so close to the crossing that it was not practicable, before reaching the crossing, for it to comply

with the statute as to checking and continuing to check the train, then the force of that statement would not apply." This excerpt from the charge fully recognized the principle stated in *Harris v. Central R. Co.*, 78 Ga. 535, 3 S. E. 355, that the statute does not require that a train started at or upon a public crossing shall be checked and be kept checked while passing over that crossing. Under the defendant's evidence the jury could have found that the engine started as far as 240 feet from the crossing, and the court left it for the jury to determine if the distance was such as to make the requirement of the statute as to checking and continuing to check the train on approaching the crossing applicable, with the instruction that, if the distance was so short that the statutory requirement could not be met, the statute would not apply. None of these grounds are meritorious.

6. As to the correctness of the verdict: The plaintiff's testimony made out a prima facie case for a recovery. The witnesses for the defendant contradicted him in important particulars; but in many respects they were inharmonious with each other. It was the jury's prerogative to accept plaintiff's version. The testimony of both physicians was that the plaintiff was a permanent physical wreck, his tongue was paralyzed, and his mental faculties greatly impaired. Indeed, since the trial the plaintiff became so violent that confinement in the State Sanitarium was necessary. At the time of his injury he was 33 years old, and was earning \$65 per month. The verdict was large, but was not unwarranted. The presiding judge was satisfied with the amount, and we see no reason for disturbing the verdict.

Judgment affirmed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 359)

MARYLAND CASUALTY CO. v. LANHAM.
(Supreme Court of Georgia. Feb. 16, 1906.)

1. INFANTS—GUARDIAN AD LITEM—NECESSITY.

Where a suit was brought against a minor for a tort alleged to have been committed by him, and personal service was made upon him, but no guardian ad litem was appointed, under Civ. Code 1895, § 4987, the suit was not in proper condition to proceed to judgment by default against the minor; and where a judgment was thus rendered, it was properly set aside on motion duly made therefor.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 195, 250.]

2. DAMAGES — LIQUIDATED DAMAGES — EVIDENCE.

Where a company insured plate glass windows against breakage, if one of them was broken by reason of the tortious conduct of a person who threw a rock against it, and thereupon the insurance company, by agreement with the insured, expended a certain amount in replacing the glass, claimed to be subrogated to the rights of the insured against the wrongdoer, and brought suit against him for the tort, as between the plaintiff and the defendant the amount of damages was not liquidated, but

under Civ. Code 1895, § 5073, although the case was in default, it was necessary to introduce evidence in order to establish the amount of such damages.

3. JURY—RIGHT TO JURY TRIAL—NECESSITY OF DEMAND.

It was provided by the act of September 27, 1883 (Acts 1882-83, p. 538, § 9), that in the city court of Floyd county the trial of all issues of fact "shall be by the court, without a jury, except where either party in a civil case, or the defendant in a criminal case, shall, in writing, demand a trial by jury."

4. DAMAGES—ACTION FOR TORTS—INTEREST—VERDICT.

In an action for a tort, where there is some fixed rule for measuring damages, the jury may, under proper circumstances, increase the amount by adding interest, but the verdict should be for one aggregate sum, and should not find an amount as principal and a separate amount as interest.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by the Maryland Casualty Company against Willie Lanham. Judgment for plaintiff. Motion by defendant, by his next friend, H. Lanham, to vacate the judgment. Judgment vacated, and plaintiff brings error. Affirmed.

The Maryland Casualty Company brought its action for damages against Willie Lanham on account of an alleged tort in breaking a plate glass window with a stone. The plaintiff was an insurance company, one feature of the business of which was to insure against losses by breakage of plate glass. It alleged, that it had been obliged, under this contract of insurance, to replace the broken glass at an expense of \$85, which it did on October 25, 1902; and that the owners of the glass had transferred to it all their rights against Lanham, and plaintiff was subrogated thereto. It further alleged that Lanham was a minor, but that he had arrived at those years of discretion and accountability when he would be criminally liable, and was possessed of sufficient capacity to have deliberately committed the tortious act with a knowledge of its consequences. It prayed that judgment be rendered in its favor for \$85, with interest from October 25, 1902. Personal service was made by the sheriff on Willie Lanham, the defendant. On January 7, 1904, the judge of the city court of Floyd county rendered a judgment, reciting that, no issuable defense having been filed, the plaintiff should recover of the defendant \$85 principal, \$7.15 interest and costs. On February 25, 1905, the defendant by his next friend, H. Lanham, made a motion to vacate and set aside the judgment, alleging, that William Lanham was a minor; that no guardian ad litem had ever been appointed for him; that judgment was taken against him by default; that no evidence was introduced as to the amount of damages, which were unliquidated; and that a judgment was rendered without a verdict, finding a principal sum with interest. The

presiding judge sustained the motion and set aside the judgment. Plaintiff excepted.

Lipscomb & Willingham, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

LUMPKIN, J. (after stating above facts).

1. "Infancy is no defense to an action for a tort, provided the defendant has arrived at those years of discretion and accountability prescribed by this code for criminal offenses." Civ. Code 1895, § 3904. As to the liability of an infant for torts, see, also, 36 Am. Law Rev. 371. This rule refers to the liability of an infant for his torts, and not to the proper manner of bringing suits against him therefor. So likewise the rule that the exemption of an infant generally from liability on his contracts is a personal privilege (Civ. Code 1895, § 3649) does not affect the proper method of suing and serving an infant. The rule was long since announced that a suit brought against a minor should be defended in his own name, but that a guardian ad litem should be appointed for him; and that this power of appointment was one incident to the court. *Nicholson v. Wilborn*, 18 Ga. 487; *Oliver v. McDuffie*, 28 Ga. 522; *Jack v. Davis*, 29 Ga. 219; *Kilpatrick v. Strozler*, 67 Ga. 247; *Burnett v. Summerlin*, 110 Ga. 349, 35 S. E. 655. Under the act of 1854 (Civ. Code 1895, §§ 4863, 4864), authorizing the judges of the superior courts in chambers, upon petition, to change trustees or order a sale of trust property, etc., and providing that if minors were interested and had no guardians, guardians ad litem should be appointed and notified before the cause proceeded, it became the practice not to notify the infant, but to appoint a guardian ad litem to represent him, and this was held to be sufficient until the act of 1876 was passed, which provided differently. *Harvey v. Cubbedge*, 75 Ga. 792; *Adams v. Franklin*, 82 Ga. 168, 8 S. E. 44. That act required personal service on the minor. Acts 1876, p. 103. As amended by the act of 1879 (Acts 1878-79, p. 140), it is codified in section 4987 of the Civil Code of 1895. By that section it is provided that "if the minor is under the age of 14 years, service is to be perfected by delivering a copy of the proceedings to such minor personally, and in cases where there is a statutory or testamentary guardian or trustee representing the interests of the minor to be affected by the legal proceeding, service as usual on such guardian or trustee shall be sufficient to bind the minor's interest in their control to be affected by said proceedings; and that if the minor is over 14 years of age, service may be made by delivering to him personally such copy." It then declares: "When the returns of such service are made to the proper court, and order taken to appoint for said minor a guardian ad litem, and such guardian ad litem agrees to serve, all of which must be shown in the proceedings of the court, then said minor

shall be considered a party to said proceedings." Except where expressly otherwise provided in this statute, there must be personal service, and a guardian ad litem must be appointed; and it is only when this shall have been done and made to appear in the proceedings of the court that "then said minor shall be considered a party to said proceedings." In the present case the age of the minor does not appear, nor was any guardian ad litem appointed, though his minority was alleged. The case could not therefore legally proceed to judgment against him. The decision in *Bartlett v. Batts*, 14 Ga. 539, that a suit commenced and prosecuted by an infant alone, without a next friend is not absolutely void, but though defective is cured by verdict, does not conflict with the ruling here made. See *Thorp v. Minor*, 109 N. C. 152, 18 S. E. 702.

2, 3. While the plaintiff may have paid the amount for which it conceded that it was liable, under its insurance policy, to the owners of the property damaged, and have become subrogated to their rights as against the tort-feasor, as against him this did not liquidate the amount of his liability, if any. That the company expended a certain amount in replacing the glass would not be conclusive upon the defendant that the amount of such expenditure was necessary or proper. Under Civ. Code 1895, § 5073, where damages are not liquidated and a judgment by default is rendered, the plaintiff is required to introduce evidence and establish the amount of such damages. By the act of September 27, 1883 (Acts 1882-83, p. 538, § 9), it is provided that in the city court of Floyd county the trial of all issues of fact "shall be by the court, without a jury, except where either party in a civil case, or the defendant in a criminal case, shall, in writing, demand a trial by the jury." In the absence of anything appearing to the contrary, this court would probably presume that the judge acted on proper evidence.

4. In an action for a tort, where there is some fixed rule for measuring damages, the jury may, under proper circumstances, increase the amount by adding interest; but the verdict should be for one aggregate sum, and should not find an amount as principal and a separate amount as interest, nor should the verdict exceed the sum sued for. *Central Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679.

Judgment affirmed. All the Justices concur.

(124 Ga. 990)

BIGGERS v. WINKLES.

(Supreme Court of Georgia. Feb. 19, 1906.)

EXECUTION—FORM—SIGNATURE OF CLERK.

One of the duties of the clerk of the superior court is to issue and sign executions based upon judgments rendered in that court. He may appoint a deputy, and such deputy will be authorized to issue executions, but he should not sign them with the name of the clerk, as if the clerk himself had made the signature.

The clerk of the superior court cannot by oral authority confer general power upon another to sign his name to executions issued in his absence and not under his immediate direction and control.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

On levy of execution by J. S. N. Biggers on property of Mrs. McNeill, J. S. Winkles interposes a claim. Judgment for claimant, and Biggers brings error. Affirmed.

An alias *fi. fa.* purporting to have been issued by the clerk of the superior court of Haralson county on January 25, 1893, in lieu of a lost original which had been issued on a judgment in favor of Grow and others against Mrs. McNeill and transferred to Biggers, was levied on certain property, and a claim was interposed by Winkles. On the trial, when the execution was offered in evidence, objection was made to it on the ground that the name of the clerk of the superior court was signed to it by Biggers who was at that time acting as deputy clerk. It purported on its face to have been signed by the clerk. The court heard the evidence of Biggers in connection with this objection. He testified in substance, that he worked in the office of the clerk of the superior court as the deputy; that it was his business to issue these *fi. fas.* and papers; that he issued most of the *fi. fas.*; that the clerk instructed him to do so and gave him authority to sign his (the clerk's name); and that he signed Beall's (the clerk's) name to this one. He further testified; "I don't remember that he pointed out this one specially to me, telling me specially to sign his name to this one. I don't remember about his being in the office at this time. I don't remember that he was standing right there. It was the practice for me to issue them, and sign his name to them. I was deputy clerk. He assigned me that part of the work to do. I usually kept the minutes. Was another thing he assigned me to do." The court rejected the evidence, and, no further evidence being offered, dismissed the levy. The plaintiff excepted.

E. S. Griffith, for plaintiff in error. W. R. Hutcheson, for defendant in error.

LUMPKIN, J. (after stating the facts). One of the duties of the clerk of the superior court as declared by the Code of this state is "to issue and sign (and attach seals thereto when necessary) every summons, subpoena, writ, execution, process, or order, or other paper under the authority of the court." Civ. Code 1895, § 4360 (4). He may appoint a deputy or deputies, who shall take the same oath as the clerk, and "whose powers and duties are the same as long as the principal continues in office and not longer." Section 4359. Process signed by the deputy clerk of the superior court is as valid and sufficient in law as if signed by

the principal clerk. *Goodwyn v. Goodwyn*, 11 Ga. 178; *Dever v. Akin*, 40 Ga. 423; *Graves v. Warner*, 26 Ga. 620. When what purports to be the signature of the clerk to an execution is not affixed thereto by him or his authority, the execution is not legally issued. *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301. The deputy could have signed the execution in his own name as deputy. But was it lawful for him to sign the name of the clerk, and was the execution so issued a lawful execution? In *Ellis v. Francis*, 9 Ga. 325, it was held that where a constable who wrote a bad hand requested a justice of the peace in his presence to make a return of "no property" on two justice's court executions, he knowing the return to be true of his own personal knowledge, it was considered as his act and valid in law. See, also, *Cox v. Montford*, 66 Ga. 62. In *Weaver v. Wood*, 103 Ga. 88, 29 S. E. 594, it was said: "While an entry may, in the immediate presence and by the direction of the levying officer, be made upon an execution by another who acts as a mere scrivener or clerk, and while an entry made under such circumstances may be upheld as the act of the officer himself, and thus protect the judgment upon which it is issued from becoming dormant, yet such officer has no power to delegate to another the authority in his absence, either generally or in a special case, to perform for him, or in his name, this particular act which the law requires him personally to perform." In the opinion it was said that it would not be wise to extend the rule further than was laid down in the cases of *Ellis v. Francis*, supra. In *Horton v. State*, 112 Ga. 27, 37 S. E. 100, it was held that where an attorney signed the name of the clerk to a subpoena under a general direction from that officer to prepare the subpoena in the case, it was not valid. In *MacKenzie v. Jackson*, 82 Ga. 80, 8 S. E. 77, one of the headnotes reads as follows: "While it may be true that a deputy clerk may perform any duty which the clerk is authorized to perform, it seems that, when the deputy clerk certifies, he must certify over his own signature, and not over that of the principal clerk." In the opinion the same language is used, except that instead of the words "it seems that," the words employed are "we are inclined to think." This was said where the deputy clerk signed a certificate with the name of the clerk by him as deputy, which makes a much stronger case than if he had simply signed the name of the clerk only; as he did in fact add to the name of his principal his own name as deputy, a method of signing which we understand to be practiced in some courts. Speaking for myself, it seems to me that it might be argued with much force that for a deputy to sign the name of his principal, by him as deputy, was a sufficient signature, by analogy to the manner in which an attorney in fact

signs for his principal. In *Hitchcock v. Latham*, 97 Ga. 253, 22 S. E. 997, where objection was made to the introduction in evidence of a tax execution, on the ground, as alleged, that the name annexed thereto, purporting to be that of the tax collector, was, "in printing as it came from the printing office," and, therefore, that the execution did not bear the genuine signature of the tax collector, and there was nothing to show when, where or how his name had been affixed to the execution. But it affirmatively appeared that the paper had come into the sheriff's hands, and that he had acted upon it as a legal execution, and in so doing had levied on, advertised, and sold land. It was held that, in the absence of further proof on the subject, it would be presumed that the printed signature was authorized by the tax collector, and that he issued the execution as his official act. In that case the question arose in an action of ejectment brought by the purchaser at the sheriff's sale.

In the case before us, if nothing more had appeared than that the execution came from the office of the clerk of the superior court and had been received by the sheriff and treated by him as a genuine execution, probably a similar presumption would have arisen. But the evidence went further and disclosed that the signature of the clerk was not made by him, but was made by one acting as a deputy, under general authority from him to issue executions and sign his name to them, and apparently the clerk had nothing to do with it. This was neither an action by the deputy in the manner in which the law authorizes him to act in place of his principal, nor was it a lawful signature under the general verbal authority given by the clerk. In *Newman v. State*, 101 Ga. 534, 539, 28 S. E. 1005, the question was whether it was necessary to the validity of a special presentment for the solicitor general to sign it. It was ruled not to be so, and what was added as to verbal authority to sign was unnecessary to the decision. In Alabama a different rule seems to prevail. *McMahan v. Colclough*, 2 Ala. 70; *Kyle v. Evans*, 3 Ala. 482, 37 Am. Dec. 705. Mr. Freeman, after referring to the cases [1 Free. on Ex. (3d Ed.) § 23], says: "But it seems to us that a general authority to issue execution cannot be delegated except where the law authorizes the appointment of a deputy and such appointment has been made; and that the cases referred to go no further than to sustain executions issued so directly under the eye and control of the officer that they must be treated as his acts."

In some of our more populous counties many executions are issued, and it would be an exceedingly dangerous practice to have them signed, not by the clerk or by a deputy as such, so that on its face it would show by whom it was signed, but by any person

to whom the clerk might give oral authority to sign his name in his absence, or for them to purport to be signed by the clerk in different handwritings. If there be any such practice in any county or counties of this state, as was contended, it is "a custom more honored in the breach than the observance," and should not be followed further. The court correctly excluded the execution from evidence. On the general subject see *Pierce v. Hubbard*, 10 Johns. (N. Y.) 404; *Shepherd v. Lane*, 18 N. C. 148. Judgment affirmed. All the Justices concur.

(124 Ga. 993)

ROCHESTER v. ROCHESTER.

(Supreme Court of Georgia. Feb. 19, 1906.)

DIVORCE—TEMPORARY ALIMONY—DISCRETION OF COURT.

Upon the petition of the wife against the husband, the pleadings were sufficient, and, the evidence authorizing the finding, the judgment allowing temporary alimony to be expended solely for the children will not be disturbed.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 769.]

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action by Florence Rochester against Wiley Rochester. From an order allowing alimony, defendant brings error. Affirmed.

Florence Rochester instituted her suit for divorce against Wiley Rochester. Among other appropriate prayers was a prayer for temporary alimony for herself and three minor children, the issue of the marriage. This suit was filed December 22, 1904. No demurrer was filed, but on December 31, 1904, the defendant answered at length and prayed for divorce from the plaintiff. On March 23, 1905, the plaintiff presented a supplementary petition to the court, wherein she recited the previous petition, and prayed the grant of temporary alimony. By agreement, the answer previously filed was used as an answer to the last petition, and the affidavits previously taken were used on the hearing, which occurred in open court, July 27, 1905. The court adjudged that the defendant, until the further order of the court, pay to the sheriff of the county \$4 per month, to be expended for the support of the three minor children. The defendant excepted, on the ground that under the evidence it was error to require him to pay any alimony.

E. F. Griffith, for plaintiff in error. Price Edwards, for defendant in error.

ATKINSON, J. The relief is obtained at the suit of the wife. The object of alimony is the support of the children as well as the wife. There may be reason for allowing alimony with direction that the same be applied to the use of one to the exclusion of the other. When the judge so finds with-

out abusing his discretion, his judgment will not be disturbed.

Judgment affirmed. All the Justices concur.

(124 Ga. 906)

HAYS et al. v. CLAY.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. LANDLORD AND TENANT—DISPOSSESSORY PROCEEDINGS—RESTRAINING PROCEEDINGS.

A warrant was sued out, under the Civil Code 1895, § 4813, to dispossess a tenant. The defendant filed an equitable petition, in behalf of herself and her minor children, against the plaintiff. In her petition she denied the tenancy, as well as plaintiff's title to the premises in question. She alleged, that her husband died intestate, seised and possessed of the premises, leaving her and the children as his heirs at law; that there had been no administration upon his estate; that prior to his death he became indebted to the defendant, and to secure the payment of the indebtedness delivered "his title deed to the land" to the defendant, and agreed, "as one way of payment" of such indebtedness, to pay defendant "certain specified rental" for the premises; that if her husband conveyed the premises to defendant, and the deed "was not fraudulently procured, and forged and held by the defendant, as petitioner * * * charges," it was merely for the purpose of securing such indebtedness; that since her husband's death she had continued to pay rent to the defendant, but always protesting that the premises belonged to her husband's estate and that the payments were not as rent; and that she and her husband were both illiterate. She charged, upon information and belief, that all of such indebtedness had been paid, and prayed for discovery as to amounts, etc., of payments, interest charged, etc., for an accounting, and that the dispossession proceedings be enjoined. She offered to pay any balance that might be found due on the indebtedness. There was no allegation that petitioner was unable, by reason of her poverty, to give the bond required by Civ. Code 1895, § 4815, to arrest the proceeding to dispossess her; nor any allegation that the defendant was insolvent; nor any averment that her damages would be irreparable, if dispossessed. *Held*, that the petition was properly dismissed on general demurrer. See *Johnson v. Thrower*, 117 Ga. 1007, 44 S. E. 846, and cit.

2. APPEAL—RECORD—PROFFERED AMENDMENT.

An amendment offered to a petition and disallowed by the court is no part of the record, and can come to the Supreme Court only by being set out in the bill of exceptions, or annexed thereto as an exhibit duly authenticated. *Moore v. Guyton*, 110 Ga. 330, 35 S. E. 339, and cit.

[Ed. Note.—For cases in point, see vol. 3 Cent. Dig. Appeal and Error, § 2347.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Lizzie Hays and others against Elmo Clay. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. W. Preston, Sr., for plaintiffs in error. Nottingham & McClelland, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 942)

THOMAS et al. v. RICHARDS.

(Supreme Court of Georgia. Feb. 19, 1906.)

CONTRACTS—BREACH—CONDITION PRECEDENT—DAMAGES—SEVERABLE CONTRACT.

Where A. enters into a contract with B. wherein he assumes the payment of certain notes made by B. maturing at different dates, the failure to pay any single note is a breach of the contract by A., and B. may maintain a suit thereon without having paid the matured note. Such a contract is severable, and B. would be limited in his recovery to the amount of the notes matured and unpaid by A. at the time of the bringing of the suit.

(Syllabus by the Court.)

Error from Superior Court, Pickens County; Geo. F. Gober, Judge.

Action by John B. Thomas and M. J. Thomas against S. L. Richards. Judgment for defendant, and plaintiffs bring error. Reversed.

John B. Thomas and Mrs. M. J. Thomas brought suit against S. L. Richards and alleged: On August 20, 1904, petitioners entered into a contract with defendant whereby they sold him their interest in the Howser Hotel, at Dawsonville, Ga., in consideration of which Richards paid to petitioners \$269.09 in cash, and assumed the payment of certain notes made by petitioners to W. G. Baber, amounting to \$275, and notes made by petitioners to J. W. Eaton, amounting to \$400. The dates of maturity of the notes were not alleged. It was alleged that the defendant failed to pay any of the notes. The defendant demurred generally, that the petition set forth no cause of action, as it was not shown that the notes were due, nor that the petitioner had paid any of them. To meet special demurrers, the dates of the maturity of the Eaton notes were added by amendment, which showed that two of the notes, for \$100 each, were past due, and two notes, for \$100 each, not due, at the time of the filing of the petition. The general demurrer was sustained, and the petition dismissed; and to this judgment the plaintiffs excepted.

N. A. Morris and Isaac Grant, for plaintiffs in error. John W. Henley and F. C. Tate, for defendant in error.

COBB, P. J. (after stating the foregoing facts). In his contract with the plaintiffs Richards assumed the payment of certain notes, and undertook to pay them at maturity. When any single note matured and Richards failed to pay it, this was a breach of his contract, and an action thereon would lie against him. It was not necessary for the other parties to the contract to delay suit until all of the notes had matured, because

the contract was severable. "If a contract be entire, but one suit can be maintained for a breach thereof; but if it be severable, or if the breaches occur at successive periods in an entire contract (as where money is to be paid by installments), an action will lie for each breach; but all the breaches occurring up to the commencement of the action must be included therein." Civ. Code 1895, § 3793. Nor was it a condition precedent to the bringing of the action that the maker had paid the matured notes which the defendant had assumed. The contract of Richards was not one of indemnity; it was not to hold the maker harmless, but to pay the notes when due. The plaintiffs were damaged when their liability arose at the maturity of the notes by reason of Richards' breach of his contract to pay the notes. In *Tucker v. Murphey*, 114 Ga. 663, 40 S. E. 836, it was said: "The contract entered into between the plaintiff and the defendant at the time the firm dissolved was one of which the defendant obligated himself to pay the debts of the firm, and in such a case there is a breach of the contract whenever the partner agreeing to pay the debts fails to do so, and the outgoing partner can maintain a suit without having paid anything himself. * * * According to the allegations of the petition, the defendant assumed all of the obligations of the firm and agreed to pay its debts. Such being the case, the moment he failed to pay any of the debts when they became due and payable the plaintiff had a right of action against him on the contract, and could bring suit to recover, as damages for the breach of the contract, whatever sum was necessary to protect him from liability on account of the debts which the defendant had failed to pay." We think, however, that the plaintiff would be entitled to recover only upon the notes which had matured when the suit was brought. It will be noticed in the decision just quoted that it is said "the plaintiff could bring suit to recover, as damages for the breach of the contract, whatever sum was necessary to protect him from liability on account of the debts which the defendant had failed to pay." There can be no failure to pay on the part of the defendant until the note, payment of which was assumed, has matured. The plaintiff has been damaged only in the sum in which he is liable by reason of the defendant's failure to pay the matured notes. See *Keen v. McAfee*, 116 Ga. 730, 42 S. E. 1022. The petition as amended, set forth a cause of action, and the judgment sustaining the demurrer was erroneous.

Judgment reversed. All the Justices concur.

(105 Va. 242)

WHITLOCK et al. v. HAWKINS, Revenue Com'r. O'FLAHERTY v. COMMONWEALTH. CANNON et al. v. HAWKINS, Revenue Com'r.

(Supreme Court of Appeals of Virginia. April 21, 1906.)

1. STATUTES—TITLE—SUFFICIENCY.

The act of December 10, 1903 (Acts 1902-03-04, p. 610, c. 388), which amends and re-enacts Code 1887, c. 23 [Va. Code 1904, p. 231], relating to the assessment of land, and which provides for the appointment of assessors, is void because it failed to receive in the senate the vote of a majority of the members elected, as it carries an appropriation. Act March 17, 1906, entitled "An act to amend and re-enact chapter 23 of the Code * * * in relation to the assessments of lands * * * as the same was amended and re-enacted by chapter 388 of the acts of assembly, * * * approved December 10, 1903, and to validate assessments * * * under the aforesaid act, * * * re-enacts in terms the act as passed December 10, 1903, and confirms assessments made in compliance therewith. *Held*, that the title of the act of 1906 embraces but one subject, within Const. § 52, providing that no law shall embrace more than one subject, which shall be expressed in its title.

2. CONSTITUTIONAL LAW—LEGISLATIVE AUTHORITY.

The state Constitution is a restraining instrument, and the General Assembly possesses all legislative power not prohibited thereby.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 30.]

3. SAME—RETROSPECTIVE LAWS—VALIDITY.

Retrospective laws are not repugnant to the state or federal Constitutions, unless they partake of the nature of ex post facto laws, or impair the obligation of contracts, or deprive a citizen of property without due process of law.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 526.]

4. SAME—CURATIVE ACTS.

A curative act can only be effectual to do that which the Legislature would have been competent to provide for and require to be done by a law prospective in its operation.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 536.]

5. TAXATION — ASSESSORS — APPOINTMENT — STATUTES.

The act of December 10, 1903 (Acts 1902-03-04, p. 626, c. 401), providing that the jurisdiction vested in the county courts and the judges thereof, under the laws of the state, shall be vested in and exercised by the circuit courts and the judges thereof, authorizes the circuit courts and the judges thereof to appoint assessors, which authority previously vested in the county courts and the judges thereof.

6. STATUTES—TITLE—SUFFICIENCY.

The act of December 10, 1903 (Acts 1902-03-04, p. 620, c. 410), entitled "An act vesting in the circuit courts * * * and in the judges thereof the jurisdiction and powers now vested in * * * the county courts or the judges thereof," etc., and providing that the jurisdiction vested in the county courts and the judges thereof shall be vested in the circuit courts and the judges thereof, is not repugnant to Const. § 52, providing that no law shall embrace more than one subject, which shall be expressed in its title.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 133-136, 184.]

7. SAME — AMENDMENT — INVALIDITY OF AMENDATORY ACT—EFFECT.

Where a statute which undertakes to amend

and re-enact an existing statute is invalid, the existing statute remains in force.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 211.]

8. SAME—CURATIVE STATUTES—VALIDITY.

The act of February 9, 1904 (Acts 1904, p. 13, c. 14), confers on the circuit courts and the judges thereof the authority to appoint assessors. The act of December 10, 1903 (Acts 1902-03-04, p. 610, c. 388), amends and re-enacts Code 1887, c. 23 [Va. Code 1904, p. 231], relating to the assessment of lands, and provides for the appointment of assessors by the circuit and corporation courts. The circuit courts appointed assessors who qualified and entered on the discharge of their duties. Subsequently the act of 1903 was held invalid. *Held* that, as the assessors were officers de jure, their acts in making assessments, as authorized by the invalid act of 1903, though invalid, could be confirmed by a curative statute not in conflict with constitutional provisions.

9. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The act of March 17, 1906, re-enacting the act of December 10, 1903 (Acts 1902-03-04, p. 610, c. 388), amending and re-enacting Code 1887, c. 23 [Va. Code 1904, p. 231], relating to assessment of land and confirming assessments made in compliance with the act of 1903, amends section 444 of the Code, as amended by the act of March 15, 1904 (Acts 1904, p. 310, c. 195), so as to provide that any person aggrieved by an assessment may apply to the courts for relief before the 1st day of February of the year next succeeding the assessment. *Held*, that so much of the act of 1906 as amends section 444 operates prospectively only, and one aggrieved by an assessment under the act of 1903 has the right to have the same corrected, as authorized by the law in force prior to the act of 1906 [Va. Code 1904, § 6], providing that no new law shall affect any right arising before it takes effect, and hence the act of 1906 is not invalid as depriving one of his property without due process of law.

10. TAXATION—ASSESSMENTS—RETURN OF ASSESSMENTS—TIME TO MAKE.

An assessment is not invalid because of the assessor's failure to return it until after the date fixed by law for its delivery, where the assessment is returned in time to give a person affected thereby time to make objection and obtain redress in the manner prescribed by law.

Appeal from Law and Equity Court of City of Richmond.

Error to Hustings Court of Richmond.

Bill by Charles Whitlock and El. Whitlock against O. A. Hawkins, commissioner of revenue for the city of Richmond; petition by James E. Cannon and others against the same defendant for writ of mandamus; and petition of D. C. O'Flaherty, substituted trustee, against the commonwealth. Decree for defendants in the first suit, and plaintiffs appeal. Judgment for the commonwealth, and O'Flaherty brings error. Decree against Whitlock and others affirmed, judgment in action by O'Flaherty affirmed, and petition for mandamus denied.

O'Flaherty & Fulton and Cannon & Gordon, for plaintiffs in error. Wm. A. Anderson, Atty. Gen., and H. R. Pollard, for defendants in error.

KEITH, P. These cases were heard together, and involve substantially the same questions of law and fact.

On the 10th of December, 1903, the General Assembly of Virginia passed an act to amend and re-enact chapter 23 of the Code of 1887 [Va. Code 1904, p. 231], in relation to the assessment of lands and lots. It was approved by the Governor and published by authority of law among the general acts of that session. By section 437 of that act (Acts 1902-03-04, p. 610, c. 388) the circuit and corporation courts were authorized and required to appoint, on or before the 1st of January, 1905, and every five years thereafter, proper persons to assess the value of all lands and lots, with the improvements thereon, within their respective counties and corporations.

This was done. The assessors were appointed, gave the bonds and took the oaths prescribed by law, and entered upon the discharge of their duties.

The act was passed in pursuance of a constitutional mandate, providing that the lands of the commonwealth should be assessed at the time and in the manner prescribed by this act, and by section 444 ample provision was made for any person believing himself aggrieved to come before the circuit or corporation court, as the case might be, of the county or corporation in which the land lies, at any time prior to the 1st day of February of the year next succeeding such assessment. The attorney for the commonwealth was required to defend such applications, and the court was authorized, if satisfied that the assessment was too high, to reduce the same to what, in its opinion, was the true value of the property assessed, and, if of the opinion that the assessment was too low, to increase it in like manner; and it was provided further that such applications should have precedence over all other causes pending in said courts.

The act, therefore, had every outward semblance of authenticity. It was passed in pursuance of the powers and duties vested in the Legislature by the Constitution, and it met every requisite of a valid and constitutional law; and recognizing that the imposition of taxes and levies is a taking, within the meaning of the Constitution of the United States, ample provision was made and opportunity afforded the owner to be heard and to contest the justice of the assessment, so that on the face of the statute no man could be deprived of his property without due process of law.

Coming before the courts, under section 444 of the act of December 10, 1903 (Acts 1902-03-04, p. 613), to have erroneous assessments corrected, it was discovered that the act carries with it an appropriation of money out of the public treasury, and that it had not received in the Senate the vote of a majority of all the members elected to that house, as the Constitution of the state requires; and it is conceded that, not having received the necessary num-

ber of votes, the act failed of its passage, and is null and void.

To meet this situation, the Legislature, on the 17th of March, 1906, passed an act, the title of which is "An act to amend and re-enact chapter 23 of the Code of Virginia, in relation to the assessments of lands and lots, as the same was amended and re-enacted by chapter 388 [page 610] of the Acts of Assembly, 1902-03-04, approved December 10, 1903, and to validate assessments and other acts done under the aforesaid act of Assembly." Then follows the act which re-enacts in terms the act as passed on December 10, 1903, and further provides that "all assessments and all other acts of every kind which have been made or done in compliance with the terms of chapter 388 of the Acts of Assembly, 1902-03-04, approved December 10, 1903, are hereby confirmed and declared to be as valid and binding as they or like assessments and acts would be if done under this act."

The validity of this act is denied.

First, it is contended that it violates section 52 of the Constitution of the state, which provides that no law shall embrace more than one subject, which shall be expressed in its title. But in this view we cannot concur. It is true that it amends and re-enacts a law in relation to the assessments of lands and lots, and that it validates assessments made under the act which it amends and re-enacts; but this diversity does not vitiate the act.

The precise objection to this act is that it embraces more than one object, in this, that it provides for the amendment of chapter 23 of the Code, in relation to the assessment of lands and lots, and also validates assessments made under that chapter as amended. We concede that, if an act embraces two subjects, the entire act must be declared void, although both are expressed in the title, as in this case; but we are of opinion that the subjects expressed both in the title and in the act are congruous, have natural connection with and are germane to one object, which is the assessment of lands of the state, and, such being the case, it is not repugnant to the constitutional provision.

As was said in *Iverson Brown's Case*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110: "Although the act or statute authorizes many things of a diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated so as to uphold the law, if practicable. All that is required by the constitutional provision is that the subjects embraced in the statute, but not specified in the title, are congruous, and have natural connection with, or are germane to, the subject expressed in the title. This has been, so far as we are aware, the construction given this provision

of the Constitution by this court, by the highest courts of other states, whose Constitutions contain the same or a similar provision, and by the Supreme Court of the United States."

In *Inglis v. Straus*, 91 Va. 200, 21 S. E. 490, it is said that, if the subjects embraced by the act, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate or germane thereto, the requirement of the Constitution is satisfied. *Prison Ass'n v. Ashby*, 93 Va. 667, 25 S. E. 893; *Bosang v. Building Ass'n*, 96 Va. 119, 30 S. E. 440; *Trehv v. Marye*, 100 Va. 40, 40 S. E. 126.

The second objection to the act is that it violates article 14 of the Constitution of the United States, and section 11 of the state Constitution, both of which provide that no person shall be deprived of his property without due process of law.

There is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.

As was said by Judge Staples, in *Town of Danville v. Pace*, 25 Grat. 9, 18 Am. Rep. 663: "The Legislature represents the sovereign authority of the people, except so far as restrictions are enforced by the Constitution in express terms or by strong implication. We look to the Constitution of the state not for grants of power, but for limitations. When the prohibition is not found in the language of that instrument, or in its framework and general arrangement, there is no solid ground to pronounce the enactment void. The infraction must be clear and palpable." This conclusion follows from the accepted canon of construction applicable to the Constitution of this state, that it is a restraining instrument, and that the General Assembly of the state possesses all legislative power not prohibited by the Constitution. *Brown v. Epps*, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676.

In the language of Chief Justice Marshall: "The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The opposition between the Constitution and the law should be such that the judge feels a strong and clear conviction of their incompatibility with each other." *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 126, 3 L. Ed. 162.

"Let it be conceded," says Judge Staples, in *Town of Danville v. Pace*, supra, "that there are restrictions upon the legislative power not found expressly enumerated in the Constitution; that a law may not infringe upon any specific provision of that instrument, and yet it may involve so flagrant an abuse of power that it is the imperative duty of the judiciary to interpose and arrest its execution; still it must be also conceded that, when we depart from the express limi-

tations of the Constitution, and venture into the vast and unexplored region of implied restrictions, the legislative usurpation ought to be very clear, palpable, and oppressive to justify the interposition of the judiciary."

Courts do not look with favor upon retroactive and retrospective laws, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest. But it cannot be denied that the Legislature may, in its wisdom, pass retrospective statutes, sometimes called curative laws, subject to certain well-defined limitations upon its power. It cannot pass an *ex post facto* law, nor a law which impairs the obligation of a contract, and, since the adoption of the fourteenth amendment and the introduction into our Constitution of identical phraseology, it may be conceded that it cannot divest vested rights, because that would be to deprive a citizen of property without due process of law; but, until that principle was introduced into the Constitution of the United States by the fourteenth amendment, the only limitation upon the power of a state with respect to retrospective laws was that they should not impair the obligation of contracts, nor partake of the nature of *ex post facto* laws.

The case of *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380, 7 L. Ed. 458, is a striking illustration of the recognized power of states with respect to retroactive legislation. *Satterlee* and *Matthewson* held land in Pennsylvania, in common, under a Connecticut title. A division of the land was made between them, and *Satterlee* became the tenant of *Matthewson* of his part of the land, under a lease to be terminated on a notice of one year. *Satterlee* afterwards obtained a Pennsylvania title to the land leased to him by *Matthewson*, and on a trial in an ejectment for the land, brought by *Matthewson* against *Satterlee*, the court of common pleas of Pennsylvania held that S., having held the land as tenant of *Matthewson*, could not set up a title against his landlord. Upon a writ of error to the Supreme Court of Pennsylvania, it was held that "the relation between landlord and tenant could not exist between persons holding under a Connecticut title." The Legislature of Pennsylvania, on the 8th of April, 1826 (P. L. 270), passed an act declaring that "the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between citizens of the commonwealth." The case came again before the Supreme Court of Pennsylvania, and the judgment of the court of common pleas, holding that the act of Assembly of the 8th of April, 1826, was a constitutional act, and did not impair the validity of any contract, was affirmed. S. brought a writ of error to the Supreme Court of the United States, claiming that the act was unconstitutional, and that court affirmed the judgment and held that the act was constitutional. Mr. Justice Washington, deliver-

ing the opinion of the court, said in part as follows: "If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appears upon this record, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument." See *Railroad Co. v. Nesbit*, 10 How. (U. S.) 395, 13 L. Ed. 469.

In *Randall v. Krieger*, 23 Wall. (U. S.) 137, 23 L. Ed. 124, the Legislature of Minnesota undertook to validate a deed for land made by a married woman, which by reason of its ineffectual acknowledgment was null and void, and it was insisted that the Legislature could not declare an act done by a married woman to be valid and binding which, when done, she was absolutely without any capacity to do; but the court said, in answer to this contention, that there is nothing in the Constitution of the United States which prohibits the Legislature of a state from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of a contract.

Among the cases cited in the opinion in that case is that of *Watson v. Mercer*, reported in 8 Pet. (U. S.) 110, 8 L. Ed. 876. The title to the premises in controversy in that case was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband, they conveyed to a third person, who immediately conveyed to James Mercer, her husband. The deed of Mercer and wife bore date of the 30th of May, 1785. It was fatally defective as to the wife, in not having been acknowledged by her in conformity with the provision of the statute of Pennsylvania of 1770, touching the conveyance of real estate by *femes covert*. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises and recovered. The Supreme Court of the state affirmed the judgment. In 1826 the Legislature passed an act which cured the defective acknowledgment of Margaret Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the Supreme Court of the state, and the judgment of affirmance was affirmed by the Supreme Court of the United States.

It is not claimed that there is any inhibition in the Constitution of the state of Virginia upon the passage of retrospective laws by the Legislature. The authorities we have cited abundantly show that such laws are not repugnant to the Constitution of the United States, unless they partake of the nature of *ex post facto* laws, or impair the obligation

of a contract; or, since the adoption of the fourteenth amendment, deprive a citizen of property without due process of law.

From these propositions a fourth qualification is deduced, which is really a corollary from them, and that is, that the curative act can only be effectual to do that which the Legislature would have been competent to provide for and require to be done by a law prospective in its operation.

There is one other act which we must consider before we come to a general discussion of the principles applicable to the curative act, the validity of which we are called upon to determine.

By an act approved December 10, 1903 (Acts 1902-03-04, p. 626, c. 401), which is entitled, "An act vesting in the circuit courts of this commonwealth, and in the judges thereof, the jurisdiction and powers now vested in and exercised by, and duties imposed upon, the county courts, or the judges thereof, under the laws of this state, or under any will or other instrument of writing," it is provided that "the jurisdiction and powers now vested in and exercised by, and duties imposed upon, the county courts of this commonwealth, and the judges thereof, under the laws of this state, or under any will or other instrument of writing, shall be vested in, exercised by, and imposed upon, the circuit courts of this commonwealth, and the judges thereof, except when otherwise specially provided"; and by an act approved February 9, 1904 (Acts 1904, p. 13, c. 14), that act is amended in a manner not necessary to be here mentioned, and re-enacted.

By that act, we are of opinion that the circuit courts and the judges thereof were vested with the jurisdiction to appoint assessors, which had theretofore been vested in and exercised by the county courts and judges; and that, upon the authority of the cases cited in discussing the assessment act, approved December 10, 1903, it is not repugnant to section 52 of the Constitution of the state.

It is contended, however, that as the act of December 10, 1903, was null and void, there was no such officer as that of assessor provided for by law, and that there can be no such thing as a *de facto* officer, unless there is in existence a *de jure* office.

Let this be conceded. The act of December 10, 1903, being void, the chapter which it undertook to amend and re-enact remains in force as it stood prior to that date, and under it the county courts were required to appoint assessors. But by the act to which we have just referred, approved February 9, 1904, that duty devolved upon the circuit courts, by whom assessors were duly appointed. Those assessors qualified and entered upon the discharge of their duties. They were officers, not only *de facto*, but *de jure*. These officers thus appointed proceeded in the execution of their duties under the act, or sup-

posed act, of December 10, 1903, and in fact assessed all the lands of the state, and it is those assessments which the Legislature undertook to validate by the act of March 17, 1906.

Let us consider for a moment the facts as they existed when the act of March 17, 1906, was passed. There was, as we have seen, upon the statute books a law, published by authority, within the competency of the Legislature to pass, and accepted and acted upon as a valid and binding law. Under it all the lands of the state were assessed by officers duly appointed by competent authority and regularly inducted into office. Unknown to all, there was an infirmity in that act which rendered it null and void, because not passed in the manner prescribed by the Constitution. What was done under the act, however, remains. Whatever infirmity may have existed in the law which required the assessment to be made, the fact remains that the assessment was made in accordance with its terms. About that there can be no dispute, and as a fact it remains to be dealt with.

The Legislature, confronted with this situation, met it by the passage of the act of March 17, 1906, by which the act of December 10, 1903, was re-enacted in the mode prescribed by the Constitution; and the same act confirms and declares to be valid and binding all assessments made in compliance with the terms of the act of December 10, 1903.

Does that curative act violate the Constitution of the United States or of the state? It is not *ex post facto* in its nature. It does not impair the obligation of a contract. It divests no vested right. It is the duty of every citizen, in return for the protection he receives of his person and property, to bear his just proportion of the burden of taxation. That burden cannot be distributed without an assessment of the property upon which it is to be imposed. That the Legislature had the authority, and was charged with the duty, to pass a proper assessment law, is beyond dispute. Every intendment and presumption, which can apply with respect to the constitutionality of an act of the legislature, bears with full force upon the act under consideration. We have seen that it is not repugnant to the Constitution of the United States, provided it meets the requirement of the fourteenth amendment with respect to due process of law, and the similar provision in the state Constitution, with respect to which subjects we will deal later on. We have seen that there is no express inhibition in the state Constitution upon the passage of retrospective laws; and can it be said, in the language of Judge Staples, in *Town of Danville v. Pace*, *supra*, that "it involves so flagrant an abuse of power that it is the imperative duty of the judiciary to interpose and arrest its execution"? That admirable statement of the law is followed

by the impressive caution that, "when we depart from the express limitations of the Constitution, and venture into the vast and unexplored region of implied restrictions, the legislative usurpation ought to be very clear, palpable, and oppressive to justify the interposition of the judiciary."

We have endeavored to look into the underlying facts and the principles of law which ought to apply to them, and we have thus far been unable to discover any reason to denounce the curative act as unconstitutional. Let us now examine into the authorities bearing upon the subject.

We have no case in our Reports which throws any very helpful light upon the discussion. *Griffin's Ex'r v. Cunningham*, 20 Grat. 31, was cited and relied on by counsel for appellants. After the war the Congress of the United States passed a series of measures known as the "Reconstruction Laws," by virtue of which the state passed under the control of a military governor, who filled the various offices of the state with his appointees. The judges of the Court of Appeals were among the number, and when the state was restored to the Union they continued to exercise the functions of their office. By an act of the General Assembly (Acts 1869-70, p. 17, c. 17, § 2), it was provided that any judgment, decree, or order rendered by the Court of Appeals at its term commencing on the 11th day of January, 1870, "shall be subject to the supervision and control of the Supreme Court of Appeals, to be organized under the Constitution, upon the motion or petition of any party to the cause for a rehearing; and such judgment, decree, or order may be set aside and annulled, or affirmed, as to said Supreme Court may seem right and proper." This court held, however, when the question was brought before it, that that act was unconstitutional; that a case decided by the Supreme Court of Appeals at one term of the court, at which no motion is made to rehear it, cannot be reheard at a subsequent term of the court; and these conclusions were reached because the judges who had rendered the decisions which the "Enabling Act" authorized the court to rehear were *de facto* officers holding a *de jure* office, were acting *colore officii*, and whose acts, while they remained in office, were as valid and binding as though they had been legally appointed and duly qualified. The reconstruction acts were a flagrant violation of the Constitution, and the whole system which rested upon them was an usurpation; but such was the vigor of the principle which, upon grounds of public policy, imparts vitality to the acts of a *de facto* officer who has been inducted into an office, that they were, in *Griffin's Ex'r v. Cunningham*, held to be valid and binding, although the act of the Legislature did not undertake to cure the infirmity, but sought to give to the court authority to uproot and

to annul the judgment of a court so organized.

As illustrating what the Legislature may not do by a retrospective law, we may cite *Hasbrouch v. Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718, where it was held that the act of a municipal corporation could not be ratified so as to impose a burden upon the corporation without its assent, because such a law, if prospective in its operation, would have been equally in excess of the legislative power.

In *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677, it is said that an assessment made upon lots in a city for the purpose of improving a street may be apportioned by reference to the number of front feet of the lots, or any other standard which will approximate equality; yet, whatever standard is adopted, it must be levied with uniformity and equality. Therefore if, in levying such an assessment, a lot of land within the district declared to be benefited is not assessed, and the whole expense is assessed upon the remaining lots, the whole assessment is void. The Legislature has not the power to levy an assessment not uniform and equal, in an incorporated city for the purpose of improving a street, nor can it, after an assessment has been made by the municipal authorities for such purpose, which is void for want of uniformity and equality, validate it. Obviously not. It cannot give retroactive force to a law which it was incapable of passing and giving prospective validity to. Yet it is of this case that Mr. Cooley remarks that it shows very clearly the limit of power in validating assessments. Cooley, 531, note.

In *Walpole v. Elliott*, 18 Ind. 259, 81 Am. Dec. 353, it is said that "curative laws are but a species of retrospective legislation, and retrospective legislation is valid where not forbidden by the Constitution"; and the court declared that it was competent for the Legislature, by a curative statute, where not restrained by a constitutional provision, to make a void thing valid.

In *Cowgill v. Long*, 15 Ill. 202, it appears that, by an act of the Legislature of Illinois (Acts 1849, p. 177, § 82), it was provided that "on the first Saturday of May next, and on the first Saturday of May annually thereafter, the inhabitants, legal voters of any school district in this state, may meet together at some convenient place in the district, for the purpose of voting for or against levying a tax for the support of common schools, for building and repairing school houses, or for other school purposes." It was further provided that, "if five of said inhabitants request it, the school directors shall call such meeting, to be holden upon any Saturday." The seventy-second section (page 172) of the act required the district clerk to certify to the county clerk, before the 1st of July, a correct abstract of the votes, and the amount of money voted to be raised. On Saturday, the 20th day of July,

the inhabitants of a school district voted \$500 for the purpose of erecting a school house, and Cowgill was charged with \$28.28 on account of this tax. The collector distrained for its payment, and he thereupon filed his bill in chancery against the collector, and enjoined him from selling the property distrained. The court said: "The tax might properly have been voted on any Saturday in May or June. But the tax was improperly voted in July. It was then too late to have the same charged on the assessment for 1850. A school tax could not be included in the taxbook of that year, unless it was reported to the county clerk before the 1st of July. This provision of the statute is imperative, and in no sense discretionary. It is as essential to the validity of a school tax that it be certified to the county clerk by the day designated, as it is to the validity of a state and county tax that the assessment be made and returned within the time limited. If this was the only point in the case, the complainants would clearly be entitled to the relief sought, or, if the property seized had been sold, their title would not be divested by the proceedings." In other words, the court up to that point held that the election was void and the tax imposed was illegal. But on the 21st of January, 1853, the Legislature passed an act (Laws 1853, p. 442), relating exclusively to this particular tax, with respect to which the court says: "The intention of the Legislature cannot be mistaken. It was to cure the defects in voting and charging the tax. And the object was accomplished, if the Legislature had power to pass the act. So far as this case is concerned, there can be no reasonable doubt of its authority in the matter." And the law was upheld, though it clearly gave validity to that which was, in the absence of the curative statute, an utter nullity. See, also, *Rogers v. Keokuk*, 3 Wall. (U. S.) 18 L. Ed. 74; *Thompson v. Lee Co.*, 3 Wall. (U. S.) 327, 18 L. Ed. 177.

In *Boardman v. Beckwith*, 18 Iowa, 292, the facts were as follows: On the 22d of March, 1858, a general act (Laws 1859, p. 305, c. 152) was passed relating to revenue, which repealed all prior acts in conflict therewith. By this act, however, no provision was made for the levy and assessment of taxes for 1858. At the next session of the General Assembly an act was passed "to enforce the collection of delinquent taxes for the year 1858" (Laws 1860, p. 77, c. 66), which, in the preamble, refers to the prior legislation and the omission, and recites that taxes were assessed and levied in pursuance of the laws in force prior to 1858, and that many persons had refused to pay the same. Then follows an enactment legalizing such levies and assessments with like effect as if chapter 152 had not been enacted, and also declaring it to be lawful for, and the duty of, the several collectors to proceed in the collection of all taxes thus legalized, as in

other cases of like delinquent taxes assessed pursuant to law. And by the last section it is declared that the title to all property sold in the collection of delinquent taxes in said act legalized shall vest in the purchaser with like effect as if said taxes had been legally assessed, and said sales had taken place in pursuance of law. In that case, it will be observed that all prior acts were repealed by the act of the 22d of March, 1858, which went into effect July 4, 1858, but this act made no provision for the levy or assessment of taxes for the year 1858, so that there was no law whatever, constitutional or unconstitutional, authorizing such assessment and levy. The court in that case said: "The point made upon this legislation is that it was not competent for the General Assembly to thus legalize the levy and assessment of 1858; that, as there was no law at the time authorizing such levy and assessment, all proceedings thereunder, notwithstanding the curative act, were illegal and void. Whatever doubt there might be, if the act of 1860 had taken effect after the sale and purchase under which plaintiff claims, there can be no room for controversy when it is remembered that it was passed and took effect long prior to that time. That it is competent to thus legislate we entertain no doubt. The power of the Legislature to pass acts of this character, conducive as they are to the general welfare, and based upon considerations of controlling public necessity, is, in our opinion, undoubted. It does not interfere with vested rights, nor impair the obligation of any contract. Nor is it, we may remark in further answer to appellant's argument, a general statute, having other or less than a uniform operation."

In *State v. Squires*, 28 Iowa, 340, it is held that retrospective laws, as distinguished from ex post facto laws, are not in conflict with the Constitution of the United States; that, in the absence of any constitutional inhibition, the Legislature has the power to pass retrospective or retroactive laws, and they will not be declared inoperative except when they disturb or interfere with vested rights; that, as a requisite to the rightful exercise of the legislative power to cure a defective proceeding, it must have possessed the power to authorize the same result by prior legislation, though it is not necessary that it might have accomplished the result in the precise manner it has adopted to cure the defect. In the course of the opinion, the court said: "Nor is the power of the Legislature to cure defective or irregular proceedings limited by the fact that, but for such curative act, the defective proceeding would be wholly invalid or inoperative." And further it declared that "It cannot be claimed that the act in controversy divests or interferes with vested rights, or that it contravenes sound public policy. But, on the contrary, it is reasonable, and conducive to the public good in quieting litigation and

otherwise, and, as it does not conflict with the Constitution or violate any principle of justice, it should be upheld."

In *Iowa Railroad Land Co. v. Soper*, 89 Iowa, 112, the syllabus says: "In the absence of any constitutional inhibition, the Legislature has the power to pass retrospective or retroactive laws, and they will be declared inoperative only when they interfere with vested rights. Such laws, as distinguished from ex post facto laws, are not unconstitutional. Taxes levied without authority of law may be rendered legal and valid by subsequent legislative enactment. Since the Legislature has the power to pass a general law for the levy and collection of special taxes, for the purpose of paying judgments, without limitation as to rate, it may rightfully legalize levies in excess of lawful authority at the time they are made. A legislative act, which legalizes a tax before invalid and uncollectible, does not impair any vested right of the taxpayer. The distinction between legislation which attempts to cure the acts of officers void for informality or mistake, and that which seeks to legalize official acts void for want of authority, is not recognized in this state."

Referring to *Boardmen v. Beckwith*, supra, the opinion says: "This act [in that case], although it was retrospective and legalized taxes which were levied without any shadow of legal authority, and the levies were therefore utterly void, was held constitutional and operative."

In further discussion of the subject the court said: "There can be no doubt that the General Assembly had the power, and might have enacted a law under which the various municipal corporations in the state would have been authorized to levy and collect the taxes in question. In other words, the authority to levy and collect taxes to pay judgments against municipal corporations could have been conferred by a general law without any limitation therein, as to the rate, so that the taxes, legalized by the act under consideration, would have been authorized and valid. Having the power to authorize, by general law, the levy and collection of special taxes, by municipal corporations, without limitation as to rate, for the purpose of paying judgments, the Legislature may rightfully legalize or cure the levies made in excess of lawful authority at the time. When it is conceded that the General Assembly has the power to pass an act conferring authority upon municipal corporations to levy taxes, it necessarily follows that the same power may cure or ratify and make valid the taxes levied without such prior authority, unless vested rights are thereby impaired."

But it is claimed that this curative act is invalid, because it takes property without due process of law, in that it did not afford an opportunity of appearing and contesting before any court the validity and

justice of the assessment. In support of this contention an act approved March 15, 1904 (Acts 1904, p. 810, c. 195), is cited, which amends section 444 of the Code, which corresponds with section 444 of the act passed December 10, 1903. By the terms of the act of March 15, 1904, any person feeling himself aggrieved might "apply to the circuit court of the county or corporation court of the corporation in which the land lies, at any time prior to the first day of February of the second year after such assessment, and not after, to have the assessment of his lands and lots corrected." By the curative act passed March 17, 1906, this section was amended and re-enacted so as to provide that any person feeling himself so aggrieved might apply before the 1st day of February of the year next succeeding such assessment, and not after, to have the assessment of his lands or lots corrected.

The assessment which is the subject of controversy in these proceedings having been made in 1905, and the curative act having been passed in March, 1906, there was, of course, by the terms of the curative act, no possible time within which a person feeling aggrieved could have applied for relief. To give to this feature of the law a retrospective operation would therefore lead to a manifest absurdity, and such a construction will not be adopted by the courts.

But there is no occasion to give it any such construction. The law of March 17, 1906, is prospective as well as retrospective in its operation, and as to any future assessment it remains upon the statute books unchanged, and the person who deems himself aggrieved must apply for relief according to its terms at some time prior to February 1st of the year next succeeding the assessment. But that has no application to assessments actually made prior to the passage of the act.

It is also true that, where a statute can be construed as in harmony with the fundamental law, the courts will adopt that construction, rather than one which will render the law void. Now by the act of March 17, 1906, the Legislature, as we have seen, by a curative law, operating retrospectively, confirmed the assessments actually made under a void law. That curative act is valid, if it affords those deeming themselves aggrieved by the assessment an opportunity to apply to the courts for relief. By an act approved March 15, 1904, section 444 of the Code of 1887 [Va. Code 1904, p. 286], with respect to the correction of erroneous assessments of lands, was amended and re-enacted so as to read as follows: "Any person feeling himself aggrieved by the assessment of his lands or lots may, upon giving notice to the assessor and to the attorney for the commonwealth, apply to the circuit court of the county, or corporation court of the corporation, in which the land lies, at any time prior to the first day of February

of the second year after such assessment, and not after, to have the assessment of his lands and lots corrected, which notice shall be in writing, and shall have appended thereto an affidavit of the owner, or his duly authorized agent, that in the opinion of the affiant the assessment of his lands or lots is above the true value thereof. The attorney for the commonwealth shall defend the application, and if the court shall be satisfied that the assessment is too high, it shall reduce the same to what, in its opinion, is the true value of such lands or lots; but if it shall be of opinion that the assessment is too low, then it shall increase it in like manner, and such application shall have precedence over all other causes pending in said court, but no costs shall be taxed against the applicant or the commonwealth."

The assessment of lands and imposition of taxes is a taking, within the meaning of the Constitution of the United States, and the law, under which property is assessed, must provide an opportunity for the owner to be heard and contest the justice of the assessment; otherwise he is deprived of his property without due process of law, and the law is unconstitutional and void. *Heth v. Radford*, 96 Va. 272, 31 S. E. 8.

If, therefore, section 444, as passed March 17, 1906, be held to be retrospective, it would deprive the persons assessed of all remedy, and would be unconstitutional and void. By preserving to the citizen the remedy prescribed by section 444, as to acts, under the act of December 10, 1903, done prior to the act of March 17, 1906, the curative act is valid in all its parts. The rules which require an act to be construed so as, if possible, to give it a sensible operation, and which adopt that construction which renders the law conformable to the Constitution, are, we think, sufficient to preserve as to past transactions the remedy given by section 444 as it stood on the day before the passage of the curative act.

But if there be any doubt upon the subject, section 6 of the Code of 1904 would put it at rest. That section is as follows:

"No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect. * * *"

Any other construction would defeat the purpose of the Legislature, and, as the conclusion can be reached in accordance with established rules of construction, we are of opinion that the remedy remained, as to past transactions, as it existed on the day before the passage of the act of March 17, 1906, and any person aggrieved by assessments made before that day may apply to the courts for

relief at any time prior to the 1st day of February of the second year after such assessments were made.

That a provision in a statute "for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land," fulfills all the essentials of due process of law, is established by *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; and *Paulsen v. City of Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637.

There remains one question to be disposed of, which arises in respect to the assessment in the city of Richmond. It is claimed that it is invalid because there was no return made of such assessment within the time prescribed by law; but we cannot agree to the correctness of this position, the effect of which would be to render all assessments of lands of the commonwealth void, if the assessors failed to return their assessments until after the date fixed by law for their delivery.

Time is not, in this case, of the essence of the transaction, nor is it anywhere in the act made a condition of its validity. The assessments should be returned in time to give all persons affected by them opportunity to make objection and obtain redress; but, when this has been done, we think that every necessary condition has been satisfied, and that the provision relied upon is directory and not mandatory in its operation.

To recapitulate the positions discussed, and, as we hope, established by what we have said, it appears that on December 10, 1903, the Legislature undertook to pass an act, as it was required by the Constitution to do, providing for the assessment of lands and lots in this state; that the act was published by authority among the statutes enacted at that session of the General Assembly; that under it assessors were appointed by the circuit and corporation courts, who qualified and actually assessed the lands of the state in accordance with the terms of that statute; that in the progress of events an infirmity was discovered in the method in which that act was passed, which rendered it null and void; that, being void, the law was in force as it existed on and before the 10th of December, 1903; that the law then existing provided for the appointment of assessors by the county courts; that by an act also passed December 10, 1903, and amended by an act approved February 9, 1904, the jurisdiction to appoint assessors, theretofore existing in the county courts, was vested in the circuit courts of the state; that by virtue of this appointment assessments were in point of fact made, and made in accordance with the terms of the act of December 10, 1903, the assessors assuming, of course, that the act of December 10, 1903, was the law by which they were to be guided and controlled; that, the infirmity in that law having been discovered, the Legislature re-enacted the law, and in the same act declared

all assessments and all other acts of every kind made or done in compliance with the terms of chapter 388, p. 610, of the Acts of Assembly of 1902-03-04, approved December 10, 1903, "are hereby confirmed and declared to be as valid and binding as they or like assessments and acts would be if done under this act"; that section 444 of the curative act is to be construed prospectively, and as applicable only to future assessments, because to give to it a retrospective operation would not only involve an absurdity, but would render the very thing which the Legislature undertook to do unconstitutional and void, and therefore that construction is adopted which gives the act a rational and sensible effect, and, by preserving to past transactions the remedy existing at the time those acts were done, relieves the curative act of the taint of unconstitutionality which would attach to it, if no provision were made to enable persons aggrieved by the assessment to resort to the courts for relief.

For these reasons we have reached the conclusion that the curative act is a valid and constitutional exercise of legislative authority, and operates to validate the assessments made under the act of December 10, 1903.

In the consideration of the many novel and difficult questions presented in this record, we have been greatly aided by the researches of counsel, and by the able and instructive opinion of the judge of the law and equity court of the city of Richmond.

We are of opinion that the decree of the law and equity court, in *Whitlock and others v. Hawkins, Commissioner, etc.*, and the judgment of the hustings court of the city of Richmond, in *O'Flaherty, Substituted Trustee, etc., v. Commonwealth*, should be affirmed, and that in the case of *Cannon and others v. Hawkins, Commissioner, etc.*, the petition to this court for mandamus should be refused.

(50 W. Va. 148)

CAMDEN v. WEST BRANCH LUMBER CO.
(Supreme Court of Appeals of West Virginia.
Feb. 27, 1906.)

1. ADVERSE POSSESSION—WHAT CONSTITUTES
—OUSTER OF SENIOR PATENTEE.

The actual possession of the owner of a tract of land, lying adjacent to another tract of uncleared land, the title to which is vested in another person by a grant from the state, is not extended over a portion of such other tract by the acquisition of a junior patent, covering such portion and purporting to vest title thereto in the owner of such first mentioned tract, however long such possession may continue. To work an ouster of the elder patentee and hold adversely to him, the junior patentee must take actual possession of some part of the land included in the junior patent and within the boundaries of the senior patent.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 77-81.]

2. SAME—EVIDENCE.

For evidential purposes in an action of unlawful entry and detainer between the owner or a claimant under color of title, of a large

tract of land and another person, possession of a small portion of such tract by a tenant of such owner or claimant, under a lease restricting the right of occupancy and use of the land by the tenant to such small portion, is, in legal effect, possession by the owner or claimant of so much of the entire tract as is not in the actual, hostile possession of some other person.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 116-119.]

3. APPEAL—REVIEW—HARMLESS ERROR.

In an action of unlawful entry and detainer, it is not reversible error to refuse to allow the introduction, by the defendant, of a deed or contract showing he does not own, and is not in possession of, a portion of the land sued for.

(Syllabus by the Court.)

Error to Circuit Court, Braxton County.

Action by J. N. Camden against the West Branch Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Mollohan, McClintic & Mathews, for plaintiff in error. W. E. Haymond, and A. W. Corley, for defendant in error.

POFFENBARGER, J. The West Branch Lumber Company, a corporation, complains of a judgment rendered against it in an action of unlawful entry and detainer, instituted by J. N. Camden, in the circuit court of Braxton county, by which judgment, possession of a tract of land containing 200 acres, claimed by said corporation, was given to said Camden. The errors assigned relate to instructions given and evidence excluded.

The plaintiff below, defendant in error, derived his title from Andrew Perrine, who obtained a grant for said 200 acres of land from the commonwealth of Virginia on the 2d day of April, 1855. Perrine then owned a tract of 75 acres granted to Miffin Hines in 1819, and conveyed to his ancestor, Lewis Perrine, by deed dated September 1, 1837, a boundary line of which touched at one point said tract of 200 acres. Camden introduced the patent for the 200 acres issued to Andrew Perrine; a deed executed by A. S. Knight, Virginia Knight, W. R. Perrine and others, heirs of Andrew Perrine, dated January 17, 1887, conveying to J. S. Hyer and A. C. Dyer said tract of 200 acres; a deed from J. S. Hyer and wife and A. C. Dyer and wife, dated July 18, 1890, conveying said 200 acres to J. N. Camden; a deed from Lewis Perrine and wife, dated September 1, 1837, conveying said 75-acre tract to Andrew Perrine; a deed from George McElwain and Andrew Perrine, dated January 10, 1843, conveying to Andrew Perrine 61 acres of land, a part of a tract, containing 116 acres. The defendant below derived its claim of title as follows: A grant of a tract of 5,000 acres made by the commonwealth of Virginia on the 13th day of April, 1786, to Samuel Young; sale and conveyance of said tract, as delinquent and forfeited land, under proceedings had in the circuit court of Braxton county in 1841, by the commissioner of

delinquent and forfeited lands, to Gideon D. Camden, by deed bearing date April 13, 1842; a deed from said Camden to Francis Albright, dated April 15, 1842; a deed from Norman D. Squires, recorder of Braxton county, William L. J. Corley, and Morgan H. Morrison to Henry Brockerhoff and others, dated September 9, 1870; a deed from William L. J. Corley, clerk of the county court of Braxton county, to A. N. Ervin, dated January 3, 1879; a deed from A. N. Ervin and wife to Margaret C. Brockerhoff, dated September 6, 1879; a deed from Andrew Brockerhoff and others to the West Branch Lumber Company, dated December 20, 1889. All of the above mentioned deeds refer to the land by them conveyed as the land patented by Samuel Young and evidence was introduced on the trial tending to prove that the 200-acre tract of land in controversy lies within the 5,000-acre tract granted to Samuel Young in 1786, and was not excepted therefrom.

Plaintiff below proved that Andrew Perrine had resided for many years on said 75-acre tract of land at the time he obtained the patent for said 200-acre tract; but did not then take and hold actual possession of the latter tract. He never at any time resided on it, but kept the taxes on it paid and cleared a small space on one corner of it. A clearing made on the 75-acre tract extended slightly over on to said 200-acre tract. When this was done does not appear, but it must have been prior to 1890, as it was done by Andrew Perrine, who died before that time. Nothing in the evidence indicates whether this occupancy contained for any length of time. Soon after Camden purchased the land he sold the timber on a part of it to B. H. Camden, and H. P. Camden, who, about 1892 or 1893, took off of it the timber purchased by them, and, while these timbering operations were in progress, some houses were built on the land for use in connection with them. Near that date, the West Virginia & Pittsburg Railroad was built through said tract, and a number of persons, employed in the construction of the road, settled at various points on the land along its line. After the completion of the timber operations and the construction of the railroad, some of the people, who had come there as employes, remained upon the land; and whose tenants they were, and who had possession of the houses and small cleared lots after these operations ceased, were controverted matters in the trial. The only evidence tending to show any occupation of the land prior to the cutting of the timber and the building of the railroad is that of Jacob A. Hosey, who says he built a house on it for Hudson Knight, a son-in-law of Andrew Perrine, before the war, but never completed it and it was never occupied. This man built some of the houses for the railroad company or its contractors. Elizabeth Mowery moved in the old house built by Hosey before the war,

when B. H. and H. P. Camden were taking the timber from the land, and she says B. H. Camden told her she could stay there as long as she wanted to, and furnish lumber to put a floor in the house. She further says she put out fruit trees which still remain on the place; that she kept the property for four years, and that A. W. Corley, agent for J. N. Camden, told her to come there and stay as long as she wanted to. At another place about a quarter of a mile distant from the house which Mrs. Mowery occupied, a Mrs. Treanno was residing in a house on the land in controversy at the time this action was commenced, claiming to be the tenant of J. N. Camden. She also went on the property while the timber operations were in progress, with the consent of B. H. Camden, as an employé of the Camdens, or one of their contractors. She then occupied a small house near the one occupied by the Camden laborers and contractors, and, after they left, moved into the house which they vacated. A. W. Corley testifies that she was there in July, 1892, with his consent, as tenant of Camden. Her name was then Mrs. Hicks and some time afterwards Moses Treanno married her, and moved into the house with her. Around this house there was a small piece of cleared land under fence, containing five or six acres. Mrs. Treanno exhibited in connection with her testimony some letters from J. N. Camden to her showing that they recognized each other as landlord and tenant, respectively. The letter of earliest date was written in 1901, but she claims to have had some older that had been destroyed. A. W. Corley testified that he, as agent of J. N. Camden, gave permission to one Chapman, who had a contract for grading some part of the railroad, to erect shanties and such other houses on the land as might be needed for the accommodation of his employés in that work.

The defendant introduced in evidence a number of leases executed by Brockerhoff and others, claiming the title, held by the defendant company. These are as follows: One executed by M. C. Brockerhoff to Moses Treanno, dated the ——— day of June, 1895; one executed by said Brockerhoff to Jesse Hosey, bearing date June 1, 1895; one executed by said Brockerhoff to Elben and Clarke Cogar, bearing date December 25, 1897; another executed by the West Branch Lumber Company to J. H. Spencer, dated May 9, 1900; another by the West Branch Lumber Company to John Paulhamus & Son, dated January 1, 1900; another by Paulhamus & Son to F. W. Carpenter, dated February 15, 1901. Jesse Hosey testified that he had moved into a house, belonging to Chapman, the railroad contractor, in 1893; that neither Mrs. Treanno nor Andrew Mowery was living there at that time; and that the only person occupying any part of the 200 acre tract at that time was Carlisle Cogar, who was running a camp for men em-

ployed by McIntire, who was engaged in the Camden timber operations. Hosey continued to reside there, and, on the first day of June, 1895, entered into the written contract of lease with M. C. Brockerhoff, which the defendant put in evidence as above stated. He further stated that, before he moved on to the 200 acre tract, he had resided on another part of the 5000-acre Albright survey, which included said 200-acre tract, under a written contract of lease, entered into with I. B. Cogar, agent for Brockerhoff. Under the lease on the 200-acre tract, he held an acre and a half of land under fence for a period of three years, and the line of said tract ran through this space. Moses Treanno says his wife was not present when he took the written lease from Brockerhoff and knew nothing about it. Benjamin Carpenter testifies that nobody lived on the 200-acre tract until the railroad was built. John Dunlap testified that he had been employed by Brockerhoff in August, 1897, to take care of the land in controversy and adjoining lands claimed by him; that he put no tenants on the land, but that there were several living on it; that he let Mr. Detimore have a small piece of it, in 1889, for one year, with the understanding that he would get a lease of it; that there was then no person in possession of the lot on which he put Detimore as a tenant, but that Mr. and Mrs. Mowery had previously occupied it, and that he purchased from Mrs. Mowery, after she had left the land, her claim to the premises which, from what she said to him about it, he considered a mere "squatter's claim." Detimore never lived on the land, and, under a verbal agreement with Dunlap on behalf of Brockerhoff he fenced up the lot, cultivated it one year and then rented it to E. L. Taylor. He testifies that in 1898, to the best of his recollection, Mrs. Treanno had showed him a letter from J. N. Camden which was in substance as follows: "You said in your letter you are on my land, and if you are, stay where you are." Dr. Brockerhoff, President of the West Branch Lumber Company, and son of M. C. Brockerhoff, hereinbefore mentioned, testified that the 200 acres in controversy is part of the Albright Survey and wholly within it; that he and those under whom the defendant claims had had possession of said 200 acres since the purchase thereof in 1879; that no tenants had occupied the land except under leases given by the defendant and those under whom it claimed; that there were only three pieces of the tract capable of occupation and they had had tenants on them; that the 200-acre tract is entirely surrounded by the other Brockerhoff land, except at one point where an acute angle thereof touches the Andrew Perrine 75-acre tract; that he had had personal charge of the land since 1895, prior to which time Jordan Cogar and Isaac Cogar had successively been in charge of it as agents; that at the time the Camdens took timber

from it, 1892, he had no knowledge of the Camden claim, nor of any timber having been cut from the 200-acre tract; that he had had direct control of the tenants on the 200-acre tract of land for the last five or six years, and that they were holding under the leases hereinbefore mentioned; that he knew nothing of the Camden claim until 1896 or 1897; that the lands were known as the Bockerhoff lands; that there were always tenants on all parts of them, Jordan Cogar having ordinarily had different tenants on the tracts, at places which he did not specify; that Cogar had reported to him and his co-owners that there were tenants on different parts of the land; that he did not know who the tenants were in 1894; and that he had no personal knowledge of any tenants on the land prior to 1895. By John Newlon, deputy clerk of the county court of Braxton county, the following facts, concerning the taxation of the Albright survey were disclosed: "In the year 1865, 4,713 acres was assessed to Francis Albright, described as lying on Elk river. For the years 1866 and 1867 the same land was charged on the books to George Gregory as a tract of 5,000 acres. From 1868 to 1870, assessed to Francis Albright's heirs and George Gregory. From 1871 to 1877 same tract of land was assessed and charged on the land books as 4,715 acres charged to Henry Bockerhoff and others. 1878 and 1879 charged to Henry Bockerhoff and others. From 80 to 82 it was charged to M. C. Bockerhoff as 4,713 acres. From 1882 to 1885 charged to M. C. Bockerhoff as 4,713 acres. From 1886 to 1897 to M. C. Bockerhoff as 4,588 acres. From 1897 to 1901 the West Branch Lumber Company, 4,655 acres. From 1901 to 1903 the same."

Instruction No. 4, given at the instance of the plaintiff, over the objection of the defendant, is the basis of one of the principal assignments of error. It reads as follows: "The court further instructs the jury that if they believe from the evidence that Andrew Perrine and those claiming under him had possession by actual occupancy of the tract of 75 acres of land; and that the tract of 75 acres of land is adjoining the tract of 200 acres of land; and that there was no other possession within the limits of the 200 acres of land; and that the said Andrew Perrine, and those claiming under him, had actual, continuous, adversary possession of the said 75 acres, claiming the said 200 acres under the grant to Andrew Perrine read in evidence in this cause; then such possession of Andrew Perrine was actual, adversary possession of the tract of 200 acres of land; and if the jury believes that such possession was continued for a period of 15 years prior to the first day of April, 1869, or for a period of 10 years after that time then such possession and claims of title to the land under said grant made a perfect title to the said land in the said Andrew Perrine and

those claiming under him. And this is true whether the land was subject to grant by the commonwealth at the time of the patent or not." In passing upon the exception to this instruction it is necessary to keep in view the nature of the action and the principles involved therein. The action of unlawful entry and detainer differs in very material respects from that of ejectment; but many rules and principles governing the trial in the latter action apply in the trial of the former. What they are depends, in some measure, upon the nature of the evidence adduced and relied upon. In some instances, the question of title is never involved. In others it is, and, when it becomes important in ascertaining the right of possession, the only question actually and finally determined in this class of actions, its influence is potent and far reaching. A mere trespasser, having not a shadow of right to the possession, may maintain his possession against everybody but the true owner or some other person who shows himself to be entitled to the possession. Such owner or other person need never to have had the actual possession. It suffices for him to show title in himself, because title gives a right of entry, a right to the possession, a right against which a mere trespasser can make no defense. *Duff v. Good*, 24 W. Va. 682; *Garrett v. Ramsey*, 26 W. Va. 345; *Billingsley v. Stutler*, 52 W. Va. 92, 43 S. E. 96; *Olinger v. Shepherd*, 12 Grat. 262. Thus, though the question of title is not determined in the action, it is an important element in the evidence in determining the right of possession.

It is of immense importance in another class of cases, namely, where there is actual possession by both parties of parts of a tract or body of land, covered by conflicting title papers such as patents and deeds, as in the case of interlocks. If the owner of the better title has the actual possession of any part of the land in controversy, his possession is held to extend to all the land included within the exterior boundaries of the deed or patent under which he claims, that is not in the actual possession of the other party. *Olinger v. Shepherd*, 12 Grat. 462; *Garrett v. Ramsey*, 26 W. Va. 345. "The title draws to it the possession of the land not in the adverse possession of another. Actual possession of a part of a tract of land under a bona fide claim and color of title to the whole tract, is possession of the whole, or so much thereof as is not in the actual adverse possession of others. This is the general rule in actions of trespass and ejectment. And it has been held by this court in an action of unlawful entry and detainer that, where a party is in the actual possession of a part under a bona fide claim and color of title to the whole, he has a sufficient possession of the residue of the tract to entitle him to recover possession thereof against a wrongdoer who enters upon such

residue, and who has not the right of entry thereon. But the owner of such residue, or those authorized under him, may lawfully enter upon such residue without force and hold the same. *Moore v. Douglass*, 14 W. Va. 708." *Duff v. Good*, 24 W. Va. 682. This applies the rule in ejectment cases to actions of unlawful entry and detainer. It allows a recovery by a bona fide claimant having good title, or having color of title, in possession of part of the land he claims, against one who unlawfully, that is, without right, enters upon another part of the same tract lying beyond the enclosure of the owner. In other words, the actual possession of the claimant, occupying a part of the land claimed, extends to the whole of the tract and legally covers every part thereof not in the actual possession of some other person. *Garrett v. Ramsey*, 28 W. Va. 345. In *Moore v. Douglass*, 14 W. Va. 708, 782, the law is summarized by Judge Haymond as follows: "The nature of the possession to which this summary remedy applies is not confined to a possession by actual occupancy or enclosure; it applies to any possession which is sufficient to sustain an action of trespass. Title draws after it possession of property not in the adverse possession of another. Actual possession of a part of a tract of land, under a bona fide claim and color of title as to the whole, is possession of the whole, or so much thereof as is not in the actual possession of others. This is the general principle, and it applies to the remedy in question."

Title may be acquired by grant or by adversary possession. The latter is a prescriptive title or right, presupposing a valid grant, and deriving its strength and virtue from the statute of limitations, barring the remedy. In order to acquire such a title, it is not necessary to have the whole of the tract of land actually enclosed or in actual occupation. It suffices that some part of it be in actual, open, exclusive, and continuous possession under color of title. If the entry or possession be under color of title, such as a deed or a patent defining the boundaries of the tract, a part of which is so actually occupied, such actual possession extends to the exterior bounds of the tract as defined by the deed or other instrument under which possession is taken. Since title to the whole tract may be thus acquired by holding possession of a part only, the actual possession must be deemed to extend to the whole tract during the entire period required for the ripening of the possession into a perfect title. Therefore, for the purpose of determining the right of possession, in a summary proceeding such as this, as well as in an action of ejectment, such possession must extend to the limits of the entire boundary. Nothing can disturb this possession, or work an ouster of the holder thereof, but an actual entry by some other person upon some part of the tract. Thus, in the case of an inter-

lock, if the owner of the elder title be in the actual possession of a part of the land covered by his patent, but outside of the interlock, and the holder of the junior patent be in possession of a part of the land covered by his patent, but outside of the interlock, the actual possession of the holder of the better title is deemed to extend to and cover every part of the interlock. Strict adherence to this common law rule would limit the adverse possession of the junior patentee within the interlock to his enclosure or the land actually, occupied, his *pedis possessio*. As this would work great hardship and injustice, the courts have so far modified it as to make the actual possession of the junior patentee within the interlock extend to the whole thereof, provided the senior patentee has not also a *pedis possessio* within it. See *Garrett v. Ramsey*, 28 W. Va. 345, 375, opinion of Judge Snyder. Hence, if the claimant under the junior patent is in the actual possession of some part of the interlock, his possession is deemed to extend to every part thereof. If, on the contrary, the claimant under the older patent is in possession of another part thereof, then the possession of the former extends to all the land in the interlock not in the actual possession of the other party. If, in any one of the instances just stated, the relation of the parties to one another and to the land be maintained for a period of 10 years, their respective titles will be determined and fixed by their possessory holdings, independently of the rights which their title papers appear to vest in them.

In ejectment law, however, a possession for less than 10 years is utterly worthless and unavailing as a basis of recovery. It must go down before a good paper title. But, if it has continued for 10 years, it will prevail over a perfect paper title; and, though it be for a period less than 10 years, the land cannot be recovered against it, in ejectment, unless the plaintiff shows title in himself. That the occupant is a mere trespasser on the lands of another person does the plaintiff no good, unless he is such other person. Mere color of title, without 10 years possession under it, is worthless to the plaintiff in ejectment, however long he may have been in possession, short of said period. By parity of reasoning, certain similar conclusions are attained in the law governing the action of unlawful entry and detainer. In this law, the period of limitation is three years. A wrongful possession for a period of less than three years, is, therefore, worthless to the defendant, whether he holds under color of title or without a shadow of title, if the plaintiff show good title in himself. But his actual possession, no matter how taken, will avail him as a good defense against all persons who are unable to show title or a right of entry. No person, demanding possession of him, under a mere color of title, can recover from him. If he holds, not under color of title, but under

a mere claim of title, there being no written instrument defining the limits of his claim, his right of possession is limited to the pedis possessio, his actual enclosure. But if he holds under color of title, it extends to the boundaries therein defined. And, in either event, if he has had such possession for a period of three years, it is a good defense against the world in an action of unlawful entry and detainer. The statute does not allow a recovery of the possession from a defendant who has been in possession for that period of time, although the plaintiff has a perfect paper title to the property. He may recover, but not in such action. He must resort to his action of ejectment. *Billingsley v. Stutler*, 52 W. Va. 92, 43 S. E. 96.

In applying these principles, it is to be observed that the defendant relies upon a patent issued in the year 1786, covering all the land in controversy, as well as a number of deeds purporting to give title to the same land. These seem to vest a perfect paper title in the defendant, and such title, without actual possession, puts every foot of land within the boundaries fixed by the paper title constructively in the possession of the owner. This possession cannot be broken except by the actual possession of some other person within those bounds. The 200-acre tract is not an interlock nor lap made by a junior patent, covering it and other lands beyond the limits of the Young survey. It lies wholly within it. If it were such a conflicting patent, and a claimant thereunder held possession under it of some part of the land included within it, but outside and beyond the limit of the Young survey, such possession would not break the possession under the Young patent. It requires actual, hostile, possession within the Young patent to do that. But if there were possession, within the Young survey, of some part of the land covered by the Perrine patent of 1855, then such possession would be regarded as extending to the limits of said 200-acre patent, provided some part of it were not in the actual occupation of the owner of the elder title. In that case, possession, within the interlock, under the junior title, would be limited to the land actually occupied. It is not pretended that the possession of the adjoining 75-acre tract by Andrew Perrine could, in any way, affect said 200-acre tract, until after he had obtained the patent for it in 1855. At that time, the holder of the Young patent, for anything that appears in this record, had valid title to all the land lying within the boundaries thereby defined. Such title drew to it the right of possession, and the owner thereof had constructive possession of the whole of said tract including the 200 acres. Nothing short of an actual entry upon, and taking possession of, some part of that land could destroy that possession or work a disseisin of the

owner of the land to which it extended. By obtaining a patent for a part thereof, Perrine did not act upon the land, took possession of no part of it, did nothing on it which gave any notice whatever of an adverse claim. To work a disseisin or ouster, it is not enough to set up a mere claim by obtaining a deed or patent or otherwise. It requires an adverse holding, actual occupation of the land, and such as is calculated to give notice. Perrine's continuous occupancy of the 75 acres, after obtaining the patent for the contiguous 200-acre tract, did not give any notice. If possession of the latter tract at all, it was silent, calm possession, not in any way apparent. His recorded muniment of title, if recorded, was notice only of the holding of paper title, or color of title, not of possession.

The court below, in giving the instruction complained of, assumed that the case of *Overton's Heirs v. Davisson*, 1 Grat. 211, 42 Am. Dec. 544, justified its action. That case does say: "Upon the question of adversary possession, it is immaterial whether the land in controversy is embraced by one or several coterminous grants of the older, or younger patentee; in either case, the land granted to the same person by several patents is to be regarded as forming one entire tract." The principle was applied by this court in *State v. Harman*, 50 S. E. 828, but it is to be observed that neither of those cases presents the same state of facts that appears in this case. There was an actual possession, under the junior title, within the boundaries of the senior title. Close attention to the terms in which the proposition is stated, and its logical connection with other principles enunciated in the decision, makes it manifest that, in the case of an interlock, the claimant must put his foot on some part of the land in controversy, and that it is not enough to make his actual enclosure or perform other acts of dominion, on land claimed by him outside of the interlock. The rule applies "upon the question of adversary possession." Such possession never occurs until there is a disseisin or ouster of the owner. To effect that, an actual, not merely a legal or constructive, entry must be made within the bounds of the title to which adverse possession is asserted, and the possession relied upon must be there only, or there as well as on other portions of the junior grant lying outside of the interlock. In other words, possession of part is not possession of the whole, if the junior grant conflicts with the senior, unless the actual possession itself is within the interlock, as shown by improvements, or other sufficient acts of dominion done on the interlock. See points 4, 8, and 9 of syllabus in *Overton's Heirs v. Davisson*. The proposition is plainly stated in *Taylor's Devisees v. Burnside*, 1 Grat. 166, 196, by

Judge Baldwin, as follows: "The question whether the possession of a party be actual, often arises, upon conflicting titles, under the operation of the rule, that possession of part is possession of the whole. Where the abutments of the conflicting titles are the same throughout, the question is of easy solution upon the principles already stated; but it is sometimes attended with difficulty where the abutments are different in the whole or in part. There the limits of the one title are either embraced in the broader limits of the other; or the limits of the two conflict and cause an interlock. Take, for example, the case of two patents thus interfering. If the junior patentee settles within the boundaries of his grant, but outside those of the older patent, in such case, I think, he gains thereby no actual possession of the land in controversy, whether the possession of the older patentee be actual, or constructive only. For though where there is no controversy, the rule that possession of part is possession of the whole, is to be taken in reference to the entire tract; yet where there is a conflict of titles, it is to be taken in reference to such conflict. And without actual possession of some part of the land in controversy, the junior patentee can gain no possession of the subject against the better right of the older patentee. This, I consider perfectly just and reasonable; for otherwise the lawful owner might be dispossessed not only without his knowledge, but without the means of acquiring it." In *Sulphur Mines Co. v. Thompson*, 93 Va. 321, 25 S. E. 232, the proposition is declared to be settled law. In *Overton's Heirs v. Davisson* and other cases in which the contiguous tract rule has been applied, the possession was adverse, hostile, within the bounds of the elder patent. To show that Judge Baldwin, in delivering the opinion in *Overton's Heirs v. Davisson*, did not mean to express any views inconsistent with what has been hereinbefore asserted, as to the necessity of actual possession, to work a disseisin or ouster of an elder patentee, or in other words, to destroy his constructive possession, the following is quoted from his opinion in that case: "The court is further of opinion that where lands have been granted by the commonwealth to different persons, by conflicting patents, the junior patentee cannot, under any circumstances, disseise or oust the older patentee from, or acquire an adversary possession of, the land in controversy, but by the actual occupation of some part thereof, by acts of ownership equivalent to such actual occupation; and that while such patented lands remain completely in a state of nature, they are not susceptible of a disseisin or ouster of, or adversary possession against, the older patentee, unless by acts of ownership effecting a change in their condition." Nothing in any decision warrants a de-

parture from this principle. On the contrary, it has been uniformly recognized and enforced. *Turpin v. Saunders*, 32 Grat. 27; *Kolner v. Rankin's Heirs*, 11 Grat. 420; *Kincheloe v. Tracewells*, 11 Grat. 587; *Taylor's Devisees v. Burnside*, 1 Grat. 165; *Cline's Heirs v. Catron*, 22 Grat. 392; *Ilisley v. Wilson*, 42 W. Va. 757, 26 S. E. 551; *Garrett v. Ramsey*, 26 W. Va. 345; *Congrove v. Burdett*, 28 W. Va. 220. This is radically inconsistent with the other proposition in *Overton's Heirs v. Davisson*, as interpreted by the attorney for the defendant in error. The rule was applied in *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063, and *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624, but, in those cases, the possession relied upon was within the boundaries of the land actually in controversy. In *Harman v. Ratliff*, 93 Va. 249, 24 S. E. 1023, the Virginia Supreme Court of Appeals made a distinction between *Overton v. Davisson* and such a case as is presented by this record. Point 2 of the syllabus says: "Where the state has, by conflicting patents, granted uncleared lands, which adjoin the home tract of the junior patentee, the possession by the junior patentee, of his home tract, claiming possession of the land granted by the conflicting patents, is not extended to the lands thus granted so as to give him adverse possession as against the senior patentee." Our conclusion, from the foregoing examination of the question and review of the authorities bearing upon it, is that the court erred in giving said instruction No. 4.

To break the force of the evidence for the defendant, as to its possession by tenants under lease, the court, at the instance of the plaintiff, gave the following instruction: "The court further instructs the jury that possession by tenants under a writing limiting the tenants to any particular part of a tract of land, limits the possession to that particular part and does not constitute possession of any land outside of the limit of the contract under which the tenant holds, and this is true even if the contract does provide that the tenant endeavor to prevent trespass to other parts of the land." The leases were all very similar and gave to the lessees, respectively, the use of the land which was then in their possession, and contained an express stipulation that they were to have the use of only those parts of the land as then under fence and in their actual occupancy. By them, the tenants were bound neither to cause nor permit any waste by the cutting or removal of the timber or otherwise, and to promptly notify the lessor of any acts of trespass upon any of the land. No authority is produced for the proposition stated in the instruction, and it seems to be contrary to reason as well as legal principle. What a man may do himself, in the matter

of taking and holding possession of real estate, he may do by another. As hereinbefore shown, actual possession of any part of the land is possession of the whole thereof. This results from natural limitations upon the power of occupation. No man can be in the actual physical occupation of all his lands at one time, unless he has them all under fence or in cultivation, a thing very unusual in this country of vast areas of land far exceeding the requirements of actual occupation and cultivation. In that respect our lands are out of proportion to our population. Possession by one's tenant is his own possession. *State v. Harmon* (W. Va) 50 S. E. 828, holds that the possession of a vendee under an executory contract of sale of a tract of land is the possession of a vendee and extends to the whole of the tract from which the part was sold. It seems to me that a tenancy of a part of a large tract is a much stronger case. The limitation of the lease to a specific part of the tract does not prevent the possession under the lease from being possession on behalf of the lessor, under the title of the lessor, nor of a part of the tract of land claimed under that title. It is an open, notorious, and exclusive act of dominion on the part of the lessor, as much so as if he were himself the occupant thereof. We, therefore, conclude that the court erred in giving said instruction No. 6.

The contention that these are harmless errors for which the judgment should not be reversed is not well founded. There is evidence of possession by the defendant. Its sufficiency to sustain a verdict for the defendant, had one been rendered, is a matter with which the court cannot deal in the present status of the case. It is for the jury first, unless, by some proper action, the question is brought before the court. *State v. Clifford* (decided at the present term) 52 S. E. 981. If the plaintiff had tenants who sold out or attempted to attorn to the defendant, there is evidence of other tenancies of the defendant free from such taint.

The remaining assignment of error is predicated upon the action of the court in refusing to allow the introduction of a contract executed by Margaret C. Bockerhoff and the West Virginia & Pittsburg Railroad Company, purporting to grant and convey to said railroad company a right of way 60 feet wide through her lands on Elk river and Laurel creek in Braxton and Webster counties. This contract was offered for the purpose of proving that the railroad company had taken possession of the strip of land granted as aforesaid, constructed its road thereon and was, at the time of the institution of this action, and had been for a long time prior thereto, in possession of said strip of land; and it is urged that the court should have permitted it to go in to prevent a recovery by the plaintiff of the possession of said right of way. The usual method by

which a defendant relieves himself of the necessity of defending as to a tract of land which he does not hold, is disclaimer. This was not done, but as the defendant was not in possession of the railroad right of way, and the railroad company was not a party to the action, how either the defendant or the railroad company can be prejudiced or injured by a judgment covering such right of way is not perceived. It takes from the defendant nothing that it owns or claims. As to the railroad company, it is a judgment acquired without citation or hearing, and is, for that reason, null and void. Therefore, there was no duty resting upon the defendant to ward off, by the introduction of this contract, a harmless judgment.

For the errors hereinbefore noted, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

(60 W. Va. 331)

STATE v. MAYO.

(Supreme Court of Appeals of West Virginia.
April 10, 1906.)

INTOXICATING LIQUORS—ILLEGAL SALE—INDICTMENT.

In an indictment under sections 16, 17, c. 32, Code 1899, for selling intoxicating drinks to a minor, it is not sufficient to charge that the sale was made by a certain-named person for the defendant. The indictment should charge that the sale was made by the defendant.

(Syllabus by the Court.)

Brannon, J., dissenting.

Error to Circuit Court, Randolph County. Lem Mayo for M. Stalnaker was convicted of illegal sale of liquors, and brings error. Reversed. Motion to quash indictment sustained, and indictment dismissed.

Jared L. Wamsley, for plaintiff in error. C. W. May, Atty. Gen., and Frank Lively, for the State.

SANDERS, J. This is a writ of error to a judgment of the circuit court of Randolph county, convicting the defendant, M. Stalnaker, of a misdemeanor. The defendant appeared and moved to quash the indictment against her, which motion was overruled, and which is assigned as error. The indictment is in the following form: "The grand jurors of the state of West Virginia, in and for the body of the said county of Randolph, and now attending the said court, upon their oaths present that Lem Mayo for M. Stalnaker on the — day of January, 1901, within one year next preceding the finding of this indictment, in the county aforesaid, she, the said M. Stalnaker, having then and there a state license to sell spirituous liquors, wine, porter, ale, beer, and other intoxicating drinks, he the said Lem Mayo did at M. Stalnaker's place of business and on premises under her control, in the town of South Elkins, in said county, then and there unlawfully, and in violation of the conditions of M. Stal-

naker's license bond, sell and give away to one Charlie Stalnaker, a minor, intoxicating drink, and he, the said Lem Mayo, then and there knowing and having reason to believe that the said Charlie Stalnaker was then and there a minor under 21 years of age, against the peace and dignity of the state."

Should the court have sustained the motion to quash the indictment? By section 16 of chapter 32 of the Code it is provided that if any person having a state license to sell spirituous liquors shall sell or give away any such liquors or drinks to a minor, he shall be guilty of a misdemeanor, and section 17 of the same chapter says: "A sale of any such liquors or drink by one person for another shall, in any prosecution for such sale, be taken and deemed as a sale by both, and both may be indicted and fined therefor, either jointly or separately." By this section it is made immaterial whether the sale is by the person having the license, or by some one acting for such person—still the person having the license would be liable. Therefore, if the defendant had a state license, as charged in the indictment, to sell spirituous liquors, and Lem Mayo, acting as her agent, made the sale to a minor, when at the time he had reason to believe such person to be a minor, the defendant would be liable, but there should be a charge in the indictment that the sale was made by her. There is no charge in the indictment against the defendant. She is not accused of any offense. The indictment charges that the sale was made by Lem Mayo for the defendant. This does not constitute a charge against her. If the allegations of the indictment be true, an indictment could be found against her, charging her with making the sale, and if, upon the proof, it were shown that the sale was made for her, she could be found guilty, yet there must be a specific and direct charge against her. It will not do to simply charge the agent with making the sale for her. To hold such an indictment good as to the defendant, would be a plain violation of criminal pleading.

The court erred in refusing to quash the indictment as to M. Stalnaker. We reverse the judgment, sustain the motion to quash as to M. Stalnaker, dismiss the indictment as to her, and discharge her from further prosecution thereunder.

BRANNON, J. (dissenting). I am not willing to quash the indictment. It says that "Lem Mayo for M. Stalnaker" sold to a minor. If those quoted words are true both defendants are guilty, by the very letter of the statute. If one for another sell or give a minor liquor both are guilty. It is generally enough to charge an offense in the words of the statute. I had some question whether the indictment ought not amplify the words of the statute by saying to the effect that Mayo as agent of Stalnaker, and by her di-

rection and procurement, gave the liquor to the minor; but that little word "for" would compel the state to prove such agency to convict Mayo, and therefore I do not think such enlargement on the words of the statute necessary; not necessary for notice, nor as descriptive of the offense. If Mayo for Stalnaker gave the liquor, both are guilty by the words of the statute. What more does the indictment need? It is an indictment against both.

(73 S. C. 241)

MARSHALL v. COLUMBIA & E. C. ELECTRIC ST. RY. CO. et al.

(Supreme Court of South Carolina. Feb. 17, 1903.)

1. EVIDENCE—DECLARATIONS—CORPORATE OFFICER.

In an action against a corporation to perpetually enjoin the use of a certain easement for private purposes, admission of declarations of the president of the corporation on the purchase of a lot as to an adjoining easement is not error.

2. SAME—PAROL EVIDENCE.

Evidence as to the purpose for which certain land was intended as showing defendant's construction of the contract was not inadmissible as parol evidence contradicting the terms of the deed.

3. CORPORATIONS—DECLARATIONS OF PRESIDENT.

Representations of the president of a corporation, who was much referred to by all the stockholders in the management of its business, and more particularly in the sale of lots, were binding on the company.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1688.]

4. VENDOR AND PURCHASER—SALE OF LOT—REPRESENTATIONS.

On a map of a town site a park was located, and the company owning the property represented to the purchaser that it would be kept open, and thereby induced the purchase of the lot. Held, that such representation was binding on the company, though the map was not accepted or adopted by the corporation.

Appeal from Common Pleas Circuit Court of Richland County; Gary, Judge.

Action by Julia C. Marshall against the Columbia & Eau Claire Electric Street Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The circuit decree is as follows:

"This case was heard by me at the summer term of common pleas for Richland county in 1905, on the pleadings and on evidence taken by the master for Richland county under an order for that purpose, and, after hearing argument of counsel, I find the following facts:

"That during the year 1897 the defendant the Columbia & Eau Claire Electric Street Railway Company, being the owner of a tract of land containing about 191 acres near the city of Columbia, had a plat thereof made for the purpose of laying out a town to be known as Eau Claire, as shown and delineated by the plat in evidence as Exhibit A, made by Niernsee & La Motte, civil engineers. That on

said plat of said Niernsee & La Motte, civil engineers, there was a 'Circle' bounded as follows: north by lands of Columbia & Eau Claire Electric Street Railway Company, and lands hereinafter described of Mrs. Julia C. Marshall and Columbia & Eau Claire Electric Street Railway Company and N. P. Booker, south by lands of A. G. La Motte and Columbia & Eau Claire Electric Street Railway Company and Mrs. Agnes W. Tompkins, and west by lands of Columbia & Eau Claire Electric Street Railway Company; the same being a part of and lying around the intersection of Fifth avenue and Second streets on said map, in the said town of Eau Claire, in the said county and state. That on the 30th day of December, 1897, the plaintiff herein, Mrs. Julia C. Marshall, purchased from the defendant the Columbia & Eau Claire Electric Street Railway Company, the three parcels of land described in the complaint, situate in what is known as the town of Eau Claire, in the said county and state, and received from the said defendant the Columbia & Eau Claire Electric Street Railway Company a deed to the said premises, a copy of which is set out in the complaint herein. The following is a description of the lots so sold and conveyed by the said defendant the Columbia & Eau Claire Electric Street Railway Company to the said Mrs. Marshall: (1) All that lot of land containing two 25-100 acres, more or less, situate in the county of Richland and state of South Carolina, and being a subdivision of the said company's tract of land, containing one hundred and ninety-one (191) acres, lying about two miles from Columbia, on the west side of the Winnsboro road, and being bounded as follows: north by Sixth avenue, measuring along same two hundred and eighty-nine feet and six inches (289' 6") from the corner of the intersection of Second street and Sixth avenue; east by lots of J. B. Duke and G. W. Floyd, measuring thereon four hundred and fifty-five feet (455'); south by Fifth avenue, measuring thereon fifty-eight feet six inches (58' 6") to the corner of Fifth avenue and the 'Circle'; west by the east line of the 'Circle,' measuring thereon one hundred and eighty-eight feet and eight inches (188' 8"), and west by Second street, measuring thereon three hundred and forty-five feet (345'). (2) All that lot of land containing three acres, being a subdivision of the said company's tract of one hundred and ninety-one (191) acres, lying about two miles from Columbia, on the west side of the Winnsboro road, and being bounded as follows: north by land of the said company and the 'Circle'; east by Second street; south by Fourth avenue, and west by Third street, being a rectangular parallelogram in shape, measuring on its north and south sides each five hundred feet (500') and on its east and west sides each two hundred and fifty-one feet (251'). The streets, avenues, and circle referred to in the two foregoing descriptions

are delineated on the said plat of said company's said tract of 191 acres, made by Niernsee & La Motte, civil engineers.

"That the said plat, Exhibit A, at the time of the said purchase of the said Mrs. Julia C. Marshall from said company, was exhibited on the premises so sold to Mrs. Julia C. Marshall by Mr. F. H. Hyatt, president of the said company, who had control and management and the negotiations of the sales of said lots, and he assured the said plaintiff that the said 'Circle,' upon which her said lots bounded, was dedicated by said company for public uses and would be kept open, and the said plaintiff, Mrs. Julia C. Marshall, purchased the said lots with the understanding and agreement after she had seen said plat that the said 'Circle' would be kept open and remain as designated and delineated in the said plat for public uses, for the purpose of said town, and was one of the inducements which led her to buy said lots adjoining the said 'Circle.' And thereafter the defendant the Columbia & Eau Claire Electric Street Railway Company changed the said 'Circle' and divided the same into lots, and offered them for sale, according to a map exhibited and made by A. G. La Motte, civil engineer, and at said sale the defendants, Wylie Jones, J. C. Brown, L. A. Riser, J. McManus, J. N. Cantey, W. P. Booker, and J. L. Toney, were purchasers. These said purchasers had actual personal notice of the claim of Mrs. Julia C. Marshall, the plaintiff, that the said 'Circle' had been dedicated to public uses by the said company, and of the rights of the plaintiff, Mrs. Julia C. Marshall, in said 'Circle' as an easement incident to her lots and of her rights therein.

"I find that the defendant the Columbia & Eau Claire Electric Street Railway Company having dedicated the said 'Circle' to the said uses of the said town, and the said Mrs. Marshall having bought in reference thereto, she has an easement in and over the said 'Circle,' and the said company had no right to divide the said circle into lots and offer them for sale, and the other defendants to this action, having notice of this, bought it with full knowledge of this right easement, and can take no title to said lots purchased by them. It is therefore ordered that the Columbia & Eau Claire Electric Street Railway Company and all persons claiming under, by, or through said company, be, and the same are hereby, perpetually restrained from hereafter interfering with in any way the right of the said Mrs. Julia C. Marshall, and of all persons claiming under her, or entering upon and having full access to or egress from the said 'Circle,' so dedicated by the said Columbia & Eau Claire Electric Street Railway Company for the said use of the said town; and it is further ordered that the said plat be filed in this case and the clerk of this court do record the same in the plat book in his office; and it is further ordered that the defendant company be, and

they are hereby, restrained from conveying any portion of said 'Circle' to any persons whomsoever; and it is further ordered that the defendants Columbia & Eau Claire Electric Street Railway Company pay all the costs of this action and the costs of recording the plat herein."

The defendants appeal on the following exceptions:

"(1) Because his honor did not rule upon and sustain objections made by the defendants to the evidence of the witness A. G. La Motte, as follows: 'Q. Can you give the conversation that passed between them? Mr. Robinson: I object to any conversation between Mr. Hyatt and Mrs. Tompkins or any person other than Mrs. Marshall, same not with reference to the issue, and hearsay. Witness: I was present at Mr. Hyatt's office by request at a conversation between Mr. Hyatt and Mr. and Mrs. Tompkins, and probably one or two others. If I remember, there were one or two others in the office—possibly several others at the time. Mr. Tompkins: Well, now just state was Mrs. Marshall present? Witness: I do not think that Mrs. Marshall was present. She might have been, but I do not remember. Q. Well, tell the conversation. A. What occurred? Q. Yes. Mr. Robinson: Objected to as above. Witness: At that time the question of the "Circle," or doing away with the "Circle," was brought up and discussed, and at Mr. Hyatt's request I expressed myself about it, advising them as their engineer about it, and discussed it with them fully, and after going over the matter, Mr. Hyatt said the "Circle" could stand as it was. Q. Stand as it was? A. Yes, sir—because the said evidence was irrelevant and incompetent to this case, and the statements and declarations therein referred to were not to or with the plaintiff, and were not made at the time or before the purchase by her of the lots described in the complaint, but, on the contrary, the evidence of plaintiff's witnesses L. S. Tompkins, as also of the witness Agnes W. Tompkins, show that the representations were made after the purchase and conveyance of the lots mentioned in the complaint, and at the time the witness Agnes W. Tompkins was beginning the erection of a building thereon.

"(2) That his honor erred in not ruling and sustaining the objection of the defendants to the testimony of the witness L. S. Tompkins as to the conversation between him, his wife, and Mr. F. H. Hyatt, as follows: 'Q. Well, what did he tell you with reference to this "Circle" and the streets and avenues laid out on that map? Mr. Robinson: Objected to on the ground that it is parol evidence and the contract was afterwards reduced to writing, and that he had no authority to make representations. Mr. Tompkins: All right; go ahead. Witness: Well, we bought according to that map right there—one like it—and before we—when we started to build out there, we thought there might something

come up about that "Circle"—that four acres. So my wife, myself, and Mr. La Motte went up to Mr. Hyatt's office and asked Mr. Hyatt— Mr. Robinson: And also further objected to on the ground that the representations were after the deed mentioned in the complaint, and after the contract of sale, and could not affect the same. Now go ahead, Mr. Tompkins. Witness: Mr. Hyatt told my wife that that would continue to be a circle; that we were on the corner; that we bought out there on the corner. Mr. Tompkins: Well, do you know exactly when that was that you all went to his office? Witness: That was just before—we had the lumber out there to build. Q. Well, had the deed been made to Mrs. Marshall at that time? A. I think it had. Q. You think the deed had been made? A. Yes, sir.' Because the said evidence was irrelevant and incompetent to this cause, and the statements and declarations therein referred to were not made to or with the plaintiff, and were not made at the time or before the purchase by her of the lots described in the complaint; but, on the contrary, the evidence of plaintiff's witnesses L. S. Tompkins, as also of the plaintiff's witness Agnes W. Tompkins, shows that these representations were made after the purchase and conveyance of the lots mentioned in the complaint, and at the time the witness Agnes W. Tompkins was beginning the erection of a building thereon.

"(3) That his honor erred in ruling and deciding "that during the year 1897 the defendant, * * * being the owner of a tract of land containing about 191 acres, near the city of Columbia, had a plat thereof made for the purpose of laying out a town to be known as Eau Claire, as shown and delineated by the plat in evidence as Exhibit A, made by Niernsee & La Motte, civil engineers, if thereby the inference is intended that said map so introduced in evidence was accepted and adopted by the defendant company," because the evidence shows that the map 'A' was never accepted and adopted by the defendant company, but, on the contrary, was altered and changed in very material respects, with reference to the lands mentioned and described in the pleadings herein, and the changes were made in reference to the 'Circle' and 'bicycle and ball park,' and with reference to the streets and boundaries in and to the lands mentioned in the complaint, at the time of and before the purchase by the plaintiff of the lands described in her complaint.

"(4) That his honor erred in ruling and deciding "that the said plat, Exhibit A, at the time of the said purchase of the said Mrs. Julia C. Marshall from said company, was exhibited on the premises so sold to Mrs. Julia C. Marshall by Mr. F. H. Hyatt, president of the said company, who had control and management and the negotiations of the sales of said lots, and he assured the said plaintiff that the said "Circle" upon

which her said lots bounded, was dedicated by said company for public uses, and would be kept open, and the said plaintiff, Mrs. Julia C. Marshall, purchased the said lots with the understanding and agreement after she had seen said plat that the said "Circle" would be kept open and remain as designated and delineated in the said plat for public uses, for the purpose of said town, and was one of the inducements which led her to buy her said lots adjoining the said "Circle," because (a) the evidence shows that the defendant Columbia & Eau Claire Electric Street Railway Company never adopted and accepted the map, Exhibit A, as originally made, and never dedicated the 'Circle' or the streets in and about the 'Circle,' and never dedicated the 'bicycle and ball park' to public uses and purposes, and that neither the defendant company nor its president represented to the plaintiff at the time of her purchase that said 'Circle' and 'bicycle and ball park' and said streets were so dedicated; (b) but, on the contrary, the defendant, for a considerable time before the purchase by said plaintiff, had determined to use the land marked 'Circle' and 'bicycle and ball park' for lots, and to cut the same and all their lands up and sell it in such manner as to suit the convenience and desire of the purchasers, and at the time of the purchase by plaintiff the map was disregarded, and the lots were cut up in such sizes and shape as the plaintiff requested. (c) Furthermore, plaintiff was advised at the time of her purchase that the said 'Circle' would be used for private purposes, and (d) the alleged representations which plaintiff claims were made to her, plaintiff's own evidence shows, if made at all, were made a considerable time after her purchase, and at the time her daughter was building on one of the lots, and could not in any wise have entered into or formed a part of the consideration of the deed mentioned in the complaint; and (e) furthermore, there is no evidence or authority by the defendant company or Mr. Hyatt to make such representation.

"(5) That his honor erred in ruling and deciding 'that the defendants Wylie Jones, J. C. Brown, L. A. Riser, J. McManus, J. M. Cantey, W. P. Bookter, and I. L. Toney, had actual and personal notice of the claims of Mrs. Julia C. Marshall, the plaintiff, that the said "Circle" had been dedicated to public uses by the said company, and of the rights of the plaintiff, Mrs. Julia C. Marshall, in said "Circle," as an easement incident to her said lots, and of her rights therein'; because there is no evidence warranting the finding or conclusion that said defendants had notice of their rights at the time of their purchases, and notice subsequent thereto would be of no force.

"(6) That his honor erred in holding 'that defendant had dedicated said "Circle" to the uses of said town,' and that Mrs. Marshall has 'an easement in and over the said

"Circle," and the said company had no right to divide said "Circle" into lots and offer them for sale, and that the other defendants

* * * bought with full knowledge of this right, easement, and can take no title to said lots purchased by them'; because the evidence does not show or warrant the conclusion that the 'Circle' was dedicated to the use of the town, or that Mrs. Marshall had any rights therein because of the lots which she had purchased, and the evidence does not show that the defendants, other than the Columbia & Eau Claire Electric Street Railway Company, bought with full knowledge of her easement, and, on the contrary, the evidence and the facts in this case warrant the conclusion that the plaintiff had no easement or right in and to said 'Circle,' and the defendant Columbia & Eau Claire Electric Street Railway Company had a right to sell the same in such manner as it saw proper.

"(7) That his honor erred in ruling and deciding 'that the Columbia & Eau Claire Electric Street Railway Company, and all persons claiming under, by, or through said company, be, and the same are hereby, perpetually restrained from hereafter interfering with in any way the right of said Mrs. Julia C. Marshall, and of all other persons claiming under her, of entering upon and having full access to or egress from the said "Circle" so dedicated by the said Columbia & Eau Claire Electric Street Railway Company, for the said use of the said town'; because said ruling is based upon the erroneous findings and conclusions of fact and law, embraced in the above exceptions, and is therefore contrary to the facts and law of this case, for the reasons set forth in the foregoing exceptions.

"(8) That his honor erred in ruling and ordering 'that the said plat be filed in this case, and that the clerk of this court do record the same in the plat book in his office'; because the said plat was never accepted or adopted by the defendant company, and the sales for the lots made by the defendant company were not made with reference to or in accordance with the said plat, Exhibit A.

"(9) That his honor erred in ruling 'that the defendant company be, and they are hereby, restrained from conveying any portion of said "Circle" to any person whomsoever'; because the said company has a right to convey the lands owned by it, without reference to said plat and said 'Circle,' for the reasons set forth in the foregoing exceptions.

"(10) That his honor erred in ruling and rendering judgment that 'the defendants Columbia & Eau Claire Electric Street Railway Company pay all the costs of this action, and the costs of recording the plat herein'; because the judgment of his honor is erroneous, for the reasons and in the particulars set forth in the foregoing exceptions."

Clark & Clark and D. W. Robinson, for appellants. Frank G. Tompkins, for respondent.

GARY, A. J. In this action the plaintiff invokes the equitable aid of the court to reform the deed executed by the defendant Columbia & Eau Claire Electric Street Railway Company, whereby it conveyed to the plaintiff the two lots described in the complaint; also for an injunction to prevent the company from selling or in any manner interfering with the land described as the "Circle," in the plat or map to which reference is made in said deed, so as to affect her rights. The vital question raised by the pleading is whether there was an agreement between the plaintiff and said defendant that the land designated on the plat or map as the "Circle," and mentioned in the deed as one of the boundaries of her lots, should remain open as a park or for some other public purpose. The "Circle" contains about four acres of land. The decree of his honor, the circuit judge, finds the facts substantially as alleged in the complaint. The defendants denied the material allegations of the complaint and set up the plea of the statute of frauds as to the agreement therein alleged. The decree and the exceptions will be incorporated in the report of the case.

1. First exception: The record does not disclose the fact that the circuit judge was requested to rule upon the objections to the testimony mentioned in said exception, nor that a motion was made to strike out the testimony. But, waiving this objection, the exception cannot be sustained. The only objections to the testimony which can be considered by this court are those which were interposed when it was offered before the master, and the only grounds upon which it was then urged that it was inadmissible were that it was not with reference to the issue and was hearsay. The objection that the testimony "was not with reference to the issue" is untenable, as it related to the question whether there was an agreement that the "Circle" should be kept open, which was the main issue in the case. The objection to the admissibility of the testimony on the ground that it was hearsay is likewise untenable, as the testimony of the witness immediately preceding that set out in the exception shows that the conversation took place between Mr. Hyatt and the plaintiff or her representatives.

2. Second exception: The first ground to the objection to the admissibility of the testimony when it was offered before the master was "that it is parol evidence, and the contract was afterwards reduced to writing." The testimony does not contradict or vary the terms of the deed, but was explanatory of the purposes for which the land designated on the map as the "Circle" was intended, and tended to show the defendant's construction of the contract. *Williamson v.*

Association, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822. The testimony was likewise admissible for the purpose of showing the negotiations leading up to the execution of the deed. *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415. It was also competent as tending to show the actual consideration for the deed. *Whitman v. Corley*, 72 S. C. 410, 52 S. E. 49; *Earle v. Owings*, 72 S. C. 362, 51 S. E. 980; *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272; *Egan v. Bissell*, 53 S. C. 547, 31 S. E. 661.

3. The other objection to the testimony when it was offered before the master was "that he [Hyatt] had no authority to make representations." Mr. Muller, a witness for the defendants, who drew the deed, and who was a stockholder in said company, testified that Mr. Hyatt "was the president and leading spirit of the company. Was referred to very much by all the stockholders in the management of the business of the company, and more particularly in the sale of lots." His representations in the sale of the lots were, therefore, binding upon the company. *Williamson v. Association*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822; *Association v. Williamson* (U. S.) 23 Sup. Ct. 527, 47 L. Ed. 735.

4. The other exceptions assign error on the part of the circuit judge in his findings of fact. Even if the map was not accepted or adopted by the defendant company, and even if the "Circle" was not dedicated so as to confer rights that could be enforced by the public, nevertheless, if the company represented to the plaintiff that the "Circle" would be kept open, and thereby induced the plaintiff to purchase her lots, such representations would be binding upon the defendant. This court is satisfied with the findings of the circuit judge upon this question.

The foregoing conclusions practically dispose of all questions presented by the exceptions.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(73 S. C. 264)

GUESS & GLOVER v. SOUTHERN RY.
(Supreme Court of South Carolina. Feb. 19, 1906.)

1. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

An objection that notice to strike out allegations of a complaint was not sufficiently specific will not be reviewed unless raised below.

2. PLEADING—AMENDMENT OF COMPLAINT—SERVICE ON DEFENDANTS.

Requiring complaint after amendment to be served on defendants is not error.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1007.]

3. CARRIERS—DELAY IN FREIGHT—COMPLAINT.

In an action against a railroad company for delay in shipment of machinery, allegation that by such negligence great loss was inflicted on plaintiffs in their business and worry and anxiety of mind in that plaintiffs had gone to great trouble and expense to prepare for the prompt arrival and setting up of said

machinery which was necessary to their business and that the same was greatly hampered, curtailed, lost, and destroyed by the delay in delivering said machinery, was properly stricken out as irrelevant, where there was no allegation of notice of this fact at the time of the shipment on the part of defendants.

Appeal from Common Pleas Circuit Court of Hampton County; Aldrich, Judge.

Action by Guess & Glover against the Southern Railway. From an order striking out certain allegations of the complaint, plaintiffs appeal. Affirmed.

W. S. Tillinghast and A. McIver Bostick for appellants. B. L. Abney and Jas. W. Moore, for respondent.

GARY, A. J. The defendant's attorney made a motion to require the plaintiffs to make their complaint definite and certain, and to strike out certain allegations as irrelevant and redundant, whereupon his honor, the circuit judge, granted the following order: "A motion having been made in the above-stated action for an order requiring plaintiffs in the above-stated cause to make their complaint more definite and certain, and to strike out as irrelevant and redundant certain portions of paragraph 4 of said complaint, after hearing argument of counsel, it is ordered: That the following portions of paragraph 4 of said complaint be stricken out as irrelevant and redundant, to wit, the words 'in their business,' which follow immediately after the words 'inflicting great loss and injury'; also the words 'and worry and anxiety of mind, in that plaintiffs had gone to great trouble and expense to prepare for the prompt arrival and setting up of said machinery, which was necessary to their business,' following immediately after the words 'in their business'; also the words 'and the same was greatly hampered, curtailed, lost, and destroyed by the delay aforesaid in transporting and delivering of said machinery,' following immediately after the words 'which was necessary to their business.' That the plaintiffs do amend their complaint in accordance with this order and serve a copy of the amended complaint upon the attorney of defendant within 20 days from the date of this order, and the defendant have 20 days after the service of said copy of amended complaint in which to plead thereto." The first and second paragraphs of the complaint are formal; the third alleges that the defendant received for shipment at Charlotte, N. C., certain machinery consisting of a gin, engine, etc., consigned to the plaintiffs at Richardson, a station on the Atlantic Coast Line Railroad, in Hampton county. The fourth paragraph is as follows: "That the defendant, notwithstanding its said contract, so negligently and carelessly handled said shipment in the matter of its transportation over its said lines to point of delivery to connecting line aforesaid, in utter reckless and wanton disregard of its duty and obligation to plain-

tiffs, the consignee thereof, as to consume a most unnecessary and unreasonable length of time before delivery to connecting line as aforesaid, thereby, that is to say, by said careless, negligent, unnecessary, and wanton delay in transit on the part of defendant, its servants, agents and employes, inflicting upon plaintiffs great loss and injury in their business and worry and anxiety of mind, in that plaintiffs had gone to great trouble and expense to prepare for the prompt arrival and setting up of said machinery which was necessary to their business, and the same was greatly hampered, curtailed, lost, and destroyed by the delay aforesaid in transporting and delivering of said machinery, to the damage of plaintiffs in the sum of \$1,900."

The plaintiffs appealed from said order on the following exceptions: "(1) That his honor erred in entertaining the motion to make more definite and certain upon the notice served; whereas, he should have decided that the said notice was insufficient for failure to state specifically, wherein the pleading was deficient in definiteness and certainty and the particular statement, required, and should therefore have refused the motion as a whole. (2) That his honor erred in entertaining at one and the same time and upon one and the same notice, motions to make more definite and certain and at the same time to strike out as irrelevant and redundant; whereas, he should have refused both motions, or at least required the defendant to elect. (3) That his honor erred in requiring amended complaint to be served upon order striking out mere incidental allegations of damage, and not affecting the continuity or legal status of the general ad damnum statement. (4) That his honor erred in striking out the whole or any part of the matter required to be stricken from the complaint by said order as irrelevant or redundant; whereas, he should have held and decided, that the words and clauses, so stricken, were neither redundant nor irrelevant, but, on the other hand, highly pertinent to the cause of action stated in complaint as a more particular and special statement of the damage suffered and in aggravation thereof. (5) That his honor erred in striking out and excluding from the cause of action, as stated in the complaint, the special and incidental matters so stricken therefrom in an action, which included punitive as well as actual damages."

1. First and second exceptions: It does not appear from the record that the appellant interposed the objections set out in these exceptions when the motion was heard, or that the circuit judge ruled upon them. In the absence of such facts they must be regarded as having been waived, and are not properly before this court for consideration.

2. Third exception: While it would not have been error for the circuit judge to order that the irrelevant and redundant matter

should simply be struck out of the complaint, still, it was not error to require that the complaint, as amended, should be served, as such a practice tends to neatness and legibility of pleadings, and is, therefore, to be commended.

3. Fourth and fifth exceptions: The allegations cannot be regarded as relevant on the ground that they embody the element of special damages, for the reason that they do not contain the further allegation that the defendant had notice of such facts. In *Traywick v. Ry.*, 71 S. C. 82, 50 S. E. 549, the court says: "The last question is whether there was error in refusing to strike out the words 'and caused a number of persons who had engaged the plaintiff to hull their rice to take it elsewhere.' * * * The object in alleging that fact was to enable the plaintiff to prove special damages. The plaintiff failed to allege notice of this fact on the part of the defendant. Therefore, the allegation should have been struck out, as the plaintiff could derive no benefit from it, without the further allegation of notice on the part of the defendant." Nor can the allegations be construed as relevant on the ground that they contain probative matter. In *Pom. Rem.*, § 517, it is said: "The fundamental and most important principle of the reformed pleading, the one from which all the others are reduced as necessary corollaries, is the following: The material facts, which constitute the ground of relief * * * should be averred as they actually existed or took place, and not the legal effect or aspect of those facts, and not the mere evidence of probative matter, by which their existence is established (italics ours). Section 526 of the same publication shows that "those important and substantial facts should be alleged, which either immediately form the basis of the primary right and duty, or which directly make up the wrongful acts or omissions of the defendant, and not the details of the probative matter or particulars of evidence, by which these material elements are to be established" (italics ours).

It is the judgment of this court that the judgment of the circuit court be affirmed.

(73 S. C. 257)

STATE v. ANDREWS.

(Supreme Court of South Carolina. Feb. 19, 1906.)

1. HOMICIDE—EVIDENCE—REPUTATION OF DECEASED.

Particular acts of violence on the part of deceased cannot be shown on trial for murder, unless so connected with the fatal rencontre as to produce reasonable apprehension of grievous bodily harm, and create a necessity to slay in self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 391-397.]

2. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES.

On a trial for murder, to prove that deceased had been tried for homicide record must be introduced as evidence.

3. HOMICIDE—EVIDENCE—MOTIVE.

On a trial for murder, it was competent to show that both parties were in love with the same woman in order to show motive.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 328.]

4. SAME—INSTRUCTIONS—MUTUAL COMBAT.

An instruction that where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder, but if it be done in sudden heat and passion upon sufficient provocation without premeditation or malice it would be manslaughter, is a sufficient instruction as to mutual combat.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 32, 66, 87, 153, 154.]

5. SAME—SELF-DEFENSE.

Where defendant pleads self-defense, he must show that he had no other safe, reasonable means of escape.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 155-157, 164-167.]

Appeal from General Sessions Circuit Court of Saluda County; Purdy, Judge.

Wis Andrews was convicted of manslaughter, and appeals. Affirmed.

C. J. Ramage and Croft & Salley, for appellant. R. A. Cooper, for the State.

WOODS, J. The defendant, Wis Andrews, shot and killed Willis Daniel on May 29, 1904, immediately after a religious service at Reedy Branch church, in Saluda county. Upon his trial for murder, the killing being undisputed, the issues were whether the defendant was guilty of murder or of manslaughter, or killed in self-defense. From conviction and sentence for manslaughter, the defendant appeals, alleging errors in the admission and exclusion of evidence, and in the charge to the jury.

1. For the purpose of showing that the deceased was of violent disposition, counsel for the defense asked the witness, Mack Tillman, these questions: "Do you know that Willis was tried for assisting or being an accessory to the killing of Narrow Bell?" "Did you hear of his being in the Narrow Bell killing?" The general reputation of the deceased for violence might have been proved, but not particular acts of violence, unless such specific acts were so connected in point of time or occasion with the fatal rencontre as to produce reasonable apprehension of grievous bodily harm and reduce the other party to the apparent necessity to slay in self-defense. *State v. Smith*, 12 Rich. Law 443; *State v. Dill*, 48 S. C. 249, 26 S. E. 567; *State v. Thrallkill*, 71 S. C. 142, 50 S. E. 551. No such connection was here shown.

2. Even if it had been the right of the defendant to prove deceased had been tried for murder, it was incumbent upon him to introduce the record as the best evidence of that fact. Certainly it could not be proved by mere hearsay. *State v. Williamson*, 65 S. C. 246, 43 S. E. 671. The exceptions as to the exclusion of the answers to these questions are, therefore, not well founded.

3. The defendant next alleges it was error

to allow the solicitor to ask the defendant on cross-examination, "Where is that woman you and he [deceased] were loving and you and he were mad with each other about?" The defendant in response denied that there was any ill-feeling between himself and deceased about a woman, or that they had ever had any unpleasantness on that account, and the prosecution made no further effort to prove any such motive for the killing; the defendant, therefore, was not prejudiced. But the question was competent on the cross-examination for the purpose of showing motive; the defendant having the right, however, to refuse to answer if the answer would have tended to criminate him. *State v. Williamson, supra*. The record does not indicate that the witness claimed the right to refuse to answer on this ground.

In the fifth, sixth, seventh, ninth and tenth exceptions, the defendant takes from the charge isolated sentences and imputes to the circuit court error in definitions of murder and of manslaughter, in not instructing the jury to consider any lack of testimony as well as the evidence actually introduced, and in charging the jury not to consider the testimony, or at least leaving it in doubt as to whether it was their duty to consider it. No reference is made to these exceptions in the argument, for the reason, no doubt, that on reflection counsel perceived they were without foundation. Definitions of murder and of manslaughter were accurate and full, and the jury were instructed to consider the entire case and give the defendant the benefit of any reasonable doubt.

4. As to the mutual combat, the circuit judge charged: "Something has been said in your hearing about the law in reference to mutual combat, where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation without premeditation or malice, it would be manslaughter." This language seems perfectly clear, but if any more specific definition of mutual combat was desired it should have been requested.

5. The refusal of the following request is assigned as error in the eleventh exception: "That as to question as to a safe, reasonable means of escape in a homicide case, it is incumbent on state to show that the defendant had such a safe, reasonable means of escape beyond a reasonable doubt." "The absence of other probable means of escape is an essential element of the plea of self-defense, and like its other elements must be established by the preponderance of the evidence." *State v. Thrallkill*, 71 S. C. 136, 50 S. E. 551. The burden was not on the state to establish that there was such probable means of escape, and the request was properly refused. The law was correctly given to the jury in the following language of the circuit judge: "When he undertakes

to make out the plea of self-defense, he has to make that good only by the preponderance of the evidence, and if on that and on the testimony arising in the whole case you have a reasonable doubt as to his guilt on any material point, he must have the benefit of that doubt, and acquittal must follow on the matter on which you have a reasonable doubt."

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 263)

ROUNTREE v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Feb. 19, 1906.)

1. ACTION—JOINDER OF CAUSES—ELECTION.

Where plaintiff joins in the same action a cause of action for negligence under the common law and under the statute, he cannot be required under Code Civ. Proc. 1902, § 186a, providing that where two or more acts of negligence are set forth in the same complaint, plaintiff shall not be required to elect on which he will go to trial, to elect between the two causes of action stated.

2. CARRIERS—FAILURE TO STOP AT STATION.

In an action against a carrier, evidence that it failed to stop a train at a flag station to let off a passenger having a ticket to such station, and that he was put off at another station two miles distant, and was compelled to walk therefrom, is to be considered in determining whether plaintiff has suffered any damage at common law.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1082.]

3. SAME—STATUTORY PENALTY.

Civ. Code 1902, § 2202, providing that if any carrier shall do any act prohibited by the chapter or omit to do any act required to be done, it shall be liable to three times the amount of the damage sustained, does not render a railroad company liable to such penalty for failure to stop a train at a flag station, as a violation of section 2134, providing that every railroad company shall cause all its trains to stop on each arrival at a station advertised by such company as a station for receiving passengers.

4. APPEAL—REVIEW—GROUNDS OF DECISION—REASONS.

In refusing a motion for a new trial, erroneous statement by the judge as to the force and effect of the testimony, is no ground for reversing his decision.

Appeal from Common Pleas Circuit Court of Barnwell County; Townsend, Judge.

Action by James Rountree against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Robert Aldrich, for appellant. Bates & Simms, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by plaintiff, through the negligence and willfulness of the defendant in failing to stop its train at the flag station, to which it sold him a ticket; also, for the alleged violation of sections 2134 and 2202 of the Code of Laws

of 1902. The jury rendered a verdict in favor of the plaintiff for \$250.

The defendant appealed, and the first assignment of error is as follows: "(1) That the presiding judge erred in law, as it is respectfully submitted, in refusing defendant's motion to require the plaintiff to elect which of the two causes of action stated in his complaint he would rely upon, namely, the common-law action or the action under the statute, upon the grounds assigned by him, to wit, that the statute of this state upon the subject, which is section 186a of the Code of Civil Procedure of 1902, authorizes the two causes of action to be thus stated, when it is respectfully submitted that statute relates not to two separate and distinct causes of action, but to the right of a party to recover either actual or punitive damages without stating his grounds separately, and exempting him from the necessity to elect which he will go to trial for actual or other damages, and does not exempt him from electing which of two separate and distinct causes of action he will rely upon, when both are stated together in the same complaint."

Section 2184 of the Code of Laws of 1902 is as follows: "Every railroad company in this state shall cause all its trains of cars for passengers to entirely stop upon each arrival at a station, advertised by such company as a station for receiving passengers upon such trains, for a time sufficient to receive and let off passengers."

Section 2202 of the Code of Laws of 1902 provides that "each and every act, matter or thing in this chapter declared to be unlawful, is hereby prohibited; and in case any person or persons as defined in this chapter engaged as aforesaid shall do, suffer, or permit to be done, any act, matter or thing in this chapter prohibited or forbidden, or shall omit to do any act, matter or thing in this chapter required to be done, or shall be guilty of any violation of the provisions of this chapter, such person or persons shall, where no specific penalty is hereinbefore already provided for such violation, forfeit and pay to the person or persons who may sustain damage thereby, a sum equal to three times the amount of the damage so sustained, to be recovered by the person or persons so damaged, by suit in any circuit court in this state, where the person or persons causing such damage can be found, or may have an agent, office, or place of business; but in any such case of recovery, the damage shall not be assessed at a less sum than two hundred and fifty dollars * * *."

Section 186a of the Code of Civil Procedure of 1902 is as follows: "In all actions ex delicto in which vindictive, punitive or exemplary damages are claimed in the complaint, it shall be proper for the party to recover also his actual damages sustained, and no party shall be required to make any separate

statement in the complaint in such action, nor shall any party be required to elect whether he will go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instructions of the court. In all cases where two or more acts of negligence or other wrongs, are set forth in the complaint, as causing or contributing to the injury, for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury, under the instructions of the court, and to recover such damages as he has sustained, whether such damages arose from one, or another, or all of such acts or wrongs alleged in the complaint.

This court has heretofore ruled that when a complaint alleges two or more acts of wrong, they constitute separate causes of action; that the defendant may make a motion for nonsuit on the whole case, but it cannot properly be granted if there is testimony tending to prove any of said acts of wrong; that the defendant, also, has the right to elect to move for a nonsuit as to each separate cause of action, and it should be sustained in the absence of testimony tending to support that particular cause of action. *Machen v. Tel. Co.*, 72 S. C. 256, 51 S. E. 697. But the court has not decided that the plaintiff may be required to make an election as to the cause of action upon which he will proceed to trial, and we are unwilling to extend the doctrine as to the election of remedies. This court is satisfied that, under the terms of section 186a of the Code the presiding judge was not in error in refusing the motion to require the plaintiff to elect upon which cause of action he would proceed to trial.

2. The second exception is as follows: "(2) That the presiding judge erred in law, as it is respectfully submitted, in refusing defendant's motion for nonsuit on the common-law action, when there was no allegation or evidence whatever of any actual damages or evidence of any wanton, willful or malicious injury, and said motion for nonsuit is renewed in the Supreme Court." There was testimony to the effect that the plaintiff was compelled to walk in the night, two miles further than he would have had to travel, if the defendant's train had stopped at the station to which he purchased his ticket; and this was an element to be considered by the jury, in determining whether the plaintiff sustained damages. In the case of *Milhous v. Railway*, 72 S. C. 442, 52 S. E. 41, the court says: "When there is testimony showing that the inconvenience was the direct and proximate result of negligence or willfulness, it may be taken into consideration by the jury in awarding damages"

—citing *Gen. R. & B. Co. v. Strickland* (Ga.) 16 S. E. 352.

3. The third assignment of error is as follows: "(3) That the presiding judge erred in law, as it is respectfully submitted, in refusing defendant's motion for nonsuit on the statutory action, when the evidence was wholly to the fact that the station by which the plaintiff was carried as he complains, is a flag station, and the statute gives a right of action in such a case only at a station advertised by the company as a station for receiving passengers, and said motion for nonsuit is renewed in the Supreme Court." The motion for nonsuit in this case must be construed in a double aspect—(1) as a motion based upon the fact that there was no testimony tending to establish the common law action; and (2) as a motion founded upon the absence of testimony tending to sustain the statutory action. The plaintiff admitted that the place to which he purchased his ticket was a flag station, and the cases of *Milhou v. Railway*, 72 S. C. 442, 52 S. E. 41 and *Lake Erie & Western R. R. Co. v. People*, 42 Ill. App. 387, show that the provisions of the statute are inapplicable to flag stations. In the last mentioned case, the court having under consideration a statute similar to that in this state, used the following language: "This statute is a penal one; the judgment rendered against the appellant is in the nature of a fine inflicted for its violation. Such statutes are to be strictly construed, and to warrant the imposition of the punishment provided, the proof must bring the one accused of its violation clearly within the provisions of the law. Courts have no power to extend such enactments to cases not clearly within their terms. Nor can usage or custom be held to extend the terms of a penal statute. * * * Carlock was not advertised by the folder as 'a place for receiving and discharging passengers,' but was expressly advertised as a place where the train would only stop if signalled to do so. A failure to stop if signalled might, of course, subject the appellant to such damages as the failure should cause, but to hold that a failure to stop there because signalled to do so, or because of a contract with the agent of the appellant to do so, or because such train usually did stop when requested, would subject the appellant to the forfeiture provided for in violation of the statute in question, would simply be an extension by the court of a penal statute to a case not within its terms." It is true, the presiding judge charged the jury that the statute was inapplicable to flag stations, but he did not instruct them that they could not render a verdict based in whole or in part on the statutory cause of action; on the contrary, he submitted to them the question whether Myer's Mill was a flag station. Therefore, the error in refusing the nonsuit was not cured.

4. The fourth exception is as follows: "(4) That the presiding judge erred in law, as it is respectfully submitted, in refusing defendant's motion for a new trial on the minutes of the court upon the grounds as stated by him, that 'the testimony of the conductor himself shows that he was convinced that he had done wrong, and there is other testimony in the case that shows that the conductor was negligent and reckless.' When, as it is respectfully submitted, there is no such testimony in the case and his honor in coming to such a conclusion misconstrued the testimony altogether, and in refusing the motion upon a clear misunderstanding of the testimony committed error of law." In refusing the motion for a new trial, the presiding judge merely stated his impressions as to the force and effect of the testimony. The rule is thus stated in *Webber v. Ahrens*, 36 S. C. 585, 15 S. E. 732: "The trial judge need not have given any reasons for his refusal of the motion for a new trial; * * * but if he gave his reasons for his conclusions, such reasons cannot be canvassed by this court, if they relate to the questions of fact submitted to the jury."

It is the judgment of this court, that the judgment of the circuit court be reversed and the case remanded to that court for a new trial.

POPE, C. J., concurs in the result.

(73 S. C. 277)

STATE v. MILLER et al.

(Supreme Court of South Carolina. Feb. 20, 1906.)

1. HOMICIDE—EVIDENCE—OTHER OFFENSES—CIRCUMSTANCES PRECEDING ACT.

In a prosecution for homicide, evidence that a few minutes before the killing defendant was traveling in the direction of the scene of the tragedy, shouting and crying out, and that, a short time before reaching deceased, he attacked another person without provocation, is relevant, as bearing upon the state of defendant's mind.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 341.]

2. SAME—ADMISSIONS.

In a prosecution for murder, an admission by defendant within 5 or 10 minutes after the crime that he had shot a man is admissible.

3. SAME—REPUTATION—INSTRUCTIONS.

In a criminal prosecution, an instruction that testimony that, so far as witness knew, the reputation of a certain person was good, should be taken in connection with what the witness stated other persons had said on the subject, was proper.

4. SAME—INSTRUCTIONS—MALICE.

An instruction that malice has been defined to be a term of art importing wickedness and excluding just cause and excuse is not erroneous, on the ground that it leads the jury to believe that mere wickedness is malice.

5. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

In a criminal prosecution, an instruction that defendant is entitled to the benefit of all evidence in his favor is not erroneous, as depriving defendant of any benefit arising from the lack of evidence.

6. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

In a prosecution for murder, an instruction that the law of self-defense is founded in necessity, so that if it be not necessary to take human life, and it does not appear to be necessary, the law of self-defense falls to the ground, though it does not make any difference whether the danger was real or not, if the party actually believed at the time that he was in danger, was proper.

Appeal from General Sessions Circuit Court of Saluda County; Purdy, Judge.

Slon Miller and another were convicted of manslaughter, and appeal. Affirmed.

C. J. Ramage, for appellants. R. A. Cooper, for the State.

JONES, J. Slon Miller, Joe B. Miller, and Russell McCormick were indicted for the murder of Richard Truesdale. Slon Miller and Russell McCormick were convicted of manslaughter and sentenced to imprisonment in the state penitentiary at hard labor for 10 years.

1. The homicide occurred in Saluda county, in the afternoon of June 11, 1904, at Long Bridge on the Mt. Willing road leading from Batesburg to said bridge. The defendants that afternoon, previous to the homicide, passed by the home of W. L. Wise on said road, about three miles from Long Bridge, going in the direction of said bridge. The witness W. L. Wise was, over objection, permitted to testify that about 15 or 20 minutes before defendants passed his house that afternoon he heard hollering and pistol shots up the road in the direction from which they were coming, and this ruling is the foundation of the first exception, the appellant alleging that the testimony was not sufficiently connected in point of time with the killing and not calculated to explain any phase of the homicide. The witness Lawrence Hartley, a negro, was, over objection, permitted to testify as to the unprovoked and violent conduct of defendant Russell McCormick towards him on said road that afternoon, about one-quarter of a mile from Wise's house. The witness testified: "Mr. McCormick said: 'Hello, nigger.' I said: 'Good evening, Mister.' He said: 'Raise your hat to me. If you don't, I will shoot your God damn brains out.' I could not raise my hat at once. He caught hold of my mule's bridle and drew a knife on me and said: 'If you don't raise your hat to me I will cut your God damn heart out.' And I raised my hat to him." This testimony was admitted on the ground that it tended to show the defendant's state of mind a short time before the homicide. This ruling is the basis of the second exception, which contends that such conduct was not connected with the homicide and had no tendency to show defendant's frame of mind towards the deceased. The general rule is that proof of distinct and independent offenses is not admissible on the trial of a person accused of crime, but there are exceptions to or modi-

fications of this general rule, as where such evidence reasonably tends to show the malice, intent, or motive of the defendant with respect to the crime charged, or to show the identity of the defendant and his connection with the crime charged, or where the offense is so closely connected with the crime charged as to bring it within the rule of *res gestae*. Wharton's Crim. Ev. (8th Ed.) §§ '30-47. See, also, a full and elaborate note to *People v. Molineux*, 62 L. R. A. 193. The testimony admitted tended to show that the defendants were, a short time before the homicide, approaching the place where it occurred, armed with a deadly weapon and with a mind ready for mischief. The conduct, actions, and general behavior of the accused immediately before the killing is admissible to show that he was armed and in a vicious humor. 4 Elliott on Ev. § 3029.

2. The sixth exception alleges error in permitting the witness W. C. Duncan to testify, over objection, on cross-examination by the solicitor, that defendants, 5 or 10 minutes after the homicide, in a short conversation with witness, said that they had shot a darky. The ground of objection was not made known to the circuit court, but the testimony is clearly competent to show that they committed the homicide.

3. The seventh exception relates to remarks of the court in connection with the testimony of J. A. Ridgell, offered by the state to prove the reputation of the deceased for peace and good order. After the witness in his testimony said, "So far as I know, it was good," the court properly remarked: "In order that there may be no misunderstanding about this matter, when you attempt to prove the good character, or the bad character, by reputation, not by what you know about it, or what the witness knows about it, but by showing what people generally say about the witness whose character is assailed, or whose character is sought to be bolstered up. Reputation is what people say and think about a man. This witness's testimony will be taken in connection with what he said about what people said about the deceased."

4. The judge charged the jury: "Now malice has been defined to be a term of art importing wickedness and excluding just cause or excuse. It is something that springs from wickedness, from depravity, from a depraved spirit, from a spirit at the time bent on mischief, and not then having a regard for the social obligations, or the obligations which rest upon mankind." The third exception alleges error in this charge in that it confounds wickedness and malice, and the instruction had a tendency to make the jury believe that mere wickedness in a defendant is equivalent to malice. We see no merit in this exception. The charge was correct.

5. The court also charged: "Now the defendants come into court and say not guilty,

and when they say not guilty they are not called upon to name any special defense beyond just saying not guilty, but any defense that may arise from the testimony that inures to their benefit; they may set up a special plea, or may not set up any special plea. Under the plea of not guilty they are entitled to the benefit of all the testimony in the case that may inure to their benefit." In their fourth exception appellants allege that the court erred in charging the last sentence above, in that he should have charged the jury that defendants were also entitled to any benefit arising from the failure of proof or lack of testimony. This exception cannot be sustained. We see nothing in the charge excluding the matter which appellants claim should have been incorporated, and in other portions of the charge it was made manifest to the jury that it was the duty of the state to prove its case against the defendants beyond any reasonable doubt.

6. The fifth and remaining exception assigns error in the charge as to self-defense in not distinguishing between an absolute and an apparent necessity to strike. The charge was full and clear on that point as shown by this extract from the charge, the first sentence being the portion to which exception is taken: "The whole thing of self-defense after all is summarized and embraced in one word, necessity. The law of self-defense is founded in necessity, and if it be not necessary to take human life, if it appear not to be necessary to take human life at the time it was taken, the law of self-defense falls to the ground. There must be some real or some apparent necessity for taking human life, the party must be actually in imminent danger or he must believe he was in imminent danger, before he can strike. So far as the law of self-defense is concerned, it does not make one shadow of difference whether the danger was real or not, if the party actually, honestly believed at the time he was in danger of receiving serious bodily harm, or suffering death at the hands of the party slain." The charge as a whole was very full on the subject of self-defense and the law was declared in accordance with the rule stated in *State v. McCreer*, 13 S. C. 466.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(73 S. C. 232)

STATE v. IVEY.

(Supreme Court of South Carolina. Feb. 21, 1906.)

1. HAWKERS AND PEDDLERS—WHO ARE.

A person is not a hawker and peddler of medicines within Act Feb. 26, 1902 (Laws 1902, pp. 1101, 1102), forbidding traveling vendors from peddling and hawking medicines, who solicits orders for medicines, taking notes for the price, the medicines to be shipped from another state and delivered by one other than the person soliciting the order.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Hawkers and Peddlers, §§ 3-6.]

2. CRIMINAL LAW—ACQUITTAL—APPEAL BY STATE.

Where defendant convicted of hawking and peddling appeals from the magistrate to the circuit court, a finding in such court that he is not guilty is an acquittal from which the state cannot appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2604, 2605.]

Appeal from General Sessions Circuit Court of Sumter County; Watts, Judge.

W. E. Ivey was convicted of hawking and peddling, and from a judgment of the court of general sessions reversing a judgment of the magistrate, the state appeals. Affirmed.

John S. Wilson and L. D. Jennings, for the State. John H. Clifton, for respondent.

POPE, C. J. A prosecution in the magistrate's court of H. Harby, Esq., of Sumter county, S. C., was instituted about the 14th of October, 1905, against W. E. Ivey, as defendant, on the charge of the purchase and delivery of a package of medicine, in violation of section 1, of an act entitled "An act to prevent traveling vendors from plying their vocation," approved 26th of February, A. D. 1902, pp. 1101, 1102. After the introduction of testimony on both sides, the magistrate found the defendant guilty and sentenced him to pay a fine of \$30 or to be imprisoned in the county jail for 30 days. From this judgment the defendant appealed. His appeal came on to be heard before his honor, Judge R. C. Watts, at the regular term of the court of general sessions of Sumter county, on the 26th day of October, 1905.

After the hearing, the following order was passed: "The above stated case was heard by me on an appeal from the court of magistrate, after a full hearing and argument by L. D. Jennings for the state and John H. Clifton for the defendant. I am satisfied that the defendant was not engaged in hawking or peddling medicine, drugs or compounds, contrary to the statute, known as the hawker and peddler act, and upon the contrary it appears that the defendant was merely soliciting orders for the future delivery of a package of medicines, which at the time of the solicitations of orders therefor was not within the state of South Carolina, and consequently not the subject of legislative control upon the part of the said state. The defendant was in no sense a hawker or peddler, the testimony showing that he neither carried around from place to place for the purpose of selling, or offering for sale, the prohibited commodities, nor did he sell or offer to sell the same, and the testimony further shows that the defendant was engaged in an interstate transaction, and is, therefore, protected by the law and regulations of interstate commerce, and consequently cannot be made to pay license for such interstate business. Therefore it is ordered, on motion of John H. Clifton, defendant's attorney: That so far as the exceptions of the de-

defendant to the rulings and judgment of the magistrate raise or point out errors made by the magistrate contrary to and inconsistent with this order and the findings herein made, the same be, and hereby are, sustained. It is further ordered: That the judgment of the magistrate, made and pronounced against the said defendant, be, and the same is, hereby overruled; the prosecution heretofore commenced against the defendant be dismissed, and that the cash bond heretofore deposited by defendant in lieu of recognizance, pending hearing of this appeal, be refunded to him or his attorney."

From this judgment the state has appealed upon the following grounds: "(1) Because his honor erred in holding that at the time the defendant solicited orders for the sale of medicine that the same was not within the limits of the state and subject to legislative control; whereas, his honor should have held that the soliciting of orders and offering for sale medicines without license within the state of South Carolina, constituted an offense, and that it made no difference whether the medicine offered to be sold, or for which the defendant was soliciting orders, was within the limits of the state of South Carolina or not. (2) Because his honor erred in holding that the defendant, as a matter of law, was engaged in interstate commerce, and was, therefore, protected by the laws regulating interstate commerce, and was not liable under the hawkers and peddlers act; whereas, his honor should have held that the defendant was not engaged in interstate commerce business, but that he went from place to place within the county of Sumter, and state of South Carolina, exhibiting a sample case of medicine and selling medicine for future delivery, which the testimony showed was actually shipped into the state in large bulk and then taken by representatives of the defendant and distributed from place to place to the persons to whom he had made sale when going around with the samples, which his honor should have held constituted the crime of hawking and peddling, as laid down by this court in the case of *State v. Moorehead*, 42 S. C. 211, 20 S. E. 544, 28 L. R. A. 585, 46 Am. St. Rep. 719, in which case the court referred to *Amer. & Eng. Enc. of Law*, pages 307, 308, in which the definition of hawkers and peddlers is given as follows: 'A person is a hawker and peddler where he transfers the merchandise from place to place by means of public conveyance or otherwise, as well as where he himself carries it, and one who goes from house to house soliciting orders for the purchase of goods to be delivered in the future is likewise a hawker and peddler, as well as one who goes about the country bartering merchandise for such articles as he can get in exchange.' Therefore, his honor erred, as is respectfully submitted, in holding that the defendant, in going from place to place taking orders for the future delivery of medicines, was not a hawker and peddler

under the statute. (3) Because his honor erred in holding that the defendant, in going from place to place within the state soliciting orders, selling medicine, and taking notes and security for the same to be delivered in the future, was not a hawker and peddler, because the medicine was not within the state at the time of sale; whereas, we respectfully submit that his honor should have held that the defendant in going from place to place, selling medicine and taking orders for the same, taking notes and securities for the payment, was a hawker and peddler without license, and guilty of a violation of the Acts of 1902, at page 1101, which provides as follows: "That after the approval of this act, it shall be unlawful for any person to travel as hawkers and peddlers from place to place in this state and to sell or to offer for sale any medicine, drug or compound to be used as a curative without first paying to the clerk of the court of each county in which such person seeks to sell such medicine, drug or compound, a fee of \$100 for the use of such county, and procuring from him a license permitting such person to sell such medicine, drug or compound within such county," etc. (4) His honor erred in not holding that the traveling from place to place offering medicine for sale was a violation of said section, whether said medicine was ever delivered or not, and in not sustaining the judgment and conviction of the defendant by the magistrate. (5) Because his honor erred in holding that the testimony did not show that the defendant was a hawker and peddler; about which testimony there is no dispute, and which testimony shows that the defendant went from house to house with the sample case of medicine and took notes like the one printed in the case, and promised to deliver the medicine in the future, which, according to the testimony, was shipped from without the state to the defendant's superior agent in bulk and by another agent taken to the different parties in packages, and delivered, which testimony his honor should have held constituted the defendant a hawker and peddler, and was not interstate commerce business, because his honor should have held that orders were not taken and sent direct to the house outside of the state, and then filled by the house and shipped direct to the purchaser, but said orders were never sent to the house, but that the defendant and his superior ordered the medicine in bulk shipped to themselves and then unpacked and distributed in small quantities, all of which the evidence shows, and which his honor should have held constituted the defendant a hawking peddler."

We will now examine the exception. The language used in the statute, whose provisions it is claimed were willfully violated by the defendant, and which offense is set forth in the third ground of appeal, is directed against the hawking and peddling of medicines, drugs, or compounds to be used as a

curative, and shows that it is as a hawker and peddler of the same that is intended to be covered by this legislative provision. Therefore, it is necessary to ascertain what is the meaning in law attached to the terms "hawker" and "peddler." In the case of *State v. Belcher*, 1 McM. 42, this court, through Judge O'Neill, as its organ, said it was necessary to go back to the old act of 1737 (P. L. p. 152) to ascertain these terms and definitions; that "persons who travel from town to town, from one plantation to another, by land or by water, carrying to sell or exposing to sale any rum, sugar, or other goods, wares, or merchandises, are included in the general terms 'hawkers' and 'peddlers.'" In the case of *State v. Moorehead*, 42 S. C. 213, 20 S. E. 544, 26 L. R. A. 585, 46 Am. St. Rep. 719, the aforesaid definition of these words, hawker and peddler, was retained. Also, in the case of *Alexander Bros. v. Greenville County*, 49 S. C. 529, 27 S. E. 469, this definition is retained. In *State v. Coop*, 52 S. C. 511, 30 S. E. 609, 41 L. R. A. 501, the said definition of these terms was retained. Also, in 15 A. and E. Ency., at page 291, this definition is retained in this language: "Hawkers and peddlers are persons who practice carrying merchandise about from place to place for sale, as opposed to traders who sell at established shops." On the same page, this work points out the essential difference between a peddler and a commercial traveler or drummer, as well as the distinction between hawkers and peddlers on the one side and on the other side itinerant vendors or transient merchants. It seems to us, therefore, that in refusing in this instance to recognize the defendant as a hawker and peddler, the circuit judge committed no error. So that the second, third, fourth, and fifth grounds of appeal must be overruled.

The first ground of appeal does not present a case where the circuit judge committed any error, as will appear by the foregoing views. But besides these matters, there is an insuperable objection in sustaining the appeal. The state has no right to appeal.

It is the judgment of this court, that the judgment of the circuit court be, and the same is, affirmed.

JONES, J. I concur in dismissing the appeal in this case. The circuit court on appeal from the magistrate court held "that the defendant was in no sense a hawker or peddler, the testimony showing that he neither carried around from place to place for the purpose of selling or offering for sale the prohibited commodities, nor did he sell or offer to sell the same." This finding of fact is sufficient to support the judgment of the circuit court, which was in legal effect a verdict of acquittal, and this Court will not review the findings of fact in a case at law, even if it should be conceded that the state has the right to appeal from a judgment of acquittal in a criminal case. But I concur

in the view of Mr. Justice GARY that the state cannot appeal in this case. *State v. Gathers*, 15 S. C. 370, shows that an appeal cannot be taken by the state from a judgment of acquittal in the court of general sessions. It is true, however, that the state may appeal from an order quashing an indictment. *State v. Young*, 30 S. C. 399, 9 S. E. 355; *State v. Bouknight*, 55 S. C. 357, 33 S. E. 451, 74 Am. St. Rep. 751; or from a judgment which substantially amounts to a quashing of an indictment. *State v. Long*, 66 S. C. 399, 44 S. E. 960.

WOODS, J. I concur in this opinion and in separate opinion of Associate Justice JONES.

GARY, A. J. I concur in the result, on the ground that the dismissal of the proceedings was, in effect, an acquittal of the defendant, from which the state has not the right of appeal.

(140 N. C. 557)

ROUSE et al. v. WOOTEN.

(Supreme Court of North Carolina. March 20, 1906.)

1. BILLS AND NOTES—NOTICE OF NONPAYMENT—RIGHT OF SURETY.

A surety on a note is not entitled to notice of nonpayment under Revisal 1905, § 2239, providing for notice of dishonor to the drawer and indorser of a dishonored negotiable instrument.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1008.]

2. SAME.

A surety on a note is not an indorser within Revisal 1905, § 2213, providing when a person is liable as indorser.

3. SAME.

A surety on a note is primarily liable thereon within Revisal 1905, § 2342, declaring that the person primarily liable on an instrument is the person who by the terms thereof is absolutely required to pay the same.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 542, 550.]

Appeal from Superior Court, Lenoir County; W. R. Allen, Judge.

Action by N. J. Rouse and another against Shade Wooten. From a judgment for plaintiffs, defendant appeals. Affirmed.

The action was brought to recover the amount of a note payable to the plaintiff and signed by E. A. Hinson as principal and the defendant as surety. The issues submitted to the jury with their answers thereto were as follows: "(1) Did the defendant execute the note sued on for value? Ans. Yes. (2) If so, did he execute said note as surety? Ans. Yes. (3) If so, was this fact known to the plaintiff? Ans. Yes. (4) If so, was said note paid at maturity? Ans. No. (5) If so, did plaintiffs give notice to the defendant of the nonpayment of said note? Ans. No. (6) If not, did plaintiffs give such notice to defendant thereafter, and, if so, when?

Ans. In doubt as to time, but about January after maturity of note." The execution of the note was admitted. There was no exception to evidence or to the charge of the court. The defendant moved for judgment upon the verdict, which motion was overruled and he excepted. Plaintiff then moved for judgment. His motion was allowed and judgment entered upon the verdict for him. Defendant excepted and appealed.

Wooten & Wooten and Shepherd & Shepherd, for appellant. Loftin & Varner and G. V. Cowper, for appellees.

WALKER, J. The defendant's contention is that he was discharged from liability on the note by reason of the fact that he was not given due notice of its dishonor, and he relies upon section 2239 of the Revisal of 1905 to sustain his position. It appears from the face of the paper that it is a note and not a bill, and that defendant was not either a drawer or indorser, who are alone mentioned in that section. The jury in their verdict find that he was simply a surety. His counsel in their brief refer to section 2213 to show that defendant is not primarily liable on the note, but he is not in any sense an indorser, as he is a party to the note, and that section therefore has no bearing on the case. We infer from the course of the argument that some reliance was placed on section 2219, dispensing with presentment for payment where it is sought to charge the person primarily liable on a negotiable instrument, the argument deduced therefrom being that presentment is necessary where the party is secondarily liable and that defendant's liability is of that character. While we do not think the question is distinctly presented, as there is nothing in the verdict concerning presentment for payment, it is a matter of general importance, and we will therefore consider it.

The negotiable instrument law (chapter 54 of the Revisal of 1905), which is an admirable compilation of the principles relating to the subject, clearly points out the well-settled distinction between persons primarily liable and those secondarily liable on commercial paper. "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." Section 2342. A surety comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the instrument, absolutely required to pay the same. In *Shaw v. McFarlane*, 23 N. C. 216, it is held that if two persons are bound by a bond or judgment for the payment of a sum of money, the one is liable to the creditor in the same manner and to the same extent as the other, though, as between themselves, they may stand as principal and surety. "In respect to the creditor they are joint debtors fixed with the same obligations and what

discharges one discharges the other and nothing less." A surety's obligation is thus defined in *Brandt on Suretyship & Guaranty* (3d Ed.) § 2: "A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal." *Mfg. Co. v. Kimmel*, 87 Ind. 566. It is there further said that he is not entitled to presentment or to notice of dishonor and that he is in the first instance answerable for the debt for which he makes himself responsible and is directly and equally bound with his principal and must take notice of his default. *Neal v. Freeman*, 85 N. C. 441. The court, by Ashe, J., in *Williams v. Glenn*, 92 N. C. 255, 53 Am. Rep. 416, said: "As between the makers of a promissory note and the holder, all are alike liable and all are principals," citing *Robison v. Lyle*, 10 Barb. (N. Y.) 512. The court then proceeds to say that, as between themselves, the true relation of the parties as principal and surety may be shown and their rights depend upon principles other than those stated. The distinction between a primary and secondary liability is well stated and illustrated in *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 175, 8 L. R. A. 380, where it is said that a surety is bound with his principal as an original promisor, but the contract of a guarantor is his own separate contract and a warranty that what is promised by the principal shall be done and not merely an engagement jointly with the principal to do the thing. "The surety's promise is to pay a debt, which becomes his own when the principal fails to pay it." To the same effect are the cases of *Woody v. Haworth* (Ind. App.) 57 N. E. 272 and *Nading v. McGregor* (Ind.) 23 N. E. 283, 6 L. R. A. 686. So in *Bell v. Howerton*, 111 N. C. 70, 15 S. E. 891, the court declared the principle to be that "the duty of performing the contract, or seeing that it is performed, is on the surety, and that he cannot require the creditor to assume any part of the burden which he has made his own."

The question we now have before us was directly involved in *Kearnes v. Montgomery*, 4 W. Va. 29, and the court thus defined the relation of a surety to the creditor: "The contract of a guarantor is collateral and secondary. It differs in that respect from the contract of a surety, which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor; while the surety undertakes for the payment, and so is responsible at once if the principal debtor makes default." *Hall v. Weaver* (C. C.) 34 Fed. 104. The court, in *Hammel v. Beardsley*, 31 Minn. 315, 17 N. W. 858, draws the distinction sharply in these words: "We have not overlooked the technical distinction between the undertaking of a surety, which is primary, and that of a guarantor properly

so called, which is collateral and secondary. But one who absolutely guaranties payment of the debt is in every respect essentially a surety." Substantially the same expression is used in *Bank v. Richards*, 35 Vt. 284, where it is said: "A surety is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any party lawfully holding the paper." *Ballard v. Burton* (Vt.) 24 Atl. 769, 16 L. R. A. 667. As we have shown, a surety is in law generally regarded as a maker of the note, and in *Hunt v. Johnson*, 96 Ala. 135, 11 South. 387, it is held, in accordance with familiar and elementary principles that the maker of a promissory note is "the primary debtor" and is not entitled to presentment or demand for payment before suit is brought. His obligation to pay is absolute and in no sense dependent upon a demand after maturity. The doctrine is succinctly stated in *McIntosh v. Reed* (C. C.) 89 Fed. 466, where it is said that a surety undertakes to pay if the debtor does not, while in a collateral undertaking, like a guaranty, the undertaking is to pay if the debtor cannot. In the one case, there is a direct liability for the act to be performed, while in the other there is a liability for the ability only of another to perform the act. "Suretyship is a direct contract to pay the debt of another. It insures the particular claim." *Relgart v. White*, 52 Pa. 440. Indeed in *Kilton v. Tool Co.*, 22 R. I. 611, 48 Atl. 1039, Douglas, J., for the court, said that "the words 'primary and direct' contrasted with 'secondary,' when spoken of an obligation, refer to the remedy provided by law for enforcing the same rather than to the character and limits of the obligation itself." Whether this is the meaning of those words as used in our statute, we need not inquire, for if it is, the remedy against the surety being direct and immediate, his liability within the sense given to the word by that court would still be "primary." 2 *Parsons, Bills & Notes* (1871) p. 118. The text writers are equally explicit in assigning the undertaking of a surety to the class of primary liabilities. "A surety is liable as much as his principal is liable, and absolutely liable as soon as default is made, without any demand upon the principal whatsoever or any notice of default. 2 *Daniel, Neg. Inst.* (5th Ed.) § 1753; *Tiedeman on Commercial Paper*, § 415." "A surety is liable absolutely as principal upon default." 2 *Randolph, Com. Paper* (2d Ed.) § 849; *Dart v. Sherwood*, 76 Am. Dec. 228. A surety undertakes primarily to pay if the debtor does not. A guarantor undertakes secondarily to pay if the debtor cannot. *Id.* note 2; *Kramph's Ex'r v. Hatze's Ex'rs*, 52 Pa. 525. "It must be remembered," it is said in 2 *Parsons on Bills & Notes* (1871), at page 118, "that while a surety of a note is generally a maker, a guarantor is never a maker. The surety's promise is to pay a debt, which becomes his own debt when the principal fails to pay it,

and the surety may therefore be sued at once as soon as the note is due and dishonored."

We find nothing in the negotiable instrument law to sustain the defense set up, either when that law is considered alone or when it is read in the light of established principles.

No error.

(140 N. C. 546)

PARROTT v. ATLANTIC & N. C. R. CO.
(Supreme Court of North Carolina. March 20, 1906.)

1. CARRIERS — PASSENGERS — EJECTION — PUNITIVE DAMAGES.

Plaintiff, who was rightfully a passenger on defendant's train, was wrongfully ejected therefrom at night in the country. Plaintiff testified that the conductor and brakeman took hold of him and forcibly ejected him, in the presence of other passengers, and that the conductor was rude, stern, harsh, and humiliating in his demeanor towards plaintiff. *Held*, that such facts were sufficient to justify the submission of the issue of plaintiff's right to punitive damages.

2. APPEAL—ADMISSION OF EVIDENCE—CURING ERROR.

Where, in an action for ejection of a passenger, the court after admitting certain evidence as to what transpired after plaintiff left the train until he arrived home next morning, some of which was admissible, withdrew all of it from the jury in a clear and distinct manner and it did not appear that defendant was prejudiced thereby, the error in admitting it was cured.

3. CUSTOMS AND USAGES—EVIDENCE AS TO EXISTENCE—REBUTTAL.

Where, in an action for ejection of a passenger, the carrier was permitted to prove the habit or custom of the conductor in question in regard to taking up tickets and checking passengers to show that the conductor could not have overlooked the fact that he had once taken up plaintiff's ticket, plaintiff was entitled to prove in rebuttal that there was no such infallible habit or custom, by showing specific instances where the custom failed, if it existed.

[*Ed. Note.*—For cases in point, see vol. 15, Cent. Dig. Customs and Usages, § 45.]

Appeal from Superior Court, Lenoir County; Council, Judge.

Action by Simon B. Parrott, by his next friend, against the Atlantic & North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action to recover damages for wrongful ejection of plaintiff from defendant's train. The following issues were submitted: "(1) Did the plaintiff purchase the ticket from the defendant as alleged in the sixth paragraph of the complaint? Yes. (2) Did the defendant wrongfully eject the plaintiff from its train as alleged in the complaint? Yes. (3) If so, what actual damages is the plaintiff entitled to recover of defendant? \$5.55. (4) Did the defendant willfully and wantonly or with malice eject said plaintiff from its train as alleged in the 9th. paragraph of the complaint? Yes. (5) If so, what punitive damages is the plaintiff entitled to recover of the defendant? \$500."

N. J. Rouse and P. M. Pearsall, for appellant. Loftin & Varser and G. V. Cowper, for appellee.

BROWN, J. 1. Defendant contends that there is no evidence in the record warranting the imposition of smart-money. The jury have found that plaintiff was rightfully a passenger and was wrongfully put off defendant's train at night in the country some 12 miles from Goldsboro. Under the fourth issue they have found the ejection was willful and wanton. We find sufficient evidence in plaintiff's own testimony to be submitted to the jury upon that issue. Plaintiff states that the conductor and brakeman took hold of him and forcibly ejected him, that it was in the presence of other passengers, and that the conductor was rude, stern, harsh, and humiliating in his demeanor towards plaintiff. We think that the authorities are clear that his honor, upon the evidence, did not err in submitting the assessment of punitive damages to the discretion of the jury. *Holmes' Case*, 94 N. C. 818; *Hutchison's Case*, 140 N. C. —, 52 S. E. 263; *Ammons' Case*, 140 N. C. —, 52 S. E. 731.

2. Exceptions 1, 2, 3, 4, and 5: These five exceptions are all directed to the same class and kind of testimony and all involve the same principle. His honor, in overruling the five several objections of defendant and in admitting the evidence embraced in these five exceptions, permitted the plaintiff to detail to the jury what transpired from the time that he left the train near La Grange until his return home the next morning, involving a description of an injury to his toe, his fright during the night on the way to Goldsboro, the soiled condition of his face and clothing, and his wandering around Goldsboro during the night. We are inclined to think that this evidence, or some of it, was competent upon the issue as to actual damages, but as that view was not considered in the argument or briefs, we do not deem it necessary to decide the question. His honor withdrew the consideration of all of it from the jury in a very clear and distinct manner. In doing so we do not think his honor exceeded his authority. When we can see that the appellant has been really injured by such action we will always order a new trial. In this case the evidence admitted and withdrawn was so compact and brief, and the language of his honor so clear in withdrawing it, that we are satisfied the jury could not have been misled or unduly influenced against defendant by it. *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810, and *Wilson v. Manufacturing Co.*, 120 N. C. 95, 26 S. E. 629, are in point. The case relied on by defendant (*Gattis v. Kilgo*, 131 N. C. 109, 42 S. E. 584) is easily distinguished. The court based its ruling upon the ground that the incompetent evidence pointed out was not a simple error upon the part of the trial judge, which

can be corrected at almost any time before verdict; but that, as the court says, "it was a misconception of the theory on which the case should have been tried," that "the incompetent evidence embraced nearly the whole of the evidence offered to show malice."

3. Exceptions 6, 7, and 8: These three exceptions arise upon the admission by his honor of the testimony of witnesses that Capt. Hinnant, the conductor, had on previous occasions called upon each of them for a ticket after it had been surrendered to him. The defendant was permitted to prove the habit or custom of Hinnant, the conductor, in regard to taking up tickets and checking passengers from all stations on the road. The conductor testified: "This custom lets us know where the passenger is going and that we have taken his ticket." It was offered by defendant to show that the conductor could not have overlooked the fact that he had once taken up plaintiff's ticket. The testimony of the witnesses of the plaintiff tended to rebut this custom and to show its fallibility, if it existed, by offering several instances when the same conductor had made the same mistake. "Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt." *Wigmore*, vol. 1, § 92; *Mathias v. O'Neill*, 94 Mo. 527, 6 S. W. 253. To rebut this, a negative habit may be shown by evidence tending to prove that there was no such habit or custom or that the custom was the contrary. The plaintiff in this case undertook to deny the existence of such an infallible habit or custom by showing specific instances where the habit failed, if there was such a habit. How else could plaintiff contradict it? "That a negative habit may be shown and not merely an affirmative one, seems unquestionable," etc. 1 *Wigmore*, § 376. The only way in which the value of the alleged custom could be judged was by subjecting it to the test of specific instances. The testimony was competent for that purpose. *State v. Railroad*, 58 N. H. 411, and cases cited.

Upon a careful examination of the record we find no error.

Affirmed.

(140 N. C. 552)

CLAUS-SHEAR CO. v. E. LEE HARDWARE HOUSE.

(Supreme Court of North Carolina. March 20, 1906.)

1. ACCOUNT, ACTION ON—VERIFIED ACCOUNTS—DEFINITENESS.

Revised 1905, § 1625, provides that in actions on an account for goods sold and delivered a verified itemized statement of such account shall be received in evidence and shall be prima facie evidence of its correctness. Held that, where an itemized account of a bill of goods sued on was duly verified, it was not objec-

tionable for indefiniteness because of trade terms and abbreviations well understood in the trade, showing the number and kind of articles shipped and catalogue numbers, price per dozen, and discounts allowed on each.

2. SALES — CONTRACT — CONSTRUCTION — TIME OF DELIVERY.

Where a contract for the sale of goods called for a delivery "immediately," it was complied with by a delivery within a reasonable time.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 219.]

3. SAME—REASONABLE TIME—QUESTION FOR JURY.

Where a contract for the sale of goods required delivery within a reasonable time, whether a delay of 30 days was an unreasonable time was a question of mixed law and fact for the jury.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 249.]

Appeal from Superior Court, Harnett County; Justice, Judge.

Action by the Claus-Shear Company against the E. Lee Hardware House on a bill for goods alleged to have been sold and delivered to defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

H. L. Godwin, for appellant. Godwin & Davis, for appellee.

BROWN, J. 1. In order to make a prima facie case the plaintiff offered in evidence, under the provisions of the statute (Revisal 1905, § 1625), an itemized account of \$35.53 duly verified. The defendant objected to it because not properly itemized and not expressed in intelligible terms, and also because it does not show on its face that it is for goods sold and delivered. We think the objections untenable. The statement sets out the number and kind of shears, scissors, and razors shipped, the catalogue numbers, price per dozen, and discounts allowed on each. There are trade terms and abbreviations used which show more fully the kind of articles shipped. To illustrate: One item is billed as follows: "½ doz. 5½ No. 315 Jap. Tlr Shrs 15—\$7.50." It is clear that those are abbreviations well understood in the hardware trade, and mean Japan tailor shears, and that the figures, "15," represent the catalogue price, and "\$7.50" the net price with discounts off. The defendant Lee, who was examined, does not profess to be ignorant of the meaning of the bill. It also appears upon the face of the bill that it is for goods sold by the plaintiff to the defendant.

2. The defendant contends that the oral contract called for a delivery of the goods immediately, and that the evidence tended to prove a delay of at least 30 days between the receipt of the order and the shipment, which the defendant contends is an unreasonable delay, and that his honor erred in leaving the question of "reasonable time" to the jury. There have been numerous cases adjudicating the meaning of the terms "immediately" and "forthwith," etc., as used in

contracts, and it is held that such terms are to be construed liberally. Such terms never mean the absolute exclusion of any interval of time, but mean only that no unreasonable length of time shall intervene before performance. 21 Am. & Eng. Enc. (1st Ed.) 535, note 1. Where a covenant requires payment of money immediately, the party is entitled to reasonable time to get it. *Toms v. Wilson*, 116 E. C. L. 455.

Whether the determination of what is a reasonable time is a question of law for the court or of fact for the jury is a matter upon which there is much conflict of authority. In our own Reports the case of *Murry v. Smith*, 8 N. C. 42, in the syllabus, declares that "reasonable time means that a party shall do an act as soon as he conveniently can, and it seems the court is to be the judge of that." This syllabus is not fully supported, so far as we can see, by the opinion of the court. The definition of what is reasonable time is taken from the charge of the superior court judge to the jury. The charge seems to have been specifically approved by this court, but there is nothing in that opinion, or any other opinions of our eminent and learned predecessors, which holds that reasonable time is essentially a question of law. If there are such, they have not been called to our attention, and they seem to have escaped the lynx-eyed vigilance of our learned Chief Justice, who has recently stated that what constitutes reasonable time is a question for the jury. *Blalock v. Clark*, 133 N. C. 308, 45 S. E. 642; *Same Case*, 137 N. C. 144, 49 S. E. 88.

In this apparent conflict between the two cases quoted, and they appear to be about the only cases bearing on the subject which the diligence of counsel and our own researches have discovered, we have examined somewhat extensively the decisions of other courts and the text writers. The result of our examination leads us to the conclusion that what is "reasonable time" is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case. *Luckhart v. Ogden*, 30 Cal. 557; *Morrison v. Wells*, 48 Kan. 494, 29 Pac. 601; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 28 Am. St. Rep. 837; *Furniture Co. v. Board of Education*, 58 N. J. Law, 646, 35 Atl. 397; *Hill v. Hobart*, 16 Me. 168; *Am. Extract Co. v. Ryan*, 104 Ala. 267, 15 South. 807; *Murrell v. Whiting*, 32 Ala. 55; *Railroad v. Pumphrey* 59 Md. 390; 2 *Mechem on Sales*, § 1132. This seems to be so decided in England. *Fray v. Hill*, 2 E. C. L. 397; *Doe v. Sandham*, 1 T. R. 705; *Ellis v. Thompson*, 3 M. & W. 445.

The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as a matter of law. Whether the question of reasonable

time is one of fact or law must "from the very nature of things" depend upon the circumstances of each particular case, as business affairs are so kaleidoscopic in their nature that it is seldom, if ever, that any two transactions are exactly alike. If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them that the question ever becomes one of law. *Colt v. Owens*, 90 N. Y. 368; *Hedges v. Hudson R. R. Co.*, 49 N. Y. 223; *Plinney v. Railroad*, 19 Minn. 251 (Gil. 211).

This question frequently arises in contracts for sale and delivery of articles of merchandise where no date is fixed for a delivery. Such was the case of *Ellis v. Thompson*, supra. In the case of *Cocker v. Mfg. Co.*, 3 Sumn. 532, Fed. Cas. No. 2,932, Mr. Justice Story on the circuit submitted the question of reasonable time to the jury, and in doing so that learned judge referred with approbation to the rule laid down by Baron Alderson in *Ellis v. Thompson*. After stating that what was reasonable time for the delivery of the coal at London was a question for the jury in the absence of a specified date in the contract, that eminent English judge says: "It seems to me the correct mode of ascertaining what reasonable time is in such a case as this, is by placing the court and jury in the same situation as the contracting parties themselves were in at the time they made the contract; that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made and under which the contract itself took place."

The term "reasonable time" is a technical and legal expression which in the abstract involves matter of law as well as fact. Thomas Starkie says: "The law cannot prescribe in general what shall be reasonable time by any defined combination of facts, so much does the question depend upon the situation of the parties and the minute and peculiar circumstances incident to each case." Starkie on Ev. pp. 769, 774; 1 Daniel on Neg. Inst. § 612; 1 Parsons on Notes & Bills, —; *Wyman v. Adams*, 12 Cush. (Mass.) 210, 214. There is no rule of law by which the court can speak authoritatively as to what is reasonable time for the delivery of merchandise ordered through a salesman at Dunn, N. C., the order to be filled and shipped from Fremont, Ohio. The time, 30 days, is not on either extreme. Many authorities hold that the time may be so short or so long that the court may, as matter of law, declare it rea-

sonable or unreasonable; but the same authorities say that where the time falls between these extremes what constitutes a reasonable time is a question to be answered by the jury. *Railway Co. v. Birnie*, 59 Ark. 78, 26 S. W. 528, citing many cases. As to who shall decide this question of reasonable time has been much better controverted in the courts, but we think the better view that it is a mixed question of law and fact, and that, except where the facts are few, simple, and undisputed, and where only one inference can be drawn, or except where the time is so short or so long that the court may declare it reasonable or unreasonable, it should be left to the sound discretion of the jury under the instruction of the court upon the particular circumstances of the case. *Bacon v. Harris*, 15 R. I. 603, 10 Atl. 647.

We find no error in the record and the judgment is affirmed.

WALKER and CONNER, JJ., concur in result.

(141 N. C. 1)

R. L. SMITH & CO. v. FRENCH.

(Supreme Court of North Carolina. March 27, 1906.)

1. CHATTEL MORTGAGES — FORECLOSURE — RECOVERY OF PROPERTY — DEMAND.

Where a mortgagor of a chattel has been left and continues in possession and control thereof and has done nothing to jeopardize the mortgagee's right, a demand is ordinarily necessary before an action to recover the property can be maintained at the mortgagor's expense.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 311.]

2. SAME — WAIVER — DENIAL OF RIGHT.

Where a mortgagor, on being informed that the mortgagee would have to have "some money or the property," replied, "If you get it you will get it by the law," he thereby waived his right to a further demand for the property as a condition precedent to the mortgagee's right to recover the same at the mortgagor's expense.

3. SAME — ACCOUNTING — PLEADING — COUNTERCLAIM.

In a suit to recover mortgaged property, the complaint alleged absolute ownership and demand of possession as such owner. Defendant's answer admitted plaintiff's right to possession under the mortgage to secure a debt of \$150, but stated that the property seized was worth \$700, and that it had been converted and wasted by plaintiff. The testimony showed that plaintiff was not the unqualified owner of the property, but only had a special interest to hold it as security for the debt. *Held*, that defendant's answer, notwithstanding its admission of plaintiff's right to possession, might be treated as a counterclaim and tendered an issue as to the value of the property seized, entitling defendant to an accounting.

4. COUNTERCLAIM — NATURE AND SCOPE — LEGAL AND EQUITABLE CLAIMS.

Revisal 1905, § 481, provides that a counterclaim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action arising (1) out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, or (2) in an action arising on contract, any other cause of action arising

also on contract and existing at the commencement of the action. Held that, subject to the limitations in such section, a counterclaim includes nearly every kind of cross-demand existing in favor of defendant and against plaintiff in the same right, whether legal or equitable.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, §§ 26-37.]

5. SAME—EXISTENCE—TIME.

The requirement restricting a counterclaim to one that exists at the time the action was commenced only applies to counterclaims within the second class, and hence a counterclaim arising under the first subdivision may be pleaded and enforced, though it did not entirely mature before answer filed.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, § 67.]

Appeal from Superior Court, Craven County; Bryan, Judge.

Action by R. L. Smith & Co. against F. J. French. From a judgment for plaintiff, but denying a recovery of costs, both parties appeal. Reversed.

Plaintiff, holding a chattel mortgage on certain personal property of defendant, a crop, a horse, etc., to secure a debt in the sum of \$150, brought this action of claim and delivery for the property, and the same was taken under process in this action and turned over to plaintiff. At the time of action brought, the note was past due, and the right of foreclosure had become absolute. The note is not set out, but the amount seems to be admitted by the parties, and is assumed to be \$150 for the purposes of this appeal. Plaintiff filed his complaint, alleging ownership of the property and its value. Defendant answered, admitting plaintiff's right to possession of the property under and by virtue of the debt and mortgage above referred to; averred that no demand for the property had ever been made on defendant before action was brought, and alleged further that under and by virtue of process in the cause, the property embraced in the mortgage to the value of \$700 had been seized and turned over to plaintiff, who had wasted and converted the same, and demanded judgment against plaintiff for the value of the property over and above the amount due on the mortgage debt, and for other relief. The court submitted an issue as to demand, declining to submit other issues, and the jury having answered the issue to the effect that no demand had been made for the property, the court gave judgment as follows: "This cause coming on to be heard, and it appearing to the court that it is admitted in the answer that plaintiffs are the owners and entitled to the possession of the property described in the complaint by virtue of a certain mortgage recorded in Book 4, page 20, in the office of the register of deeds of Craven county, it is considered and adjudged that plaintiffs are the owners and entitled to possession of said property by virtue of said mortgage. And it further appearing that the jury have found that no demand was made before bringing the action, it is con-

sidered and adjudged that plaintiffs pay the costs." From the foregoing judgment, the plaintiffs and defendants excepted and appealed.

D. L. Ward, for plaintiff. W. D. McIver, E. M. Green, and O. H. Gulon, for defendant.

Plaintiff's Appeal.

HOKE, J. (after stating the case). Plaintiff assigns for error that the judge told the jury "that the demand, as claimed and testified to by plaintiff, was not an unequivocal demand, and was insufficient, in law and in substance; that if they believed the evidence they would answer the issue 'No.'" It is very generally held that where a mortgagor of a chattel has been left and continues in possession and control of the property and has done nothing to question or jeopardize the mortgagee's right, a demand is necessary before an action to recover the property can be maintained at the mortgagor's expense. Jones on Chattel Mortgages, § 443; Cobbey on Chattel Mortgages, vol. 1, § 509. This is so held because in such case the possession of the mortgagor, while permissive, is rightful, and it would be unjust to subject him to cost and expense without giving him notice and opportunity to surrender the property without litigation. This right to a demand, however, may be waived or forfeited, and is not required "where the defendant has committed acts inconsistent with the title and right of possession in the mortgagee, and has conducted himself in such a way as to show that a demand would be wholly unavailing." Am. & Eng. Enc. vol. 24, p. 510. Our own decisions are to like effect. Buffkins v. Eason, 112 N. C. 162, 16 S. E. 916; Moore v. Hurtt, 124 N. C. 27, 32 S. E. 317.

Applying these principles to the testimony pertinent to the issue, we are of opinion that there was error in the charge of the court as indicated in the exception. On the trial, John Lancaster, a witness for plaintiff, who was acting as agent for the plaintiff at the time of the conversation, testified, among other things, as follows: "Q. Before you brought suit, what did you say to defendant? I told him we had to have some money or the property, and defendant replied, 'If you get it you will get it by the law.'" A demand need not be made in technical form. Any words which, fairly interpreted and understood, would convey notice that present delivery is required, will serve the purpose. And so any words on the part of defendant which, fairly understood, import a denial of plaintiff's right, or express a definite purpose not to deliver voluntarily, will put the defendant in the wrong and justify an action. While the language of plaintiff's agent may not express with sufficient distinctness a requirement for the present delivery of the property, the question here is not so much whether a demand was made by plaintiff, but whether the right to require such a demand was waived by defendant; and if, under the

circumstances stated, if defendants or either of them replied, "If you get the property, you will get it by law," this can only mean that defendants did not intend to surrender the property voluntarily. Such a statement, if made then and there, put the defendant in the wrong, and subjected him to an action for the property. No further demand was required.

There is error, and a new trial is awarded.

Defendant's Appeal.

Defendant, having filed an answer admitting plaintiff's right to possession of the property under the mortgage to secure the debt of \$150, answered further, and alleged that there had been seized and turned over to plaintiff, under the process in the cause, property to the value of \$700, which had been converted and wasted by the plaintiff, and tendered an issue as to the value of the property seized, to the end that defendant might have payment for any excess over and above plaintiff's debt. The court declined to submit the issue, confined the verdict to an issue as to a demand by the plaintiff, and gave judgment as set out in plaintiff's appeal. Defendant excepted.

While the plaintiff in his complaint alleges absolute ownership of the property and demands possession as such owner, the answer and the testimony tend to show that he has not the unqualified ownership, but only a special interest in it, to wit, the right to take it in payment of his debt and to retain only what is necessary for that purpose, when dealt with according to the contract stipulation. When the debt matured, defendant's right to an account arose as to any excess which might be realized from the property over and above the amount required to satisfy plaintiff's demand, and there is no reason why such an accounting should not be had in the present suit. In this view of the case the answer of defendant might be considered not so much a counterclaim as a limitation on plaintiff's interest in the property; and, where the right to account is alleged in the complaint or asserted in the answer and the evidence establishes its existence, the response to the issue as to ownership should not be "Yes," without more, but should be, "Yes, to secure the debt." And the additional facts required to adjust the rights of the parties may be determined in response to other issues by the jury or by reference as the case may require. It is the policy of the Code that all matters in controversy should be settled in one action, as far as this may be done consistent with right and justice, and the course here suggested is sustained by authority. *Taylor v. Hodges*, 105 N. C. 345, 11 S. E. 156; *Griffith v. Richmond*, 128 N. C. 377, 35 S. E. 620. Inasmuch, however, as the defendant's answer goes further and asks judgment for the excess, it may be necessary to treat the defendant's demand as a counterclaim, and, regarding it in this light,

the court is of opinion that the issue tendered by the defendant or some proper issue determinative of the account on a correct basis should have been submitted, and for the purpose stated, that he might have judgment for the excess, if any were found in his favor. If plaintiff, on obtaining possession of the property, sold it, and in doing so observed the methods required by the contract, and the property was bought in good faith by a third person, it would seem that the amount realized at the sale would be the basis for a correct accounting. Our statute on counterclaim is very broad in its scope and terms, and is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose.

In Revisal 1905, § 481, a counterclaim is described and declared to be as follows: "The counterclaim mentioned in section 479 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. Code, § 244; Code Civ. Proc. § 101." Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts. Green on Code Pleading & Practice, § 815. And our own decisions fully bear out this statement of the doctrine. *Bitting v. Thaxton*, 72 N. C. 541; *Hurst v. Everett*, 91 N. C. 399; *Lee v. Eure*, 93 N. C. 5; *Wilson v. Hughes*, 94 N. C. 182; *Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288. Under the old system of procedure the relief sought in defendant's answer was sometimes obtained in equity by way of cross-bill. Enc. of Pl. & Pr. vol. 4, p. 525. It will be noted that the requirement restricting a counterclaim to one that exists at the time the action was commenced is only stated in reference to the second class of counterclaims described in the statute—those wherein an action on a contract, the breach of an entirely different and distinct contract, is set up by defendant. This, for the very just and obvious reason that when a plaintiff rightfully sues a defend-

ant who owes him at the time the action is commenced, he shall not be put in the wrong and subjected to cost by allowing defendant to buy up claims sufficient or more than sufficient to offset his debt. But this limitation is not expressed with reference to counterclaims in the first subdivision of the statute. These must be existent and continue to exist between the same parties in the same right at the time they are offered, and they must be then due—that is, not demands to become due in the future. And they must arise out of the same contract or transaction which is the foundation of plaintiff's claim, or they must be connected with the subject of the action—that is, generally speaking, the interest involved in the litigation, and very frequently this is the property itself. As a matter of fact, in nearly every instance such a demand does exist when the action commences, but this is not the requirement of the statute, and, if the counterclaim otherwise complies with the limitations of subdivision 1, and is not embraced in subdivision 2, it would seem to be sufficient if it matures at any time before answer filed, and might be available if it matures at any time before the trial.

There are several decisions in this state which seemingly conflict with this position, but a careful examination will, we think, disclose that they were either cases (a) coming under the second subdivision of the statute, counterclaims by reason of separate and distinct contracts; or (b) cases which did not arise out of the transaction, the foundation of plaintiff's claim, or had no connection whatever with it; or (c) cases where no cause of action at all had accrued to defendant, either at the commencement of the action or at the time of trial.

Thus, in *Satterthwaite v. Ellis*, 129 N. C. 67, 39 S. E. 726, to which we were referred by plaintiff's counsel: That was a cause of action to recover possession of property conveyed in a chattel mortgage before the debt was due. It was simply an action to recover possession of property, without more, and where no right to a reckoning had arisen or then existed in defendant. Any claim, therefore, for the simple use of the property arose only from the seizure, which was rightful and had no connection with the present application of the property to the payment of the debt, which was not then due, nor to a right to the surplus, which had not then arisen. So, in *Griffin v. Thomas*, 128 N. C. 310, 38 S. E. 903, this being a counterclaim for a breach of warranty, might well come under the second subdivision, and in this case there had been no breach of warranty either at the commencement of suit or the time of trial, and so no cause of action existed in favor of defendant at all. In *Phipps v. Wilson*, 125 N. C. 106, 34 S. E. 227, which was claim and delivery for personal prop-

erty, the answer denied plaintiff's title, and set up wrongful seizure in the action as a counterclaim. Here the plaintiff's demand, as stated in his complaint, was in direct contradiction of defendant's claim, and it was necessary that it should be passed upon before defendant's right could be established. It was therefore manifest error to give judgment on defendant's counterclaim for want of a reply, when plaintiff's complaint or demand was in itself a denial of the defendant's right. As stated by the court in its opinion, such judgment was error, while the issues raised by complaint and answer were undetermined. In *Puffer v. Lucas*, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682, the claim of defendant was for breach of an executory contract, taking its rise subsequent to the commencement of the action; came within the second subdivision and was directly prohibited by it, as a valid counterclaim. In *Kramer v. Electric Co.*, 95 N. C. 277, an action to recover pay for services in which an attachment was sued out and levied on defendant's property, defendant set up counterclaim for wrongfully suing out attachment. This was a collateral matter, having no connection whatever with the transaction out of which the plaintiff's demand arose, and so did not constitute a counterclaim at all. In *Reynolds v. Smathers*, 87 N. C. 24, there is an intimation that there is the difference in the two sections of the statute here pointed out, and in *Ledbetter v. Quick*, 90 N. C. 276, a more decided intimation that the very counterclaim set up here would have been available to defendant.

Even if the present opinion should be found to conflict with some former decision, it is only a question of procedure, not involving a rule of property, and we think it better that our present construction of the statute should be now declared the true one as more in accord with the spirit and letter of our Code which, as heretofore stated, designs and contemplates that all matters growing out of or connected with the same controversy should be adjusted in one and the same action. A counterclaim connected with plaintiff's cause of action or with the subject of the same will nearly always take its rise before action brought, but we hold that neither the statute nor the reason of the thing require that such counterclaim should necessarily or entirely mature before action commenced, nor even before answer filed, if the provisions of the Code permit, and right and justice require, that an amendment be allowed which will enable parties to end the same controversy in one and the same litigation.

There was error in refusing to submit the issues tendered by the defendant on some proper issue on the question of an account, and a new trial is ordered.

New trial.

(140 N. C. 598)

NELSON v. HUNTER et al.

(Supreme Court of North Carolina. March 20, 1866.)

1. WITNESSES—QUESTIONS ASSUMING FACTS.

The issue being whether plaintiff's mother was the wife of S., both of whom were slaves, and plaintiff therefore legitimate, the question to witness, whether he ever heard S. after the War say any thing about going back to another wife, is objectionable as assuming a point in controversy, that he had another wife.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 832.]

2. APPEAL—HARMLESS ERROR.

Any error in sustaining objection to the question whether witness had heard S. talk of going to a place for a certain purpose, is cured by the witness afterwards testifying that he did not think he had any conversation with S. as to the purpose of his trip.

3. SLAVES—LEGITIMATIZING COHABITATION.

Under Act March 10, 1866 (Laws 1866, p. 99, c. 40), legitimatizing a marriage between slaves where the marriage relation was continued after the War till the act went into effect, the legitimacy of offspring of such union was not affected by the man leaving the woman after the relation had continued long enough to be legitimatized.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Slaves, § 115.]

4. SAME—EFFECT OF PRIOR COHABITATION.

That a slave had a slave wife, whom he left at the beginning of the War, did not prevent his subsequent marriage relation with another slave, existing at the close of the War and continued till the passage of Act March 10, 1866 (Laws 1866, p. 99, c. 40), being legitimatized thereby.

5. SAME—ILLEGAL RELATIONS—REPUTATION AS EVIDENCE.

Where a slave after the War and before passage of Act March 10, 1866 (Laws 1866, p. 99, c. 40), which legitimatized his marriage relation with a slave wife existing at the close of the War, if continued till the passage of the act, left such wife and lived with a prior slave wife, without an actual marriage, the relation so assumed was illicit and therefore could not be proved by general reputation, as could a marriage, though for the purpose of proving that the relation existing at the close of the War did not so continue as to be legitimatized.

6. SAME—EVIDENCE OF INTENTION.

On the issue whether the marriage relation existing between S. and J., slaves, continued after the War till the passage of Act March 10, 1866 (Laws 1866, p. 99, c. 40), and so was legitimatized thereby, or whether between such dates the relation was terminated and S. went back to V., his prior slave wife, evidence that, when the relations of S. with J. commenced, S. intended to go back to V. as soon as he could, was incompetent.

Appeal from Superior Court, Wake County; Cooke, Judge.

Action by Charles S. Nelson against Priscilla Hunter, administratrix of Jackie Nelson, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Action to recover from defendant administratrix the estate of Jackie Nelson, consisting of proceeds of sale of estate. The following issue was submitted: "Is the plaintiff the legitimate child of Jackie and Solomon Nelson? Answer: Yes." The court gave judgment for plaintiff, and the defendants appealed.

Peele & Maynard and J. N. Holding, for appellant. S. G. Ryan, for appellee.

BROWN, J. The plaintiff claims the property as the only legitimate child of Jackie Nelson. The defendants claim to share with plaintiff as the illegitimate children of Jackie, alleging that plaintiff is also illegitimate. Solomon Nelson and Jackie Cook were slaves. There is evidence by plaintiff tending to show that Solomon and Jackie lived together as man and wife during the War, that a marriage ceremony was then performed between them, and that this relationship continued to exist at the date of the ratification of the Act of March 10, 1866, and was existing in 1867. There is no evidence that Jackie ever had any other husband than Solomon, and it is admitted that defendants are her illegitimate children, born during slavery and before the alleged cohabitation with Solomon began. There is evidence tending to prove that plaintiff was the only child of Solomon and Jackie and that he was born January 12, 1867. Solomon died before Jackie. There is evidence tending to prove that Solomon was brought to Wake county by his owner in 1862 and that not long afterwards he and Jackie assumed the relationship of man and wife; that prior to 1862 he resided in Beaufort county, and for five or six years before the war had lived with a female slave named Viley.

The defendants undertook to show that the relation between Solomon and Jackie after the War was not exclusive, and that cohabitation after the War and at the time of the passage of the act had been resumed between Solomon and Viley. *Branch v. Wallace*, 102 N. C. 34, 8 S. E. 896.

There are some exceptions to evidence by the appellants that were pressed with earnestness and argued with much ingenuity by their learned counsel, which we will notice. The first exception relates to the following question: "Did you ever hear Solomon after the surrender say anything about going back to another wife?" This question was properly excluded. It is objectionable because it assumes the very point in controversy, that Solomon had another wife. However, any objection that may have existed to the court's ruling was removed when the same witness said: "I do not think I had any conversation with him (Solomon) in regard to his purpose in going down there or heard him say anything about it."

Second exception: "What was the reputation as to how Solomon and Viley had been living after he returned there (to Beaufort county) and before you went down there? This question was addressed to witness David Blount. The evidence of David Blount shows that he did not go to Beaufort county until 1867, and then he saw Solomon down there and he was not living with Viley. Before that time David was in Wake county and knew nothing of any relationship exist-

ing between Solomon and Viley prior to March 10, 1866. By virtue of the provisions of that act the relation of man and wife existing between Solomon and Jackie, if continued until the passage of the act culminated into a valid marriage and was legalized by the statute. The act has a retroactive effect so as to legalize the relation from the beginning of it, thereby legitimatizing all of the offspring of the cohabitation born during the entire period. If Solomon resumed his cohabitation with Viley after the passage of the Act of March 10, 1866 (Laws 1866, p. 99, c. 40), it could have no effect upon the legitimacy of his and Jackie's children. If his relations with Jackie continued long enough to have become legalized by the act, his conduct after that could not render the offspring of that union illegitimate, for the act made it a legal relation ab initio and capable of transmitting inheritable blood.

The third and fourth exceptions are to the ruling of the court in refusing to allow defendants to prove a general reputation among the Blount negroes and Cook negroes as to whether or not Solomon had a wife living down the country. According to the evidence the Blount negroes were brought to Wake county during the War and the Cook negroes resided there at the home of their owner. If it were competent to prove by reputation such a relationship it must be the reputation in the community where the parties had lived and not the reputation which obtained among the Blount negroes and from whom the Cook negroes had probably heard it. Moreover if Solomon had left a slave wife in Beaufort county at the beginning of the War when he was removed to Wake county, it could have no effect on his relationship with Jackie. It was no bar to his forming a new and exclusive cohabitation with her. There were no legal marriages among slaves, and they frequently formed new relations when moved from one place to another. It was competent for the defendants to prove, if they could, that after the War and prior to March 10, 1866, Solomon returned to Beaufort county and lived and cohabited with his former slave wife, Viley, but they could not prove this by mere reputation. The authorities relative to proving a marriage by general reputation have no application. The defendants did not contend that there was an actual marriage between Solomon and Viley after the War. They only proposed to prove that they had resumed after the war the relation that had existed between them before the War, and that therefore the relation with Jackie had terminated before 1866, or was not exclusive at the time of the passage of the act. At that time Solomon and Viley were no longer slaves. They could have contracted a legal marriage. If then they entered into an illegal relation and lived as man and wife, it constituted fornication and adultery, and this could not be proved by general reputation.

The fifth exception is to the refusal of the court to allow the following question: "What did Solomon say then was the purpose he had in his mind at the time he married Jackie in regard to going back down the country as soon as he could to live with his former wife?" The sixth, ninth, tenth, and eleventh exceptions relate to similar questions and rulings. We think his honor properly excluded the questions. What Solomon's feelings and purposes were at the time he first made love to Jackie can throw no light on what he actually did some years after. Jackie may have so won his heart that perhaps he forgot all about the charms of Viley. The law does not deal with what a person thinks but with what he does—his acts—hence what Solomon "had in his mind," whether he intended from the beginning to play Jackie false, is not competent evidence.

The seventh and eighth exceptions to the evidence are untenable and need no discussion.

The court very correctly applied the law in the following paragraphs of the charge, which were excepted to by the defendants: "(7) The court instructs the jury that if they shall find that Solomon Nelson and Jackie Cook or Nelson commenced to live together as husband and wife while they were slaves and continued to so live exclusively (as the court has explained to you) until their emancipation and after that until the plaintiff, Charles Nelson, was born; and if they shall further find that Charles was born before January 1, 1868, then Charles would be a legitimate child of Jackie and they should answer the issue 'yes,' although the jury might find that after the birth of the said Charles the said Solomon left the said Jackie, or that he was after that living and cohabitating with another woman and they were living together as man and wife. (8) If the jury shall find that this said relation as of husband and wife, and exclusive in its character, was commenced between Solomon and Jackie while they were slaves and so continued to and including the 10th of March, 1866, then the court instructs the jury that the said Solomon and Jackie were husband and wife from the date of the commencement of their living together as man and wife, and the said Charles would be a legitimate child, whenever born, whether before or after January 1, 1868, and the jury should answer the issue 'Yes.'" There is abundant establishing the legitimacy of plaintiff under the provisions of either of the acts of 1866 or 1879, if credited by the jury. In *Woodard v. Blue*, 103 N. C. 116, 9 S. E. 492. Chief Justice Smith says there are two essential conditions of the act of 1879, "a cohabitation subsisting at the birth of the child, and the paternity of the party from whom the property claimed is derived." Under the Act of 1866 the conditions are cohabitation as man and wife between former slaves and

its continuance until the ratification of the act. This court, in construing both acts, declares that their provisions were intended to apply for the benefit of those who occupied such relations to each other exclusively and not to others at the same time. *Branch v. Wallace*, *supra*. In this case the parentage of the plaintiff is not disputed, but, if it was, all the evidence establishes it. There is also abundant evidence to go to the jury that the relation of man and wife existed between plaintiff's parents during the war and continued until after plaintiff's birth and until after March 10, 1866, and there is also evidence that plaintiff was born in 1867. Thus the evidence offered by plaintiff meets the requirements of both acts. As to the exclusiveness of the relation between Solomon and Jackie, we do not find any evidence in the record tending to prove that Solomon, during the same period, had entered into a similar relation with any other woman than plaintiff's mother.

The charge of the court has been examined by us with care. It is a clear, comprehensive, accurate, and fair presentation of the case to the jury. We find no error in it. To comment upon each of the many exceptions to it would unduly lengthen this opinion. It is sufficient to say that we have given due consideration to them and find them without merit. The special purpose of the legislation of 1866, and 1879 was to provide against the evil of universal illegitimacy of slave children consequent upon the inability of slaves to enter into the marriage contract. The law may have worked a hardship upon these defendants, who were born of the same mother as plaintiff, and who, but for these statutes, would share equally with him in the property of the mother. But doubtless there are innumerable other cases where the result has been such as to justify the wisdom of their enactment.

Affirmed.

(140 N. C. 624)

BULLARD v. HOLLINGSWORTH et al.
(Supreme Court of North Carolina. March 27, 1906.)

1. BOUNDARIES—EVIDENCE.

In an action for trespass on lands one of the surveyors, who had been ordered to make a survey, having stated that he could indicate on the plat defendant's contention as to the location of boundary lines called for in certain deeds introduced by defendants, it was not error to direct the surveyor to plat out defendant's contention, and to subsequently permit him to be examined concerning the same.

2. EVIDENCE—DECLARATIONS—BOUNDARIES.

On an issue as to the location of boundary lines the declarations of a person as to the location of a marked corner were admissible where it appeared that the declarant was dead and disinterested, and that the declarations were made ante litem motam.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1121-1134.]

3. ADVERSE POSSESSION—INSTRUCTIONS.

In an action for trespass on land it was proper to refuse an instruction that, to raise

the presumption of a grant, it is not necessary that the possession adverse to the state be continuous or unceasing, but that it is sufficient if it is adverse to the state and shown to be within the time prescribed by the statute of limitations, since a grant from the state is presumed only after a possession adverse to the state for the full period prescribed by the statute.

4. SAME.

Under the express provisions of Revisal 1905, § 380, 30 years adverse possession against the state raises a presumption of a complete title out of the state only where the possession has been ascertained and identified under known and visible lines or boundaries.

5. TRESPASS—INSTRUCTIONS.

Where, in an action for trespass on lands, plaintiff's title was directly put in issue, the burden of proof did not, at any stage of the trial, shift to the defendant upon either the issue as to title, or as to trespass.

Appeal from Superior Court, Cumberland County; Moore, Judge.

Action by A. J. Bullard against James Hollingsworth and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Actions to recover damages for an alleged trespass upon plaintiff's lands and for an injunction restraining the further cutting of timber thereon by the defendants. The two actions were consolidated, and, by consent, the following issues were submitted to the jury: (1) Is the plaintiff the owner of the land in controversy, or any part thereof, and if of only a part, what part? Answer: No; no part. (2) Did the defendants, James Hollingsworth and wife, unlawfully trespass upon the plaintiff's land as alleged in the complaint against them? Answer: No. (3) Did the defendants, who claim under Mrs. Margaret A. McKenzie, unlawfully trespass upon the plaintiff's land as alleged in the complaint against them? Answer: No. (4) What amount of damages, if any, is plaintiff entitled to recover from the defendants, Hollingsworth and wife? Answer: None. (5) What amount of damages, if any, is plaintiff entitled to recover from the defendants, who claim under Mrs. Margaret A. McKenzie? Answer: Nothing. At the close of the evidence it was agreed that the plaintiff had failed to produce any evidence tending to show that the heirs of Mrs. Margaret A. McKenzie had committed any trespass upon any of the lands in controversy, and that the issues relative to trespass should be answered in their favor. From the judgment rendered plaintiff appealed.

Sinclair & Dye and H. L. Cook, for appellant. A. S. Hall, for appellees.

BROWN, J. The plaintiff claimed title to the land in controversy by deed from Gustavus A. Bronson and others to Margaret E. Heyer, dated July 2, 1875, and by deed, M. E. Heyer to plaintiff, January 24, 1900. Plaintiff offered evidence for the purpose of locating these deeds; to prove possession on the part of himself and those under whom he

claims, and also to establish the alleged trespass. The defendants offered in evidence a number of deeds as well as a grant under which they claimed title, and they also offered evidence tending to disprove possession upon the part of the plaintiff and to prove possession upon their part of the lands in controversy. There are a large number of exceptions set out in the record both to the evidence and charge, all of which have received our careful consideration, although we deem it necessary to notice only a few in giving our reasons for affirming the judgment of the superior court.

Exceptions 8 to 16 were taken by plaintiff to the ruling of his honor in permitting the surveyor to indicate upon the map of the official survey, the boundaries of certain deeds which defendants had introduced in evidence. It seems that during the examination of the surveyor, Averitt, defendants were unable to point out on the plat the beginning point of a certain deed. Thereupon the court asked the witness if he could take the official plat and indicate upon it the contentions of the defendants as to the location of the lines called for in certain deeds introduced by defendants, and he stated that he could. The court directed Averitt, one of the surveyors, to take the plats returned by him and his co-surveyor, made upon a partial actual survey, after notice to the parties as per the order of the court, and to plat out, as near as he could, defendants' contention from deeds which they had introduced, and mark it off on the plats, to all of which plaintiff objected. Court then took a recess until morning, when the plats were returned into court and defendants resumed their examination of the witness, Averitt, asking him as to the supposed lines in the deeds which were introduced by them as shown by the small red lines upon the map, to which plaintiff objected. In actions of ejectment and trespass it is usual, when deemed necessary for the enlightenment of the court and jury, for the court to order a survey. This is done in order that the court and jury may more easily understand the boundaries of the land in controversy and the bearing which the lines of other tracts have in ascertaining such location. The plats made in obedience to the order of the court are not, in any sense, evidence per se. They are used for the purpose of explaining and elucidating the testimony of the witnesses. In *State v. Whiteacre*, 98 N. C. 753, 3 S. E. 488, the court says: "It is a frequent practice, when necessary to explain evidence and enable the jury to comprehend it fully, to illustrate the position of parties, place, etc., by diagram, and no notice is required, in fact, they are frequently made by witnesses in the progress of an examination, and often by the direction of the court." The surveyor stated that he could indicate on the plats the location of defendants' deeds by platting them from the calls of the deeds and indicating them by small red lines. An ex-

amination of the plat shows that he has done so without injury to plaintiff. This did not create any new evidence for the defendants. It only served to illustrate to the jury their contentions. It is a matter within the sound discretion of the trial judge and in this case it was prejudicial to no one. The court permitted defendants to introduce the declarations of Samuel Vinson as to the location of an oak, a marked corner, tending to prove that the oak was a corner of the tract called the Jones land claimed by defendants. The evidence showed clearly that Vinson was dead, disinterested, and that the declarations were made ante litem motam. *Malone on Real Property Trials*, p. 219, and cases cited.

The plaintiff requested the court to instruct the jury: "That to raise the presumption of a grant it is not necessary that the possession adverse to the state be continuous or unceasing. It is sufficient if it is any possession adverse to the state and shown to be within the time prescribed by the statute of limitation." The court refused to give this instruction as asked, but charged the jury: "That to raise the presumption of a grant it is not necessary that the possession adverse to the state should be continuous or unceasing. It is sufficient if it is any possession adverse to the state and shown to exist the length of time prescribed by the statute of limitation." The instruction asked is erroneous in assuming that any adverse possession within the time prescribed by the statute will raise the presumption of a grant. The grant from the state is presumed only after a possession adverse to the state for the full period prescribed by the statute. If there has been adverse possession for any time short of such period, it is not a circumstance to be submitted to the jury as evidence upon which they may find the fact of a grant. *Reed v. Earnhart*, 32 N. C. 516; *Bullard v. Barkdale*, 33 N. C. 461. We think the instruction given by his honor is a correct statement of the law.

The plaintiff requested the court to instruct the jury: "That from 30 years' adverse possession against the state all that is necessary to show complete title out of the state is presumed." The court gave this instruction, adding after the word "possession," the following words: "Such possession having been ascertained and identified under known and visible lines or boundaries." To this modification the plaintiff excepted. The instruction given is in exact accord with the words of *Revisal 1905*, § 380. As the law now stands such possession must be ascertained under known and visible lines or boundaries.

The cases cited by plaintiff are not applicable to the present statute.

The plaintiff further asked the court to instruct the jury: "That if they find from the evidence that the plaintiff has shown title out of the state under either the 30-year statute or the 21-year statute, then the burden is upon the defendants to establish their con-

tentions that they were in continuous, adverse possession by showing that the deeds upon which they rely actually cover the land and if the jury find from the evidence that the deeds upon which the defendants rely do not cover the land in controversy, then the defendants are not entitled to recover." Merely showing title out of the state will not entitle plaintiff to recover of the defendants for the alleged trespass. In this case the title is directly put in issue. The burden is, therefore, upon the plaintiff to establish title in himself. He may do this in several different ways as pointed out in *Malone*, p. 82, and *Mobley v. Griffin*, 104 N. C. 115, 10 S. E. 142. But the plaintiff assumes the burden of proving by a preponderance of the evidence every fact necessary to establish his title to the land as well as the trespass upon his possession, before he can recover. If the plaintiff recovers at all, he must do so on the strength of his own title, and not the weakness of his adversary's. The burden of proof did not, at any stage of the trial, shift to the defendants upon either the first issue, as to title, or the second issue, as to trespass. The defendants may offer evidence tending to prove title in themselves or tending to disprove the allegation of trespass, but this is for the purpose of rebutting plaintiff's case and preventing a recovery. It is not because defendants are seeking to "recover anything," as the closing words of plaintiff's prayer would seem to imply.

After a careful review of the entire record, we are unable to find any reversible error.

Affirmed.

(140 N. C. 623)

BLAND et al. v. BEASLEY et al.

(Supreme Court of North Carolina. March 27, 1906.)

1. EVIDENCE — HEARSAY — REPUTE AS TO BOUNDARIES.

Where the true location of a line constituting a boundary of a large tract adjoining the land in dispute became relevant, but no deed covering the tract was introduced, no monument or natural object shown as marking the boundary of the tract, and no occupation tending to give it any fixed location was established, evidence of common reputation as to the location of the line was inadmissible.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Dig. Boundaries, § 155; vol. 20, Cent. Dig. Evidence, § 1218.]

2. SAME—RE MOTENESS.

Evidence of general reputation as to the location of a boundary line is inadmissible where the alleged reputation had its origin less than 17 years before the action was brought.

3. SAME.

Where a witness testified that his only knowledge as to the location of a boundary line grew out of a certain survey, and the only person he ever heard say that it was so located was still alive, and a witness in the case, his testimony is not relating to general reputation so as to be admissible on that ground.

Appeal from Superior Court, Pender County; Council, Judge.

Action by J. T. Bland and others against

L. A. Beasley and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Civil action to recover land. The plaintiffs derive title by mesne conveyances under a grant from the state to William and James Hall dated December 22, 1819. The question at issue was one chiefly of boundary, and depended to a great extent on the correct location of this grant. The description was said to begin on "a pine, Abram Hall's corner."

As an aid to the true location of this corner, the plaintiffs put in evidence a grant to Abram Hall dated May, 1816, which was said to "begin at a pine on Halsey's line," and as a further circumstance tending to show that the beginning corner of his grant was located as claimed by the plaintiffs, it became material, certainly relevant, to show that the beginning corner of this Abram Hall grant was at a pine in "Halsey's line," and in this way the existence and correct placing of this "Halsey line" became relevant. For that purpose the surveyor (Colvin) in the course of his examination by the plaintiffs was asked: "Q. Do you know where the Halsey line is?"

A. I only know what people say. Q. What indicates the Halsey line on the map? A. The line A, D, K, 43, 42, and from 42 back to A. Q. Did you ever run that patent except in 1884? A. No. Q. How long have you known that line by general reputation as the Halsey line? A. Since 1884. The eastern end of the line is at A. The western end is at K." To all and each of these questions and answers, except the first, the defendants excepted. On cross-examination, touching this Abram Hall patent and Halsey line, the same witness made answer to questions as follows: "Q. Who first told you, since the survey began, that that was the Halsey line from 30 to the ditch branch, and from A to K? A. All I know is from the survey. Q. You say Jim Cowan is the only man you ever heard say that was the Halsey line? A. Yes." Jim Cowan was living, and a witness in the case. The defendants then moved to strike out the testimony of this witness as to reputation of the location of the Halsey line. The motion was denied and the defendants excepted. The evidence was admitted as substantive evidence on the location of the Halsey line. Verdict and judgment for the plaintiffs, and the defendants excepted and appealed.

Stevens, Beasley & Weeks and Shepherd & Shepherd, for appellants. Jas. O. Carr, J. D. Kerr, and E. K. Bryan, for appellees.

HOKE, J. (after stating the case). The correct placing of the Halsey line was a fact pertinent to the issue, but if the plaintiffs considered this material to the case they should have established it by proper testimony. It is contended by the plaintiffs that common reputation is admissible on questions of boundary, that the testimony above

set out is of that character and the rulings of the court concerning it can be sustained on that ground. It is true that evidence of both hearsay and common reputation is received with us in cases of disputed private boundary, but this is an exception to the general rule, which requires that the rights of litigants must be determined on sworn testimony. Such testimony, in England, is not admitted in questions of private right, and the principle was only adopted here from necessity, and where, from lapse of time or changing conditions, it has become "difficult, if not impossible," that better evidence should be had. Speaking of such testimony (hearsay) in *Sasser v. Herring*, 14 N. C. 342, *Henderson, J.*, says: "It is the well established law in this state. And if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident termini of our lands would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity, we have in this instance sacrificed the principles upon which the rules of evidence are founded." While such testimony is thus received of necessity, it should be confined to the reasonable requirements of the necessity that called it forth, and the rules and limitations for safeguarding its application should be carefully observed. In *Hemphill v. Hemphill*, 138 N. C. 504, 51 S. E. 42, the court in speaking of this character of evidence said: "It is the law of this state that, under certain restrictions, both hearsay evidence and common reputation are admissible on questions of private boundary." Citing *Sasser v. Herring*, 14 N. C. 340, *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154, and *Yow v. Hamilton*, 136 N. C. 357, 43 S. E. 782. And in the same opinion, speaking of the restrictions placed upon evidence of common reputation, the court said: "This reputation whether by parol or otherwise should have its origin at a time comparatively remote and always *ante litem motam*. Second. It should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location." Citing *Tate v. Southard*, 8 N. C. 45, *Dobson v. Finley*, 53 N. C. 496, *Mendenhall v. Cassells*, 20 N. C. 43, *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823, and *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154.

Applying the principles set forth in these cases, we are of the opinion that the testimony of the witness Colvin on the matter in question does not comply with the conditions required for its reception. Here, the true location of the Halsey line had become a relevant circumstance, and, granting for the present that the statement of this witness amounts to evidence of common reputation, this line as shown by the plat was one boundary line of a large tract of land lying

adjacent to the land in dispute. No deed covering this tract of land is introduced, no monument or natural object is shown as marking the boundary of this tract, and no occupation or possession of any such tract by Halsey, or any of his descendants or grantees, is established tending to give it any fixed or definite location. As said by Daniel, J., in *Mendenhall v. Cassells*, 20 N. C. 43: "In a country recently and of course thinly settled, and where the monuments of boundaries were neither so extensively known nor so permanent in their nature as in the country of our ancestors, we have from necessity departed somewhat from the English rule as to traditional evidence. We receive it in regard to private boundaries, but we require that it should either have something definite to which it can adhere, or that it should be supported by proof of correspondent enjoyment and acquiescence. A tree, line, or water-course may be shown to have been pointed out by persons of a bygone generation as the true line or water course called for in an old deed or grant. A field, house, meadow, or wood may be shown to have been reputed the property of a particular man or family, and to have been claimed, enjoyed, and occupied as such. But a mere report, unfortified by evidence of enjoyment or acquiescence, that a man's paper title covers certain territory, is too slight and unsatisfactory to warrant a rational and conscientious person in making it the basis of a decision affecting important rights of his fellow men, and therefore, as far as we are advised, has never been received as competent testimony." And, in reference to the time, it has been held in this state that in order to admit evidence of general reputation, unlike hearsay in this particular, it is not necessary to show that such reputation had its origin in the declarations of persons who are dead. *Dobson v. Finley*, *supra*.

But the decisions are also to the effect that, to justify the reception of such evidence, the time at which the common reputation had its origin should be at a remote period. "Comparatively remote" is the term used in *Hemphill's Case*, *supra*. It was so used for the reason that, as the principle was established of necessity, when from changing conditions and the absence of permanent monuments, better evidence of boundary could not be procured; so the time may vary to some extent, as the facts and circumstances may show that the necessity does or does not exist. On the admission of such testimony as to the time required, and the test to be applied, it is held in *Nieman v. Ward*, 1 Watts & S. (Pa.) 68 that: "Reputation and hearsay is such evidence as is entitled to respect when the lapse of time is so great as to render it difficult to prove the existence of original landmarks." This alleged general reputation had its origin no further back than 1884, less than 17 years before action brought. It grew out of the survey, the witness said, and

on the facts and circumstances of the case we are of opinion that it is not sufficiently remote to be admitted as evidence.

While we have discussed the question on the idea that a general reputation has been testified to, because it was very earnestly contended that the ruling of the court should be sustained on that principle, as a matter of fact the testimony does not make out a case of general reputation at all, and we could well hold that there was error in not striking out this portion of the evidence in accordance with the defendant's motion. The witness said he knew the line was the Halsey line from "what people said." Again, he said his knowledge grew out of the survey in 1884; and the only person he ever heard say so was Jim Cowan, who was alive and a witness in the case. This is no testimony of a general reputation, but simply the assertion of a fact by an individual who is still living. A general reputation must be the common report of the community, and while it may be established by the assertion of individuals "such assertion must be in effect the statement of the reputation." As stated in the books, "an individual declaration must thus appear to be the result of a received reputation, and the individual declarant is thus merely the mouthpiece of the reputation." 1 Greenleaf, Ev. § 139; 2 Wigmore, Ev. § 1584—both authors citing Wood, Baron, in *Moseley v. Davis*, 11 Price, 180.

There was error in admitting the testimony, and a new trial is awarded.

New trial.

(140 N. C. 644)

BULLARD v. EDWARDS.

(Supreme Court of North Carolina. March 27, 1906.)

1. JUSTICES OF THE PEACE—DEFAULT JUDGMENT—VACATION—JURISDICTION—MOTION—TIME.

Revisal 1905, § 1478, provides that when a justice's judgment is rendered in the absence of either party, caused by his mistake or excusable neglect, he may, within 10 days after the date of the judgment, apply to the justice for relief by affidavit setting forth the facts, etc. *Held*, that a justice had no jurisdiction to set aside a default judgment under such section on an application not filed within the time specified.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 388.]

2. SAME—OBJECTION—TIME.

A default judgment was entered by a justice of the peace in defendant's absence, on January 7, 1905. On January 17th, an affidavit to set aside the judgment was delivered by defendant's attorney to a brother of the justice of the peace, who delivered it to the justice on the 19th, when the justice notified the parties to appear before him on January 26th, when the case would be reheard. On that day, plaintiff appeared and applied for a continuance until February 2d, which was granted, on which day plaintiff filed a "demurrer" to the affidavit on the ground that it was not filed in time. *Held*, that as the order fixing January 26th for a rehearing of the case was ex parte, plaintiff's objection to the affidavit was in time.

3. SAME—REMEDY.

Where a judgment was rendered by a justice of the peace in favor of plaintiff in defendant's absence, defendant's remedy, after the expiration of the 10 days fixed by Revisal 1905, § 1478, within which the justice could set aside the judgment and rehear the case, was either by appeal or by an application for a recordari.

4. SAME—DILIGENCE.

Where, in an action before a justice, after a change of venue had been taken at defendant's instance, defendant relied on the officer of the court to notify him of the date of trial, and though judgment was rendered for plaintiff on the very day the cause was removed, defendant made no inquiry of the justice for some days thereafter as to when he would try the case, or as to what had been done, he was lacking in diligence, and was not entitled to a vacation of the judgment for excusable neglect.

Appeal from Superior Court, Robeson County; Moore, Judge.

Action by D. J. Bullard against Sandy Edwards. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a summary proceeding in ejectment instituted in a justice's court. The cause came on for trial before Spurgeon Jones, J. P., on the 7th day of January, 1905, and was removed upon affidavit to Alex McMillan, J. P. Prior to the return day of the summons, the said Spurgeon Jones, J. P., issued a writ removing the defendant from possession of the premises in controversy and placing the plaintiff in possession. The writ was served on January 5th by putting out of possession, defendant, Sandy Edwards, and putting in possession, the plaintiff, D. J. Bullard. On the 7th day of January, 1905, in the absence of the defendant, Alex McMillan, J. P., tried the case and rendered judgment that the plaintiff was the owner and entitled to the immediate possession of the premises. Within 10 days thereafter, Jas. H. Johnson, Esq., attorney for the defendant Edwards, wrote a letter to the said justice of the peace, stating that the defendant was not notified that the trial would be had on the 7th day of January, and that he and the defendant were ready and willing to attend upon said trial, if they had been notified; that the officer of the court had promised to notify the defendant when the said Alex McMillan would hear the case and had not done so. Thereupon Alex McMillan notified J. H. Johnson, Esq., attorney for the defendant, that he would open the case for reconsideration, and to send him an affidavit setting forth the facts in regard to the absence of the defendant and its cause; that the affidavit, which contained the foregoing statement of facts, was sent to Roderick McMillan, a brother of the justice of the peace, and was received by him on the 17th day of January and that he forwarded it to Alex McMillan, who received the same on the 19th of January. After the affidavit of J. H. Johnson, Esq., was received, the said justice had the parties and witnesses notified to appear before him on the 26th day of January, when the case would be reheard and the same pro-

ceedings had as if the case had never been acted on. There is no evidence that any summons, subpoena or other written notice was served upon the parties or the witnesses. On the 26th day of January the plaintiff appeared before the justice and filed an affidavit for a continuance until February 2d, which was granted. On the 2d day of February both plaintiff and defendant were present, and the plaintiff filed with the court what is called a demurrer to the affidavit of J. H. Johnson, Esq. The demurrer, omitting unimportant parts, is as follows: "(1) That said affidavit was not filed within 10 days from the rendering of the judgment, said judgment having been rendered on January 7, 1905, and said affidavit was not filed until the 19th day of January, 1905, which was more than 10 days thereafter. (2) That said affidavit was filed with Roderick McMillan and not with this court. (3) That it does not state facts sufficient to warrant the court in reopening the case. (4) That it was the duty of the defendant and not of the court to have notified his counsel, and it was also his duty to have been diligent and to have known where said trial was to be had." The justice overruled the plaintiff's demurrer and ordered that the possession of the property be restored to the defendant. Plaintiff appealed. At the hearing in the superior court the judgment of the justice, rendered on February 2, 1905, was reversed and set aside, and the defendant taxed with the costs. He excepted and appealed.

McLean, McLean & McCormick, for appellant. McIntyre & Lawrence, for appellee,

WALKER, J. (after stating the case). The law requires that when a judgment has been rendered by a justice of the peace, in the absence of either party, and the absence was caused by his mistake or excusable neglect, he may, within 10 days after the date of the judgment, apply for relief to the justice by affidavit setting forth the facts. If the affidavit, which must be filed by the justice, is deemed by him sufficient, he shall rehear the case and shall cause the parties to be notified of the time and place appointed for the rehearing. Code, § 845; Revisal 1905, § 1478. It will be seen that, in order to give the justice jurisdiction to open and rehear the case, the party against whom the judgment was given must make his application by affidavit within 10 days after rendition of the judgment, which was not done by the defendant in this case. The statute, as we think, can have but one meaning, namely, that the affidavit, which is the form provided for making the application, must be filed within 10 days. The case is governed in this respect by *Navassa Co. v. Bridgers*, 98 N. C. 439. It is there said that after the lapse of 10 days the justice has no authority to rehear the case, and as a new trial cannot be had in a justice's court (Revisal 1905, § 1489), a dissat-

isfied party should, after the time has elapsed, either appeal or apply for a recordari; if the facts entitle him to either remedy. The defendant's counsel, in his well-considered argument, insisted that the objection made by the plaintiff to the application, upon the ground that it was too late, was not taken in apt time. In the exercise of the power to set aside a judgment, under the statute, it would seem that, as it is a matter of jurisdiction, the justice should proceed strictly according to the provisions of the law (*Navassa Co. v. Bridgers*, supra), and that he did so proceed should appear affirmatively; but, even if this is not so, we do not think the objection came too late. The justice upon receiving the affidavit sent by the defendant's attorney and delivered to him by his brother, set aside the judgment and ordered the case to be reheard. It is true the plaintiff, afterwards asked for a continuance to the 2d day of February, as his counsel could not be present before that time, but at the first opportunity, when all the parties were before the justice and before entering upon the trial of the merits, he "demurred" to the affidavit filed by the defendant for a rehearing of the case and this in effect called in question the jurisdiction of the court to set aside the judgment and proceed further in the cause. He could not have been heard when the order was made, as it was *ex parte*. We would not give so strained and technical a construction to his application for a continuance, as to exclude therefrom the idea that the plaintiff intended that the whole matter, and not merely the trial upon the merits, should be continued for hearing to a more convenient time, when his counsel could be present to advise and direct him how to proceed in order to save his rights. We hold that he could do, on the 2d of February, precisely what he could have done on the 26th of January, and further that he did not intend to waive any of his rights, if the jurisdiction of the justice to proceed as he did can be waived.

The defendant does not appear to have been diligent in taking care of his interests. The cause was removed at his request and he made no inquiry of the justice, who then had acquired jurisdiction in the case by removal, as to when it would be tried, but relied upon the assurance of the officer for such information. The failure of the officer to keep his promise, was defendant's misfortune and not the plaintiff's fault, and he must take the consequences of his misplaced confidence, as we said in *Navassa Co. v. Bridgers* of similar conduct on the part of the defendant in that case. The judgment was rendered on the 7th of January, the very day the case was removed and no inquiry was made of the justice, as far as appears, for some days afterwards as to when he would try the case or as to what had been done. This was not due diligence. *McDaniel v. Watkins*, 76 N. C. 399; *Sparrow v. Davidson College*, 77 N. C. 35; *Navassa Co. v. Bridgers*, supra. The

cases of *McKee v. Angel*, 90 N. C. 60, and *Whitehurst v. Transportation Co.*, 109 N. C. 344, 13 S. E. 937, which were cited by defendant's counsel are not in point, as there the judgments were rendered without the service of process and the court merely exercised its general jurisdiction to vacate them. The remedy given by section 1478 of the Revisal of 1905, is a special one and must be strictly pursued. The affidavit is made the initial step in any application for a rehearing and is indispensable to enable the justice to proceed at all. He must have evidence in some form, or what is equivalent to it, upon which to act. The letter and reason of the law are alike opposed to any other construction.

No error.

(140 N. C. 640)

MAYERS v. McRIMMON et al.

(Supreme Court of North Carolina. March 27, 1906.)

1. BILLS AND NOTES—DRAFTS—INDORSEMENT—FORM—RUBBER STAMP.

The placing of the name of the payee of a draft on the back thereof with a rubber stamp, by a person having authority to do so, and with intent to indorse the instrument, constitutes a valid indorsement.

2. SAME—PROOF.

The indorsement of a draft does not prove itself, but must be established by proper testimony.

3. SAME—BONA FIDE PURCHASERS—MODE OF TRANSFER.

Where, in an action on drafts bearing the payee's indorsement, the latter testified that the drafts had been "discounted" to plaintiff by the payee before maturity for value and without notice, but it did not appear that the drafts had been "indorsed" under such circumstances, plaintiff was but the equitable owner of the instruments, which were, therefore, subject to any valid defense open against the drawer.

4. SAME—NEGOTIABLE INSTRUMENTS LAW—EFFECT.

Revisal 1905, § 2198, declares that when the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had, and the transferee acquires in addition the right to have the indorsement of the transferor, but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. Section 2208 provides that every holder is deemed prima facie a holder in due course, etc., and section 2340 declares that a "holder" is the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, and defines "bearer" as the person in possession of a bill or note payable to bearer. *Held*, that the holder of a draft, payable to order, in the absence of proof of indorsement by the payee, was not a bona fide purchaser for value without notice.

5. SAME—EVIDENCE.

Where, in an action on drafts, defendants claimed that plaintiff was not a bona fide purchaser for value without notice before maturity, and that the drafts were therefore subject to defenses available against the payee, and the indorsement of the payee to plaintiff was not proved, it was error for the court to exclude evidence that one of the drafts had been seen in a bank unindorsed after maturity.

Appeal from Superior Court, Robeson County; Moore, Judge.

Action by Albert W. Mayers against N. J. McRimmon, and others. From a judgment for plaintiff, defendants appeal. Reversed.

The plaintiff declared on two drafts payable to the order of the Continental Jewelry Company and accepted by the defendants, each in the sum of \$16 bearing date April 19, 1904, and payable respectively 10 and 12 months after date. The defendants admitting the acceptances answered and alleged that they were obtained by false and fraudulent representation on the part of the Continental Jewelry Company in the sale of jewelry to the defendants, and also by means of false and fraudulent warranty inducing the sale, and that the plaintiff took the notes with notice and knowledge of the defenses existing against the notes. On the trial the plaintiff presented the drafts, and at the time each of these drafts was indorsed with rubber stamp "Pay to order of Albert W. Mayers, Continental Jewelry Co., Cleveland, Ohio." The plaintiff also introduced the depositions of the plaintiff and Miles F. Baxter, the general manager of said company, and both testified that the two drafts were discounted to the plaintiff before maturity for value and without notice of any defense or offset. The defendants, contending that on the facts stated the plaintiff was only the assignee or equitable holder, offered testimony to show false and fraudulent representation on the part of said company inducing the purchase, damage, etc., and on objection this court was excluded by the court and the defendants excepted. The defendants then offered to prove that one of the defendants saw one of the drafts in the bank at Rowland before action brought and after maturity, and at that time said draft had no indorsement on it. On objection this evidence was excluded and the defendants excepted. The court charged the jury that if they believed the evidence the plaintiff was entitled to recover the amount of the drafts with interest after maturity, and the defendants excepted. Verdict and judgment for the plaintiff, and the defendants appealed.

McLean, McLean & McCormick, for appellant.

HOKE, J. (after stating the case). In *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803, it is held "that in an action on a note it is error to hold that the mere introduction of the note, with the name of an indorsee written on the back, is evidence of its indorsement by such indorsee so as to vest the legal title in the plaintiff and cut off any defenses against the indorsee, as the signatures of the indorsers, whose indorsement is required to vest the legal title, must be proved." The principle applies in any action on a negotiable instrument where an indorsement is required to vest the legal title so as to constitute the plaintiff a "holder in due course" and the indorsement is denied.

In the cases suggested and in the absence of such proof, the plaintiff who presents the note is held to be the equitable owner, and the same is subject to defenses or other equities of the maker against prior holders. *Tyson v. Joyner*, supra.

On the trial below the plaintiff presented the drafts, and each appear to have the name of the payee stamped on the back with a rubber stamp. Where the name required has been so placed by one having authority to do it, and with intent to indorse the instrument, the authorities hold that this is a valid indorsement. 4 Am. & Eng. Enc. 258; *Horner v. Mo. Pa. R. Co.*, 70 Mo. App. 291. The indorsement, however, does not prove itself, but must be established, as in other cases, by proper testimony. The depositions of both the plaintiff and the general manager of the Continental Jewelry Company were received in the court below, and they both testified that the notes had been discounted to the plaintiff by the company before maturity for value and without notice, but neither stated that the instruments had been indorsed under any such circumstances. In the absence of such proof the plaintiff then, as stated, is only the equitable owner holding the instruments subject to any valid defense open to the drawer, and the evidence offered by the defendants tending to establish such a defense should have been received. There is nothing in our statute on negotiable instruments which contravenes this principle. On the contrary, every part of the statute bearing on the subject declares and sustains it. This statute, enacted in 1899 with a view of introducing some uniformity in this important feature of the law merchant, is in the main only a compendium of established custom concerning negotiable instruments, as construed and applied in the best considered decisions of the courts. And both before and since its enactment, it has been held that to constitute a holder in due course of a negotiable instrument payable to order, it is always required that the same should be indorsed. Other requirements may, under given conditions be dispensed with, but indorsement of such an instrument is essential. Thus, in Revisal of 1905, § 2198, it is provided that "where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made." And section 2208, relied upon by the plaintiff, is to like effect: "Every holder is deemed prima facie a holder in due course," etc. By the very definition established in the act, a "holder" of such an instrument, one payable to order, must be a holder by indorsement.

Thus in section 2340 it is declared "a holder means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and "bearer" is defined to be "the person in possession of a bill or note which is payable to bearer." Even if section 2208 had the effect as contended, and it does not even if the presumption referred to in this section should obtain, there would be error, for the presumption is rebuttable and would yield to facts established by proper testimony. The defendants offered evidence tending to show that one of the drafts had been seen at the bank in Rowland, N. C., unindorsed and after maturity, and this evidence also should have been admitted, for, if this be true, it would in any event destroy the plaintiff's alleged position as holder in due course and subject the note to any legitimate defense available.

There was error in refusing to receive and consider the evidence offered and a new trial is awarded.

New trial.

(140 N. C. 623)

WILLIAMS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. March 27, 1906.)

1. TRIAL — INSTRUCTION — OPINION ON EVIDENCE.

In an action for fire spreading from a railroad right of way, a charge that even if the fire was communicated to the right of way, the plaintiff cannot recover, since the engine was in good repair and equipped with an improved spark arrester, and was managed in a careful manner by a competent engineer, and the evidence as to this is uncontroverted and uncontradicted, is properly refused as an expression of opinion on the facts, forbidden by Revisal 1905, § 535.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 436-438.]

2. RAILROADS—FIRES—NEGLIGENCE OF RAILROAD COMPANY.

Where fire escapes from an engine in proper condition, having a proper spark arrester and operated in a careful manner by a skillful and competent engineer, and the fire catches off the right of way, the railroad company is not liable, for there is no negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1668-1672.]

3. SAME.

Where fire escapes from an engine in proper condition with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to adjoining premises, the railroad company is liable.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1673-1676.]

4. SAME.

Where fire escapes from a defective engine, or a defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, and fire catches off the right of way, the railroad company is liable.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1668-1672.]

5. SAME—QUESTION FOR JURY.

In an action for fire spreading from a railroad right of way, evidence held to present a

question for the jury whether the fire was communicated from the railroad engine, and whether the right of way was foul with combustible matter on it.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1742, 1743.]

Appeal from Superior Court, Duplin County; W. R. Allen, Judge.

Action by W. H. Williams against the Atlantic Coast Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Junius Davis and H. L. Stevens, for appellant. Rountree & Carr and Carlton & Williams, for appellee.

CLARK, C. J. This action is for the recovery of damages for negligently setting fire to and burning the woods of the plaintiff by sparks from an engine falling upon a foul right of way. The errors assigned are: (1) Refusal to nonsuit. (2) That there was no evidence that the fire originated from the defendant's engine. (3) Refusal to charge that "even if the fire was communicated to the defendant's right of way, the plaintiff cannot recover, for the engine was in good repair and equipped with an improved spark arrester for preventing the escape of sparks, and was managed and operated in a careful manner by a skillful and competent engineer, and the evidence as to this is uncontroverted and uncontradicted."

This prayer was properly refused because it would have been an expression of opinion upon the facts forbidden by the act of 1796. Revisal 1905, § 535. Though a witness may be uncontradicted, it is for the jury to say whether they believe him. The judge is prohibited from expressing an opinion that "a fact is fully or sufficiently proved, such matter being the true office and province of the jury." Revisal 1905, § 535. Besides, though the facts were found by the jury that the fire was not set out by a defective engine, the legal conclusion in the prayer is incorrect, if the fire began on a foul right of way. The rules of negligence applicable to cases of this kind are: (1) If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence. (2) If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Moore v. Railroad*, 124 N. C. 341, 32 S. E. 710; *Phillips v. Railroad*, 138 N. C. 12, 50 S. E. 462. (3) If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, and the fire catches off the right of way,

the defendant is liable. In the first case there would be, as above stated, no negligence. In the second case the foul right of way would be negligence, and in the third the defective engine or spark arrester, or the negligent operation of a good engine, would be negligence.

The other two exceptions of the defendant amount simply to a claim that there was no evidence that the fire proceeded from the defendant's engine. No one testified that he saw the sparks fall from the engine upon the right of way. It is rarely that this can be shown by eyewitnesses, for it would usually happen that if the sparks were seen at the moment of falling and igniting the stubble, the fire would be put out by the observer. But here the fire was seen on the right of way, it burnt along the track between the ditch and the ends of the ties, and thence had gone into the woods. The wind was blowing from the northwest across the track, the fire being on the south side. Two witnesses testified that they first saw the smoke about 30 minutes after the defendant's engine passed. How long before that the fire began no one knew, but there was no fire before the engine passed. The other witnesses first saw the fire after a longer interval, and there was evidence that the fire burnt both ways. These were matters for the jury. The evidence was plenary that the right of way was foul, with much combustible matter on it, bushes having been cut down and allowed to lie. Indeed the fact that the right of way was burned over is evidence of combustible matter thereon, and the section master stated in his testimony that it was not kept cleaned off. In *McMillan v. Railroad*, 126 N. C. 726, 36 S. E. 129, it is said that "no spark arrester can be so constructed as to entirely prevent the emission of sparks without destroying the efficiency of the engine, and while it is not negligence in the defendant to run such an engine over its road, the fact that it had recently passed over the road and fire was found there, was some evidence tending to show that it emitted sparks that set the grass on fire." The evidence of the negligent and foul condition of the track and the discovery of the fire so soon after the defendant's train passed, was sufficient to submit the question to the triors of the facts. The court was not authorized to draw the inferences of fact from this testimony. In *Armstrong v. Railroad*, 130 N. C. 66, 40 S. E. 856, there was no evidence that the fire originated upon the right of way, or that connected it with the engine in any way. In *Ice Co. v. Railroad*, 126 N. C. 797, 36 S. E. 279, there was no evidence that the engine was defective nor that the right of way was foul. In *Cheek v. Lumber Co.*, 134 N. C. 225, 46 S. E. 483, 47 N. E. 400, there was no spark arrester, but on the conflicting evidence whether sparks from the engine caused the fire, the jury found that they did not.

It was the plaintiff's right to have this case submitted to the jury. Though we know that the words "judicium parium suorum" in Magna Charta, c. 39, did not either create or guaranty the right of trial by jury (as at one time was erroneously thought), McKeechnie, Magna Charta, 452, trial by jury having been instituted after that time, still in the process of time and the evolution of law, it has become a part of the "law of the land." The Constitution of the state (article 1, § 19) guaranties it as a "sacred and inviolable" right in civil cases, and section 13 of the same article guaranties the same right in criminal actions. We know that the failure to insert a similar guaranty in the Constitution of the United States was one of the chief grounds of objection to its ratification, an objection which was only cured by an understanding that amendments guarantying the right of trial by jury in the federal courts should be adopted, which was done by the first Congress, and being promptly ratified by the states, they now constitute the sixth and seventh amendments. A right so guarantied should not be denied, unless it is clear that there is no evidence. As was said in *State v. Kiger*, 115 N. C. 751, 20 S. E. 458: "If the presiding judge deems that the verdict is against the weight of the evidence, or that the evidence was insufficient in his judgment to justify conviction, he is vested with the power to set aside the verdict and grant a new trial. This is a matter of discretion, and his granting or refusing a new trial on such ground is not subject to review here. The fact that the 12 men have convicted on the evidence will often and properly make him less sure of his own opinion to the contrary." This case has been repeatedly cited with approval. In *State v. Chancy*, 110 N. C. at page 508, 14 S. E. at page 781, *Shepherd, J.*, says: "In some jurisdictions it has been held that if the testimony be such that the judge would set the verdict aside as being against the weight of the evidence, it should not be submitted to the jury; but this, according to our decisions, would be an usurpation of the functions of that body"—citing *State v. Allen*, 48 N. C. 257; *Wittkowsky v. Wasson*, 71 N. C. 451, and he then adds, "perhaps what is 'reasonably sufficient' evidence as understood in North Carolina, is best stated by *Battle, J.*, in *Jordan v. Lassiter*, 51 N. C. 131. He says that if the circumstances 'be such as to raise more than a mere conjecture, the judge cannot pronounce upon their sufficiency to establish the fact but must leave them to be weighed by the jury, whose exclusive province it is to decide upon the effect of the testimony.'"

No more subtle and adroit application could be addressed to a trial judge than a motion of this kind with its necessary implication that the jury may do wrong and injustice, and that the superior intelligence and greater impartiality of the judge are in-

voked to prevent it. But the experience and the wisdom of the ages and the deliberate judgment of the people, as embodied in the Constitutions of both the state and the Union, are conclusive that in passing upon the facts the opinion of one man, though skilled in the law, is not deemed superior to that of 12 men of the vicinage, but is held to be decidedly inferior and to be guarded against, so much so that the guaranty of a trial by jury in both civil and criminal cases is placed in the organic law which every judge is sworn to observe before he is permitted to discharge his functions.

No error.

(24 Ga. 975)

STEWART v. GREENE.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. LIVERY STABLE KEEPERS—INJURY TO HORSE AND BUGGY—PLEADING.

When, in an action for damages against the hirer of a horse, a buggy, and harness, brought by the owner of the same, the petition alleges the hiring, and that the defendant, through his carelessness and negligence, "suffered said animal to run away and kill herself, and in so doing said buggy was destroyed and the harness injured, to the damage of petitioner in" a named sum, it is not subject to demurrer upon the ground that it states no cause of action.

2. SAME—ALLEGATIONS OF NEGLIGENCE—DEFINITENESS.

The allegation in the petition in the present case, that the horse, while attached to the buggy, was hitched by the defendant to a picket fence, and was not securely fastened, was subject to a special demurrer which called for a more specific allegation as to negligence in the manner in which the animal was fastened to the fence. This is true, notwithstanding the allegation that the fence, "being composed of upright, sharp, pointed pickets, was [a] dangerous, unsafe, and improper place" at which to hitch the horse.

3. SAME.

The allegation that this fence "was [a] dangerous, unsafe, and improper place" at which to hitch the animal, was too general to withstand a special demurrer calling for the particulars in which the place was dangerous, unsafe, and improper for such purpose.

4. SAME—EVIDENCE—SUFFICIENCY.

The evidence was not sufficient to support the verdict, and for this reason a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by J. F. Greene against James Stewart. There was a judgment for plaintiff, and defendant brings error. Reversed.

Geo. A. H. Harris & Son, for plaintiff in error. F. W. Copeland, for defendant in error.

FISH, C. J. The plaintiff, who kept a livery stable in the city of Rome, brought suit against the defendant for damages in the sum of \$200. He alleged that the defendant had hired a mare, buggy, and harness from him, for the purpose of driving

out to L. M. Johnson's, a distance of three miles, and returning, and that by reason of the defendant's negligence the mare, which, while still attached to the buggy, had been hitched by the defendant to a picket fence at Johnson's place, "finally became detached, or unhitched," and started back to her stable, and in her fright ran against a telegraph post on the streets of Rome and killed herself, wrecked and ruined the buggy, and injured the harness. The value of the mare and the amount of the damages to the vehicle and to the harness were stated. The defendant demurred to the petition, upon various grounds. The demurrer was overruled, and upon the trial the jury returned a verdict in favor of the plaintiff for \$85. The defendant moved for a new trial, which motion was overruled, and he excepted, assigning in his bill of exceptions error upon the overruling of this motion and upon exceptions pendente lite which he had filed to the ruling upon the demurrer.

1. One ground of the demurrer was that the petition set forth no cause of action. The petition alleged that the defendant hired the mare, buggy, and harness from the defendant, "and through his carelessness, negligence, and indifference toward said mare, buggy and harness, and wholly without blame on petitioner's part, suffered said animal to run away and kill herself, and in so doing the buggy was destroyed and the harness injured, to the damage of petitioner in the sum of \$200." It also set forth wherein the alleged negligence consisted. It is apparent, therefore, that there was a cause of action stated in the petition.

2, 3. The petition alleged: "Said James Stewart hired said property at night, the weather was very cold, and it was a dark night, notwithstanding which said Stewart without detaching said mare from said buggy, hitched said mare * * * to a picket fence at the end of his journey, where he remained for several hours. * * * Said mare was not securely fastened. Said picket fence being composed of upright, sharp pointed pickets, was [a] dangerous, unsafe, and improper place to hitch said mare, in which place without attention she was left standing for some time, and finally became detached, or unhitched, on which account she started to her stable, * * * and in her fright ran against a telegraph post," etc. It also alleged that the defendant "was otherwise careless and negligent, in that, the weather being very cold, and said mare having been driven but a short distance, and having been taken from her mate and other horses in the stable from which she had just been driven, * * * is was gross negligence and carelessness to leave her hitched to said buggy at said picket fence for any length of time, but * * * ordinary care and diligence required and demanded that said animal should have, under the facts and circumstances, been unhitched from said

buggy, and securely fastened at some other place than said picket fence, which could and should have been done."

One ground of the demurrer was that it was not "shown or alleged in the petition how, nor in what way, the mare could have been more securely fastened than she was, nor how or why the hitching of the mare to the picket fence, in the manner the same was done, was negligence or the want of the exercise of ordinary care." We think this ground was good as a special demurrer. The plaintiff undertook to set out the acts of negligence. He alleged that the animal was not securely fastened, without indicating how she was fastened, otherwise than by merely stating that she was hitched to a picket fence. The defendant was entitled to be informed wherein the plaintiff claimed the mare was not securely fastened. We apprehend that the animal might have been fastened securely to a picket fence. The allegation that the picket fence was a dangerous, unsafe, and improper place to hitch the animal is not an allegation as to the insecure manner in which she was fastened, but is what it purports to be, an allegation of negligence, not in failing to securely fasten, but in hitching the animal at a dangerous, unsafe, and improper place. The place might have been a dangerous, unsafe, and improper one at which to hitch the mare, and the defendant negligent in selecting such a place for this purpose, and yet the method adopted by him in fastening her at that place might have been entirely free from negligence. So, too, we think, the defendant, upon special demurrer, was entitled to be informed wherein the plaintiff claimed that the hitching of the mare to the picket fence, in the manner in which this was done, was an act of negligence. The allegation that this fence "was a dangerous, unsafe, and improper place to hitch said mare," was too general to withstand a demurrer calling for the particulars as to wherein it was dangerous, etc. This is particularly true when there was no allegation that the mare, buggy, or harness had sustained any injury while hitched at this place, the allegation as to what occurred there, after she was hitched, being simply that "she finally became detached, or unhitched, on which account she started to her stable," which was perfectly consistent with the idea that the place of the hitching was a safe one. We do not think there was any error in overruling any of the other grounds of the demurrer, and do not think them of sufficient importance to require discussion.

3. The main ground, however, upon which we think a new trial should have been granted is that the verdict was without evidence to support it. While the burden, after proof of the loss and damage, the hiring being admitted, was upon the bailee to show diligence, we think he successfully carried it. It appeared, from the testimony of both the

plaintiff and the defendant, that the mare had been perfectly gentle until this accident occurred, and that for several months the defendant had been in the habit of hiring her from the plaintiff and driving her. There was not a particle of evidence which indicated that she was nervous and likely to become frightened by being hitched to a picket fence, while still harnessed to a buggy. On the contrary, the defendant's own testimony and that of other witnesses who testified in his behalf was, that he had frequently driven the animal out to Johnson's and hitched her, while attached to the vehicle, to the same fence, at the same place, and in the same manner as on this occasion, and that until this occasion the animal never got loose and there was no accident. It is true that the plaintiff testified that it was not safe to hitch the mare to that picket fence, as the defendant told him he did. But in so doing, he merely expressed an opinion, without stating wherein it was unsafe to do this. On the other hand, the testimony of the defendant and other witnesses showed that, from the past experience of the one and the observations of the others, it was not unsafe or dangerous to tie this particular mare to this particular fence, just as she was tied to it on this occasion. Besides, witnesses other than the defendant testified that they had been in the habit of hitching horses to this same fence without incurring any accidents. Save the mere opinion of the plaintiff, there was nothing in the evidence which indicated that the place where the animal was hitched was unsafe or dangerous, or that it was unsafe to hitch a horse while attached to a buggy. Whether it was as a general proposition, safe or unsafe to hitch a horse, harnessed to a buggy, to this picket fence, there is no escape from the conclusion that the defendant, from abundant past experience with this animal, was justified, as a prudent man, in believing that it would be safe to hitch her there as he did on this occasion. The evidence failed to show that the mare became frightened in consequence of being hitched to this fence, while attached to the buggy. She got loose, not by breaking the line with which she was tied, nor by breaking her bridle, but evidently did so by simply slipping her bridle, as, after her escape, the line with which she was tied to the railing of the fence was found perfectly intact and still tied to the railing, and the bridle was found lying on the ground, uninjured, and with the throat latch still buckled.

The fact that the mare slipped her bridle, and thus got loose and started to her stable, without, so far as the evidence shows, being excited or frightened by the place where, or the manner in which she was tied, did not, in our opinion, show negligence on the part of the defendant, as the bridle was put on her by the servant of the plaintiff, and was in the same condition when the defendant

hitched the mare to the fence as it was when she was delivered to him at the plaintiff's stable. There was nothing in the evidence inconsistent with the theory that the fright of the animal, which caused her to run against the telegraph pole and kill herself, occurred after she slipped her bridle and started back to her stable. We have not overlooked the fact that the plaintiff testified that in the forenoon of the day when his loss occurred, which was December 25, 1902, he told the defendant that if he took the mare out, "he did it at his own risk, that [plaintiff] did not know whether she would run away, kill herself, or [defendant] or hurt somebody else." But this statement, from the connection in which it was made, clearly referred only to the danger of the animal's becoming frightened at the explosion of fireworks about the town, and running away in consequence thereof. We are clearly of opinion that the evidence showed that the defendant had exercised that degree of care which was incumbent upon him under the circumstances, and was, therefore, not liable to the plaintiff for the loss sustained.

Judgment reversed. All the Justices concur.

(124 Ga. 380)

SUMMERLIN et al. v. FLOYD.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. EXECUTORS AND ADMINISTRATORS — DISCHARGE—EFFECT.

The construction to be placed upon the Civ. Code 1895, § 3511 (which declares that a discharge obtained by an administrator "by means of any fraud practiced on the heirs or ordinary, is void and may be set aside on motion and proof of the fraud"), is that while the judgment of the court of ordinary discharging an administrator is open to attack on the ground that it was fraudulently procured, it is to be deemed "void" only when, in a proceeding to set it aside, the proof shows it was secured by practicing a fraud upon the heirs at law or upon the ordinary. Read in connection with the context, the term "void" is to be understood as the equivalent of "voidable." See 29 Am. & Eng. Enc. L. (2d Ed.) 1068 and citations. The provisions of this section of the code do not alter the cardinal rule that a judgment rendered by a court of competent jurisdiction, and regular upon its face, is to be deemed conclusive until it is duly set aside, either on motion in the court in which it was rendered, or in an equitable proceeding instituted in the superior court. *Carter v. Anderson*, 4 Ga. 516; *Mobley v. Mobley*, 9 Ga. 249; *Jacobs v. Pou*, 18 Ga. 346; *Cook v. Weaver*, 77 Ga. 10; *Pollock v. Cox*, 34 S. E. 213, 103 Ga. 433, 434.

2. LIMITATION OF ACTIONS — SUIT TO SET ASIDE JUDGMENT—DISCHARGE OF ADMINISTRATOR.

"All proceedings of every kind in any court of this state to set aside judgments or decrees of the courts, must be made within three years from the rendering of said judgments or decrees." Civ. Code 1895, § 3764. While the discharge of an administrator does not constitute a bar as to heirs at law who were minors at the time it was procured (Civ. Code 1895, § 3510; *Christian v. Westbrook*, 75 Ga. 852), yet the judgment discharging him can not be set aside at the instance of adult heirs, unless they attack it

by a proceeding commenced within three years from the date of its rendition (*Pollock v. Cox*, supra).

8. SAME.

It appearing, in the present case, that the plaintiffs, though of full age, waited for more than 11 years before seeking in the court of ordinary to have the discharge of the defendant, as administrator, set aside on the ground of fraud, their petition was not maintainable; and the judge of the superior court, who so held on appeal of the case to that court, did not err in dismissing the proceeding.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action by L. V. Summerlin and others against W. A. Floyd. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Griffith & Weatherly, for plaintiffs in error. W. R. Hutcheson and Price & Edwards, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(194 Ga. 1000)

SCOTT v. HUGHES et al.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. MORTGAGES—DEED INTENDED AS SECURITY.

A paper in the usual form of a warranty deed, but containing a clause providing that should the grantor pay to the grantee a stated sum of money by a given date, the instrument "shall be void; otherwise, of full force"—is a mortgage, and not a deed.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 4, 60.]

2. COURTS — CITY COURTS — JURISDICTION — FORECLOSURE OF MORTGAGES.

A city court has no jurisdiction to foreclose a mortgage on realty.

3. JUDGES—POWERS—CORRECTION OF RECORD.

A judge of a court of record may of his own motion, when approving the minutes at the close of the term, expunge therefrom a judgment which the court is, as to the subject-matter, without jurisdiction to render.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 725.]

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Action by Mrs. F. S. Scott against Mrs. Ada Hughes and another. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Mrs. Scott brought suit in the city court against Hughes and his wife, alleging that Mrs. Hughes as principal, and Hughes as security, were indebted to her in the sum of \$250 principal, "for money had and received, as shown by a deed or contract" attached to the petition. The plaintiff prayed for a general judgment, and for a special lien on the property described in the paper above referred to. The paper exhibited with the petition was in form of an ordinary warranty deed, in which Mrs. Hughes purported to convey to

Mrs. Scott a described parcel of land, but it contained immediately following a description of the land and immediately preceding the habendum clause the following: "It is hereby agreed that should Mrs. Ada Hughes pay to Mrs. F. L. Scott (\$275.00) two hundred and seventy-five dollars by Dec. 1, 1902, this instrument shall be void, otherwise in full force." The attestation clause recited that Mrs. Hughes hereunto set her hand, etc. The paper was signed by both Mrs. Hughes and her husband, and attested by two witnesses, one of them a notary public. Mrs. Hughes was served, and there was a return of non est inventus as to Hughes. Mrs. Hughes filed an answer, in which she denied each and every allegation in plaintiff's petition, and for further plea alleged that the debt sued on was the debt of her husband, and further, that the deed attached to the petition was void for usury, the amount of the usury being set out in the plea. The case was submitted to a jury, who returned a verdict in favor of the plaintiff for \$250 principal, \$28 interest, and costs of suit, there being nothing in the verdict in reference to the claim of special lien set up in the petition. Upon this verdict counsel for the plaintiff drafted a judgment in favor of the plaintiff for the amount specified in the verdict, declaring that the plaintiff should have a special lien on the land described in the paper attached to the petition. This judgment was handed to the clerk, who entered it on the minutes of the court. Subsequently, and during the term, the judge examined the minutes and made the following entry thereon: "Examined and approved, with this exception: In the judgment of Mrs. F. L. Scott v. Mrs. Ada Hughes and C. J. Hughes, the part therein entering a special lien against the property therein described is stricken from said judgment and the minutes with this correction are approved." Counsel for Mrs. Scott excepted to this order of the judge correcting the minutes, and in a bill of exceptions bringing the case to this court assigns error upon this order, the error assigned being, that the paper relied on by the plaintiff was a deed entitling her to a special lien; that the pleadings authorized a special lien, the defendant not having questioned the plaintiff's right by plea or otherwise, and that it was too late after verdict to raise the question; that the attorney of record has the right to sign a judgment in accordance with the pleadings, and that the court has no authority to strike the judgment so signed up.

E. T. Moon, for plaintiff in error. D. J. Gaffney, for defendants in error.

COBB, P. J. (after stating the foregoing facts). It is often a question difficult of solution as to whether a paper executed for the purpose of securing the payment of a debt passes title to the grantee, or is a

mere mortgage. In *Burckhalter v. Planters' Bank*, 100 Ga. 432, 28 S. E. 236, Mr. Justice Atkinson said: "The test then whether an instrument be a deed or mortgage is necessarily whether the interest acquired by the holder of an instrument is such an interest as can be extinguished by the voluntary act of the debtor alone. If it can be, the instrument is defeasible, and does not pass * * * an absolute title." The ordinary mortgage is usually in the form of a conveyance of an absolute title, but with a defeasance clause added. That the defeasance clause is not in the usual form or usual place does not make it any the less a defeasance clause. It is distinctly provided in the paper in question that if the amount which is specified as the consideration of the deed is paid by a given date, the instrument "shall be void, otherwise of full force." The language of this deed as to what will operate to defeat it is almost in terms the defeasance clause usually found in a technical mortgage. The paper was a mortgage, and not a deed. See *Ward v. Lord*, 100 Ga. 407, 28 S. E. 446; *Lubroline Oil Co. v. Athens Bank*, 104 Ga. 380, 30 S. E. 409.

The paper relied upon by the plaintiff to obtain the special lien not being a deed, the city court had no jurisdiction to enter a judgment to that effect. Treating it as a mortgage, that court was without jurisdiction. A city court has no jurisdiction to foreclose a mortgage on realty. Such an instrument must be foreclosed in the superior court, either by following the statutory procedure, or by appealing to the equity powers of that court. The verdict did not purport to find in favor of a specific lien. If the pleadings had disclosed a case in which the court had jurisdiction to enter a special lien in favor of the plaintiff, a general finding of the character now involved might probably have authorized the court to enter a judgment in accordance with the prayers of the petition. But certainly such a general finding would not authorize a judgment to be entered up which it was apparent from the face of the pleadings the court was without jurisdiction to render. It is true that an attorney of record may enter up a judgment on a verdict, but his right to enter up a judgment which will be binding upon the defendant, and which the court will be bound to recognize, is subject to two limitations: First, the judgment must be in accordance with the verdict and pleadings; and, second, the court must have jurisdiction to enter the judgment which the pleadings call for. If the judgment which the attorney prepared had been submitted to the judge before it was handed to the clerk, no one would for a moment question the right of the judge to strike that portion of the judgment which purported to set up a special lien upon the land. This being true, when the judge proceeded to examine the minutes, preparatory to approving the same as the truth of the

proceedings in his court, we see no good reason why, in his order of approval, he could not eliminate from the minutes that portion of the judgment which was improperly there, for the reason that the court was without jurisdiction to enter such judgment. The power of a judge of a court of record to correct the minutes of his court is very broad, even in those cases where he is dealing with matters within his jurisdiction. *Civ. Code*, 1895, § 4047, par. 6. *Davis v. Barker*, 1 Ga. 559; *Barefield v. Bryan*, 8 Ga. 463. If a judge has power to correct the minutes of his court in reference to matters within his jurisdiction, certainly he has power during the term to expunge from his minutes that which purports to be a judgment which his court is without jurisdiction to render.

Judgment affirmed. All the Justices concur.

(124 Ga. 923)

BRUCE, MEDLEY & NIX v. DICKERSON.
(Supreme Court of Georgia. Feb. 19, 1906.)

LOGS AND LOGGING—CONTRACT FOR SAWING.
The verdict being without evidence to support it, a new trial should have been granted. (Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by W. M. Dickerson against Bruce, Medley & Nix. Judgment for plaintiff, and defendants bring error. Reversed.

H. B. Moss and B. T. Frey, for plaintiffs in error. Griffin & Attaway, for defendant in error.

BECK, J. Dickerson sued the defendants below upon a balance alleged to be due upon a lumber account. On the trial of the case it appeared from the plaintiff's own evidence that, under a contract between himself and the defendants, the defendants were to saw certain timber on his land for half of the lumber, and were to sell part of the lumber along with their own, and to turn over to him his share of the proceeds when they were paid by the purchaser. "They were to buy the lumber straight from me, they were to put it in with theirs, and then, when they got their money from the Morgan Smith folks, why I was to have my part out of it." Thus said the plaintiff in reference to his contract with defendants. He did not know whether the defendants had received the amount sued for, from the purchaser, at the time this suit was brought or not. The defendants' evidence, however, was positive that they had not received the money at the time the suit was instituted. The jury returned a verdict for the plaintiff, and the defendants made a motion for a new trial, upon the general grounds, which was overruled by the court, and they excepted.

There can be no doubt that the court erred

in not granting the new trial. Under the plaintiff's own evidence he was not entitled to recover. He was not to receive his share of the amount for which the lumber was sold, until it had been paid to the defendants by the purchaser; and as his own testimony failed to establish that the defendants had been paid, while that of the defendants clearly showed that the suit was brought before they had received the money, the verdict was without evidence to support it.

Judgment reversed. All the Justices concur.

(124 Ga. 399)

PRICE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—WARNING—KNOWLEDGE OF DANGER.

This court has held in this case: "It is reasonably to be expected of a railway employé, who is engaged in the performance of duties in and around one of the freight yards of his master, that he shall avail himself of his opportunities to familiarize himself with his surroundings and note the location of a culvert passing under an embankment along which tracks are laid, to the end that he may guard against the obvious danger of falling into the culvert in the event his duties call him in the nighttime to the point where it is situated; and if he be injured by falling into the same, he cannot be heard to say that though he knew of its existence, and notwithstanding he had previously had full opportunity to acquaint himself with its relative location, he did not, in point of fact, know exactly where it was, and that his master should have warned him of the danger of falling into it before sending him at night to attend to his duties on and around an engine which had been left directly over the culvert." 49 S. E. 683, 121 Ga. 651. The evidence on the trial now under review was the same as that on the former trial, to which the above ruling was applied. Accordingly the plaintiff below was not entitled to recover, and the court did not err in directing a verdict for the defendant company. There was no conflict in the evidence as to the facts of the case to which the above-quoted ruling was applied.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 313.]

2. JURY — RIGHT TO JURY TRIAL — DIRECTION OF VERDICT.

Section 5331 of the Civil Code of 1895, authorizing the court to direct the jury to find a verdict for the party entitled thereto, where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict, is not repugnant to the Constitution of this state, as impairing the right of trial by jury. *Tilley v. Cox*, 47 S. E. 219, 119 Ga. 867.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 235.]

3. APPEAL—ASSIGNMENTS OF ERROR—WAIVER.

Assignments of error not referred to in the brief of counsel for the plaintiff in error are considered as abandoned.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4256.]

(Syllabus by the Court.)

On petition for rehearing. Petition overruled.

For former opinion, see 49 S. E. 683.

Joseph H. Hall, Glanson & Fowler, and Warren Roberts, for plaintiff in error. Hall & Wimberly, for defendant in error.

FISH, C. J. 1. A motion for rehearing is made upon the ground, amongst others, that the former decision in this case, reported in 121 Ga. 651-659, 49 S. E. 683, had been misapprehended. After stating the general theory of the plaintiff's case, the court said, at page 655 of 121 Ga., page 684 of 49 S. E.: "If this represents the real truth of the matter, then it was for the jury to say whether or not the plaintiff, on this occasion, acted with due caution and circumspection." It will be observed that an important element stated in the summary of facts presenting the plaintiff's theory was that the plaintiff "did not know of the existence of any culvert in that part of the company's yard, * * * and had no reason to apprehend that the engine had not, as always theretofore, been left in a place of safety." The court in the former decision, after stating this theory of the plaintiff, immediately said: "But the contention of the company is that such does not constitute the entire truth surrounding the occurrence, even though the plaintiff gave a truthful account of the manner in which he received his injury. * * * Moreover, it insists that even if the plaintiff did not have actual knowledge of the precise location of this culvert and open ravine in its yards, his opportunities for knowing all about the same had previously been such that he cannot now be heard to say that the company was under any duty to give him notice thereof, to the end that he might, on the night of February 17th have watched for and discovered the culvert and have observed that engine 1,001 had been placed directly over it. The defense thus interposed was such as, if sustained, would defeat any recovery by the plaintiff. *Blackstone v. Railway Co.*, 112 Ga. 762, 38 S. E. 79, and *cit.* And this defense was supported by testimony which demonstrated that if Price did not have actual knowledge of the existence and precise location of the culvert, his opportunities for knowing had been such that the law would impute knowledge to him." Then follows a discussion of the plaintiff's means of knowledge of the location of this culvert. The facts were all enumerated, and the court declared that: "With such opportunities for obtaining knowledge of the location of the culvert, the conclusion is irresistible that an ordinarily prudent man, under similar conditions, would have known of its location." This was a direct adjudication that, upon the undisputed facts, the plaintiff was not entitled to recover. The decision as reported in 121 Ga. 651, 49 S. E. 683, was based upon the former cases referred to in the opinion. See *Blackstone v. Railway Co.*, 112 Ga. 762, 38 S. E. 79, and *cit.* When the decision was announced, no motion for a rehearing was made.

and what was then decided became res adjudicata. So far as every question decided when the case was before the court in the first instance is concerned, the decision is binding on this court, as stating the law of the case, both as an abstract proposition and as applicable to the facts of the particular case. *Gray v. Conyers*, 70 Ga. 349; *Henderson v. Central Railroad*, 73 Ga. 718 (3). So strictly has this rule of res adjudicata been applied that it has been held that this court is bound by a former majority decision in the same case, although upon its second appearance the court, as then constituted, disapproved of the majority decision previously rendered. *Saulsbury v. Iverson*, 73 Ga. 733. So that it is not a question as to whether the original decision pronounced in 121 Ga. is or is not correct, either in its statement or in its application of the law.

2. The motion for a rehearing is further predicated upon the ground that this court "overlooked that portion of the record in which, in the original petition, a count is laid for damages under the general law regulating the general duties of master and servant, and, by its decision, the court confined the plaintiff in error's right to recovery to the statute that he must show himself free from fault. He could recover under this count, if it had not been overlooked by this court, because the negligence that this court found him guilty of was only contributory negligence, and this would not defeat his right of recovery under the law." This feature of the case was not specially discussed, for the reason that under the case made by the plaintiff, and under the former ruling of this court, the law of apportionment of damages was inapplicable. The rule was stated in *Central Railroad v. Henderson*, 69 Ga. 715, to be that "where the injury did not result from the running of trains, and was disconnected therefrom, but resulted from the existence of a dangerous hole in the ground held by the company in connection with its depot, at which the injured party was an agent, it would be necessary for him to be wholly blameless to authorize a recovery." See, also, collection of cases in 9 Enc. Dig. Ga. Rep. 270, under the head of "Contributory Negligence of Servant."

3. As another reason for a rehearing, movant insists that at the time the case was argued his counsel, "by reason of illness and suffering, was not in a condition to present his case to the court." This court has ever been considerate in the matter of granting motions for continuance or postponement of cases for providential cause. No request was made of the court, when this case was called for a hearing, to either postpone it to a later day during the term or to continue it to the next term. It is now too late to bring this matter to the attention of the court.

Judgment affirmed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 920)

HEWETT v. ROBERTSON.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. JUSTICES OF THE PEACE—CERTIORARI.

Where, upon the trial of a case before a jury in a justice's court, the jury renders a verdict against the defendant and requests the magistrate to decide which party shall bear the costs, and no exception is taken to such request, the party against whom the costs are taxed may review the judgment of the magistrate by writ of certiorari.

2. SAME—FINAL JUDGMENT.

The error complained of in the writ of certiorari being an error of law which governs the case, it was proper for the judge of the superior court to render final judgment thereon. Civ. Code 1895, § 4652.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by C. L. Robertson against Jane Hewett. Judgment for plaintiff for an amount due, and for defendant for costs, and plaintiff brought certiorari. From an order sustaining the certiorari, defendant brings error. Affirmed.

N. L. Hutchins, Jr., for plaintiff in error.
F. F. Pehan, for defendant in error.

BECK, J. This case was tried before a jury on appeal in a justice's court, and it rendered a verdict against the defendant for \$8 and requested the justice to place the costs where, in his opinion, they rightfully belonged, whereupon the magistrate rendered judgment against the plaintiff for the costs. The plaintiff carried the case to the superior court by writ of certiorari, complaining of the judgment against him for costs. The certiorari was sustained and the court directed that the judgment complained of be set aside, and that judgment for costs be entered up against the defendant; to which the defendant excepted on the ground that the certiorari was a nullity, because it complained of the judgment of the magistrate and not of the verdict of the jury; and on the additional ground that the court should have returned the case for a new trial, instead of rendering final judgment.

1. While it is true that it is to the verdict of the jury, in appeal cases in justice's courts, that the writ of certiorari is directed, and that the statute begins to run from the date of the verdict, rather than from the date of the judgment entered thereupon, yet where the jury requests the magistrate to determine which party shall bear the costs, and no objection is taken to such request, it would defeat the ends of justice to hold that the party against whom the costs are taxed can not have the judgment of the justice reviewed. Moreover, it is expressly said by our statute that, "when either party, in any case in a justice's court, * * * shall be dissatisfied with the decision of judgment in such cause, such party may apply for and obtain a writ of certiorari by petition to the superior court," etc. Civ. Code 1895, § 4637. And this would

seem to be broad enough to cover the case now under consideration.

2. The second headnote fully covers the only other questions made in the case.

Judgment affirmed. All the Justices concur, except ATKINSON, J., who did not preside.

(124 Ga. 913)

PHILLIPS v. PHILLIPS.

(Supreme Court of Georgia. Feb. 19, 1906.)

JUDGMENT—VACATING.

Plaintiff demurred to defendant's plea to an action upon a promissory note under seal, on the ground that the plea was not verified. The demurrer was filed, without notice thereof being given to the defendant, 12 days after the "demurrer docket" had been regularly called by the court. When the case was called for trial the plaintiff's counsel announced to the court that there was a demurrer in the case, and the judge set the trial for a certain date. Upon the trial defendant sought to verify his plea by way of amendment, but the court would not allow him so to do, and rendered a judgment in favor of the plaintiff. *Held*, that as the judgment was in the breast of the court until the end of the term, it was not error for the court, upon proper motion made during the term at which the judgment was rendered, to vacate the judgment and reinstate the plea. *Jordan v. Tarver*, 17 S. E. 851, 92 Ga. 379; *Walton v. Jones*, 53 Ga. 91; *Shaw v. Watson*, 52 Ga. 202. (Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by Monroe Phillips against J. D. Phillips. Judgment for plaintiff. From an order vacating the same, plaintiff brings error. Affirmed.

Monroe Phillips sued J. B. Phillips upon a promissory note under seal. The defendant failed to verify his answer and the plaintiff demurred thereto; the demurrer being filed 12 days after the regular docket for demurrers had been called, and just two days before the adjournment of the appearance term. The defendant had no knowledge of the filing of the demurrer until the trial term, after the adjournment of the appearance term, when, upon the case being called by the court for assignment for trial, counsel for the plaintiff announced that there was a demurrer in the case. The court then set the case down generally for trial. Upon the trial the defendant amended his plea by swearing to it; but, in compliance with a motion of counsel for the plaintiff, the court would not allow the amendment, the original answer was stricken, and judgment was rendered for the plaintiff. Thereupon the defendant made a motion "in arrest and for setting aside the judgment," which was granted, and it was ordered by the court that "said two judgments [be] set aside and vacated and said original suit reinstated and plaintiff's said demurrer overruled and denied, and said answer of defendant reinstated and defendant's amendment thereto * * * allowed, on condition that the said defendant do pay all costs incurred by the

filing of said amendment to his answer and by this action." To all of which the plaintiff excepted.

H. F. Strohecker and Hordeman & Moore, for plaintiff in error. E. P. Mallory and Steed & Ryals, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 921)

SMITH v. PUETT.

(Supreme Court of Georgia. Feb. 19, 1906.)

JUSTICES OF THE PEACE — JURISDICTION — AMOUNT IN CONTROVERSY.

In a suit in a justice's court no specific amount was claimed in the summons as due upon a contract attached thereto obligating the defendant to pay \$100 in cash and \$25 in work. The defendant filed a plea, and, pending the suit, the summons was amended by an entry of a proper credit on the contract attached to the summons, reducing the amount much below \$100, and after a trial judgment was rendered in favor of the plaintiff. The judgment thus obtained was not void for want of jurisdiction, and an affidavit of illegality attacking it on that ground was properly dismissed.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 170, 329.]

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by J. G. Puett against G. D. Smith. Judgment for plaintiff, on levy of execution. The affidavit of illegality was dismissed on motion, and defendant brought certiorari, and from a judgment overruling the certiorari, he brings error. Affirmed.

E. W. Coleman, for plaintiff in error. Brooke & Henderson, for defendant in error.

EVANS, J. J. G. Puett brought suit in the justice's court against G. D. Smith, to recover an amount due upon a certain rent contract attached to the summons. There was no specific amount claimed to be due in the summons, but the attached contract was an obligation to pay \$125; \$100 to be payable in cash, and \$25 to be payable in work. Before the trial of the case, a credit of \$55 was indorsed upon the rent contract attached to the summons. This was done by the magistrate at the instance of the plaintiff. The defendant filed a plea of set-off; the case was subsequently tried, and a judgment was rendered in favor of the plaintiff. Upon this judgment, execution issued, the execution was levied upon certain property of the defendant, and he filed an affidavit of illegality on the ground that the judgment upon which the execution issued was based upon a contract attached to the summons, for the sum of \$125, and that the justice's court had no jurisdiction of the subject-matter, the judgment rendered was therefore void, and the *fi. fa.* was proceeding against the defend-

ant illegally. On the trial of the illegality case, it appeared that the summons was amended by the magistrate by indorsing the credit of \$55 on the attached contract before the case was heard on the merits and the judgment attacked as void was rendered. The magistrate dismissed the illegality on motion, and the defendant sued out a writ of certiorari; the certiorari was overruled, and the bill of exceptions complains of the judgment overruling the certiorari.

The same strictness of pleading is not observed in justice's courts as is practiced in courts of record. The summons must either contain the cause of action, or a bill of particulars must be attached. When the summons has a bill of particulars attached which claims an amount apparently in excess of \$100, it is permissible, before trial, to amend the same by any proper credit which will bring the case within the jurisdiction of the court. *Johnson v. Johnson*, 113 Ga. 942, 39 S. E. 311; *De Lamater v. Martin*, 117 Ga. 139, 48 S. E. 459. Before the rendition of the judgment, the pleadings had been amended so as to affirmatively show that the amount claimed in the suit was within the jurisdiction of the court. No exception was taken to the amendment which was allowed by the magistrate, and the judgment thereafter rendered was not open to attack by illegality on the ground that the summons, as originally issued, was for a sum in excess of \$100. There was no error in overruling the certiorari.

Judgment affirmed. All the Justices concur.

(124 Ga. 337)

MOUNTAIN CITY MILL CO. v. COBB.

(Supreme Court of Georgia. Feb. 19, 1906.)

SALES—BREACH OF CONTRACT BY SELLER—RECOUPMENT IN ACTION FOR PRICE—SPECULATIVE DAMAGES.

In an action for goods the defendant in his plea admitted their purchase at the prices named, but denied any indebtedness, for the reason that at the time of the purchase the plaintiff agreed to give him the exclusive sale of that particular class of goods in the town where he did business, so long as he "pushed" the same, on the faith of which he incurred considerable expense in placing this particular class of goods before his customers and had built up a large trade, when the plaintiff sold the same class of goods to a rival merchant and withdrew the sale thereof from the defendant; that the trade he had built up was of the value of \$1,000, and that by the withdrawal of the sale of this class of goods and selling them to his competitor in business he had been damaged in the above-named sum. So much of the plea as attempted to set up recoupment was demurrable because the contract, the breach of which is alleged to have resulted in the damages claimed, was unilateral, and also because the damages were too remote and speculative to be capable of ascertainment.

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by the Mountain City Mill Company

against W. S. Cobb. Judgment for defendant, and plaintiff brings error. Reversed.

J. S. Du Pree and P. P. Du Pree, for plaintiff in error. Geo. I. Teasley and I. W. Blair, for defendant in error.

EVANS, J. This is an action on an account by the Mountain City Mill Company against W. S. Cobb. The items set out in the bill of particulars were for certain flour, bran, and grits. The defendant admitted that he bought the goods sued for, and at the prices named, but denied any indebtedness, for the reason that on or about the 15th day of January, 1902, the plaintiff sold to the defendant certain brands of flour, to wit, "White Satin" and "Diamond Patent," and the defendant was to have the exclusive right to sell flour of these particular brands in the town of Canton, Ga.; that after the purchase of this exclusive right of sale, the plaintiff sold flour under the same brands to a rival merchant in the town of Canton, and withdrew the sale of the flour from the defendant, who had built up a large trade upon this particular flour, and had been to considerable expense in placing it before his customers as a fine brand; and that by the terms of the contract the defendant was to have the exclusive sale of the flour under these brands, so long as he "pushed" the same, and that in pursuance of this contract, from and after the date of first purchase of flour, he spent large sums of money in "pushing" the sale of these brands; that the trade thus built up was of the value of \$1,000, and that by the withdrawal of the sale of these brands and placing it with his rival in the business, he had been damaged in the sum of \$1,000. The plaintiff demurred to the plea because it set forth no sufficient grounds of recoupment; because the damage claimed was not set out with clearness and definiteness; because the defendant failed to set forth his profits on the contract; and because the damages claimed were too remote to be the basis of any recovery. The court overruled the plaintiff's demurrer to the plea, and the plaintiff excepted pendente lite. The defendant submitted certain evidence in support of his plea, and recovered a verdict against the plaintiff in a certain sum. The plaintiff moved for a new trial, and this writ of error is sued out because of the refusal of the court to grant this motion. Error is also assigned on the exceptions pendente lite.

1. The contract set up in the defendant's plea was unilateral. By the terms of this alleged contract, the defendant was not bound to order any flour from the plaintiff. While it is alleged that the plaintiff agreed to give the defendant the exclusive right to sell flour of certain brands, it was entirely voluntary on the part of the defendant whether he should buy any flour at all. In all essential respects, this contract was very similar to that set out in the plea of recoupment in the

case of Huggins v. Southeastern Cement Co., 121 Ga. 311, 48 S. E. 933. In that case the contract was in writing, and Huggins agreed to "push" the sale of the cement manufactured by the plaintiff, exclusively, and not to purchase any other brand while the contract was in effect. The cement company, in turn, agreed to sell its cement at the defendant's place of residence exclusively to Huggins. In discussing this contract the court said: "While it contained an agreement on the part of the cement company to furnish cement, there was nothing in the contract which amounted to an obligation on the part of Huggins to purchase cement in any stated or otherwise definite quantity." For this reason it was held that the contract was clearly unilateral.

2. Even if the contract had been mutual and capable of enforcement, the damages claimed were too remote and speculative. *Beck Duplicator Co. v. Fulghum*, 118 Ga. 836, 45 S. E. 675. In any view of the case, the plea of recoupment should have been stricken on demurrer.

Judgment reversed. All the Justices concur.

(124 Ga. 940)

NEAL LOAN & BANKING CO. v. CHASTIAN, County Treasurer.

(Supreme Court of Georgia. Feb. 19, 1906.)

APPEAL AND ERROR—RULINGS ON MOTIONS—BURDEN OF SHOWING ERROR.

The plaintiff in error made a motion in the court below to strike the respondent's answer for the grant of a mandamus absolute, and its right to have this motion granted depended upon a state of facts which were recited in the motion; but so far as appears from the record, there was nothing shown to the court from which it could be determined whether this recital of fact was true or not. *Held*, that no error in the court's refusal to sustain the motion is made to appear.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Application by the Neal Loan & Banking Company for a writ of mandamus against J. D. Chastian as treasurer of Fannin county. A motion to strike out the answer was denied, and applicant brings error. Affirmed.

Westmoreland Bros., for plaintiff in error. J. Z. Foster, O. R. Dupre, and T. A. Brown, for defendant in error.

BECK, J. The Neal Loan & Banking Company filed its application for mandamus against Chastian, as treasurer of the county of Fannin, asking to compel him to pay certain warrants or judgments drawn on him by the ordinary of that county and owned by the petitioner. The treasurer filed a general demurrer to the petition, which was sustained by the trial court, and the petitioner brought the case here, where the judgment below was reversed. 121 Ga. 500, 49 S. E. 618. When the case was called by the trial judge after it

had been sent back by this court, the petitioner made a motion to strike the answer of the treasurer, upon the following grounds: "(1) That the respondent had interposed a demurrer, in response to the rule to show cause, which had been adjudged insufficient and overruled by the judgment of the Supreme Court, and he could not afterwards show cause by filing an answer. (2) That the answer was filed too late, one term of the court having passed between the return of the rule and the filing of the answer, and long after the rule requiring cause to be shown. (3) That the judgment of the Supreme Court finally adjudicated that petitioners were entitled to the relief sought, and that the said judgment was rendered on the 15th day of December, 1904, and the answer was not filed until the 30th day of December, 1904, and it was too late." The trial court refused to strike the answer or to make the mandamus absolute as prayed, and the petitioner excepted.

One who complains of error must show error; and even if the contention that the answer was filed too late, and the motion to strike ought to have been sustained upon that ground is sound, still it does not appear whether it was shown to the trial court that this answer was not filed in ample time. It is not certified in the bill of exceptions as to when it was filed. It merely appears that a motion was made in which it was alleged, as one of the grounds thereof, that the answer was filed too late, but there was no proof in support of that ground, and it was not alleged anywhere in the bill of exceptions that said ground was true, and the certificate of the judge is therefore only to the effect that the motion was made upon that ground, and not that the ground was true. The court cannot determine, either from the bill of exceptions or from a consideration of the entire record, whether the trial court had before it facts showing that the grounds of the motion were true, and we will not presume that the judge committed error in holding that the answer was not filed too late, for even if the law in regard to the time when the answer should have been filed were as the plaintiff in error contends it is, we are unable to say that the law had not been complied with by the respondent in the matter of filing his answer. The answer of the respondent was not specified by the plaintiff in error as necessary to an understanding of the error complained of, but upon it appearing from a consideration of the record as made up, and from the argument of counsel on the hearing of the cause before this court, that the answer and the entries thereon might enable us to determine whether it was filed in time or not, and thereby decide the case on its merits, this court, of its own motion, under the authority given by the Civ. Code 1895, § 5536, par. 4, issued an order directing the clerk of Fannin superior court to send up to this court a properly certified copy of the answer

and of the entry of filing thereon, and the order of the court, if any, allowing the answer to be filed. In response to this order the clerk of said superior court certifies and sent up a copy of the answer, but further certified that the original answer had been taken from his office; that it had not been returned; that he had no opportunity to record the same, and that it was impossible for him to "send the filing or order of the judge called for."

It is not incumbent upon this court to take other measures to render the record in the case more complete.

Judgment affirmed. All the Justices concur.

(124 Ga. 944)

CORNETT v. AULT.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. JUSTICES OF THE PEACE—JURISDICTION—VOID JUDGMENT.

Where in a sale of land two promissory notes are given for the purchase money, and bond for title is received, and afterwards suit is brought on one of the notes in a justice's court, to which the defendant pleads, admitting the execution of the note, but denying indebtedness, for reasons stated, and in addition seeks to set off a stated sum as damages, which the court, for want of jurisdiction over the subject-matter, cannot entertain, and the justice of the peace renders judgment expressly for the full amount of the set-off, but is silent as to the note, such judgment granting affirmative relief to the defendant upon his set-off, being void for the want of jurisdiction, will not be sufficient to imply a finding against the plaintiff's right to recover on the note, or support a resulting finding for court costs, and the judgment as a whole will be void, and a mere nullity.

2. SAME—JUDGMENT—RES JUDICATA.

The fact that the justice court judgment was void answers both questions raised by the defendant's general demurrer to the plaintiff's subsequent suit filed in the superior court, the grounds of demurrer being that the petition showed on its face that the matters involved were res judicata, and that the plaintiff had a complete remedy at law.

3. VENDOR AND PURCHASER—TRIAL—DIRECTING VERDICT.

In a subsequent suit filed in the superior court on the two purchase-money notes, it was competent for the defendant again in that court to plead the matters which he had originally pleaded in the justice's court; but it appearing from the evidence that the defect in the plaintiff's title of which he complained, had before the institution of the suit in the superior court been cured, there was no evidence to support the defense, and, the defendant having admitted the execution of the notes, the court did not err in directing the verdict or in rendering the decree.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by Annie Ault against F. N. Cornett. Judgment for plaintiff, and defendant brings error. Affirmed.

The questions made in this case arose on the following state of facts: The plaintiff filed her petition in the superior court against the defendant for the recovery of \$100 due

on two promissory notes for \$50 each. She alleged that she had sold certain land to the defendant, taking from him the two notes sued upon and giving to him a bond for title; that after the first note fell due, she sued the same in a justice's court; that the defendant filed a plea in that court (a copy of which she attaches to her petition), wherein he admitted the execution of the note, but denied his indebtedness to the plaintiff thereon, because at the time of the sale of the land the plaintiff represented to him that she had a good and perfect title to the land, and upon that representation he executed the note, and that, relying upon the representations of the plaintiff, and without knowledge that they were false, he had made improvements on the land so purchased and incurred expenses to the amount of \$100; that as a matter of fact the plaintiff did not have good and perfect title to said land, and could not comply with her contract as expressed in said bond for title, and the plaintiff was insolvent and unable to respond to the defendant in damages, if he should pay off the note; a prayer being contained in said plea that the defendant have judgment against the plaintiff for the full amount of his expenses and his improvements put upon said land by reason of the fraudulent sale so made by the plaintiff to the defendant. The plaintiff further alleges in her petition that the justice of the peace entertained this plea and gave judgment against her for the sum of \$100 principal, and interest \$12, and costs of suit; that she sued out the writ of certiorari to the superior court, which was sanctioned by the judge and filed, but, owing to a failure to serve the same, it became functus officio, and the judgment in question was never reviewed. The plaintiff further alleged that the justice's court had no jurisdiction over the subject-matter set forth in the plea filed by the defendant, and, for that reason, that the judgment was void; that the defendant was still in possession of the land and seeking to enforce the collection of the judgment obtained against her. Upon the allegations of that petition, the plaintiff prayed that the judgment obtained against her in the justice's court be set aside; that the defendant be enjoined from enforcing the same; and that she have judgment against the defendant for the full amount of both notes and for process. Before pleading to the merits, the defendant filed in the superior court his demurrer to the petition, claiming that the petition showed upon its face that the plaintiff had had her day in court, and that by reason of the justice court judgment, all questions presented by her petition were res judicata, and further, that the plaintiff has a complete remedy at law by illegality, and that the judgment cannot be attacked collaterally. The judge overruled that demurrer; whereupon the defendant filed his answer, wherein he pleaded the judgment

of the justice's court as an adjudication upon all the questions presented by the plaintiff's petition, and again pleaded substantially the same defense and matters which were set forth in his plea before the justice of the peace, and sought in the superior court the same affirmative relief as for damages which were claimed by him in the justice's court.

Upon the trial of the issues thus presented, the evidence was uncontradicted and was substantially in accordance with the several things pleaded by the respective parties, except that there was no evidence tending to show that the defendant was in possession of the premises. Such possession was alleged by the plaintiff in the pleadings and denied by the defendant, and there was no evidence on the point. There was further evidence to the effect that when the land was first sold, the plaintiff admittedly did not have perfect title, and that she did not have perfect title at the time of the trial in the justice's court, but that after the trial in the justice's court and before the institution of the suit in the superior court, she did perfect her title. There was no pretense on the part of the defendant that she had ever surrendered the bond for title, but there was evidence on his part that upon the failure of the plaintiff to cure the defect in the title, he moved away from the premises. The court directed a verdict for the plaintiff for the full amount of both notes, and upon the verdict entered a decree declaring the justice court judgment illegal and void, and setting the same aside, and awarding to the plaintiff the full amount of principal and interest specified in the verdict. The defendant comes to this court by direct bill of exceptions, and assigns error upon the action of the court in overruling the demurrer and in directing the verdict, and in granting that decree.

W. E. Mann, for plaintiff in error. F. A. Longley and R. J. & J. McOamy, for defendant in error.

ATKINSON, J. (after making the foregoing statement). 1. The justice of the peace was clearly without jurisdiction to render a judgment for the defendant for any sum on his set-off. This is true for two reasons. In the first place, the defendant so pleaded his cause as to show that he contends for the alleged damages not upon the breach of the contract of warranty, but on account of deceit. By electing to go upon the theory of deceit, his cause is one sounding in tort, and his remedy is by action on the case. In this connection, see *Peel v. Bryson*, 72 Ga. 335, and *cit.* The damages, not being for injury to personal property, do not fall within the comprehension of Civ. Code 1895, § 4068, which defines the subject-matter with which justices' courts may deal. In the second place, being an action

sounding in tort, it could not be pleaded as a set-off to an action on the contract (note), except upon equitable reasons, as for insolvency of the plaintiff, or other similar grounds. Civ. Code 1895, § 4944; *Hecht v. Snook & Austin Co.*, 114 Ga. 923, 41 S. E. 74, and *cit.* And no court, except a court of equity, could entertain such a plea for the purpose of granting such affirmative relief. *Ragan v. Standard Oil Co.*, 123 Ga. 14, 50 S. E. 951, and *cit.* The plea in question was one of that character. So when the justice of the peace rendered the judgment for the full amount of the defendant's setoff, he was without jurisdiction to do so, and his judgment to that effect was absolutely void and without any force whatever. That express finding, being without effect, could not support by implication any conclusion not expressed, nor a resultant finding for court costs. There was no other express finding, and it follows that the judgment as a whole was void. Being so, it should be treated as a nullity everywhere and in any court. Civ. Code 1895, § 5369.

2. The ruling expressed by the second head-note requires no further elaboration in the opinion.

3. Upon the submission of the case in the superior court, this void judgment could avail the defendant nothing, but it was his right to again plead to both notes the defense as originally made in the justice's court. However, upon examination of the uncontradicted evidence upon the trial, it appears that the defect in the plaintiff's title to the bargained land, of which the defendant complained, and on account of which he sought to avoid the note, had been cured before the institution of the suit. This leaves the defense unsupported by evidence. It follows that the execution of both notes being admitted, and there being no valid defense to either, and the justice court judgment appearing, by the facts presented by the defendant, to be void, the court did not err either in directing the verdict or granting the decree.

Judgment affirmed. All the Justices concur.

(124 Ga. 953)

SOUTHERN RY. CO. v. CLARIDAY.

(Supreme Court of Georgia. Feb. 19, 1906.)

DAMAGES—PERSONAL INJURIES—PERMANENCE—CARRIERS—INJURY TO PASSENGERS.

There was some evidence authorizing an instruction on the subject of permanent injuries. The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by Henry Clariday against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry Clariday brought suit against the Southern Railway Company and alleged: Plaintiff purchased a ticket over defendant's line of road from Rome to Oostanaula, and boarded a passenger train for that point. As the train neared Oostanaula, the porter approached plaintiff, lamp in hand, and said: "Now follow me." Plaintiff followed the porter out upon the platform, and down upon the bottom step of the car. The train had slowed up, and when the porter said, "Now step off," plaintiff attempted to alight. Just as he did so, the porter waived his lamp at the engineer in a signal to go ahead, and the train was started with a sudden jerk, which threw plaintiff to the ground, inflicting permanent injuries. The plaintiff detailed in his testimony the injuries he had received. The accident occurred two years before the trial of the case in the court below. The plaintiff, at the date of the trial, was 67 or 68 years old. His injuries were in the back, ankle, and leg. He testified that his back still hurt him, his ankle swelled up at times so that he could not walk, and his leg hurt him all the time. He had been earning 50 cents a day and his board prior to the injury. Since that time he could not work more than an hour or two at a time. He had been in bed three weeks immediately after the injury. The jury found a verdict for plaintiff for \$350. A motion for a new trial was made by the defendant upon the general grounds, which also assigned error upon certain portions of the charge of the court in reference to computing the damages of the plaintiff if the jury found he had been permanently injured. These charges as to permanent injuries were excepted to on the ground that there was no evidence to show permanent injuries, and nothing to justify such a charge. The motion was overruled, and the defendant excepted.

Shumate & Maddox and Cantrell & Ramsaur, for plaintiff in error. W. R. Rankin, for defendant in error.

COBB, P. J. (after stating the foregoing facts). The petition in the present case alleged that the plaintiff had been permanently injured. The evidence introduced in support of these allegations consisted of the plaintiff's testimony detailing the injuries he had received, the extent to which he still suffered from them, his earnings previous to, and his ability to labor after, the injury. Other witnesses testified to his inability to work since his injury. Would such evidence warrant a charge on the subject of permanent injuries? Permanent injuries may be proved either by the opinions of physicians, or by proof of facts from which a jury would be authorized to infer that the injuries were permanent. Expert opinion is not a requisite to establishing this kind of injury. When a plaintiff has proved the loss of a limb, no further evidence is necessary to show the permanent nature of the injury. The inference of permanency may arise from proof of physical injuries

which do not involve the total destruction of parts of the body. When bodily hurts are proved, and the effect of them upon the person injured, both as to the pain he has suffered and his inability to labor by reason of them, especially when these consequences have continued for two years, and the person injured has reached the advanced age of 67 or 68 years, we think a jury would be authorized in finding that the injuries were permanent. Such was the evidence in the present case. It is true that the plaintiff did not himself testify that his injuries were permanent. His opinion on that subject would have had no value. The facts upon which he would have based any such opinion were before the jury, and the jury were as competent as he could have been in determining this question. It was said by this court in *Macon St. Ry. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756: "The jury saw Barnes and heard his recital of his injuries and his condition at the trial. They may have preferred to follow their own judgment as to his chances of complete recovery than to accept as absolutely reliable the theory of medical experts who expressed the opinion that he would ultimately regain his former strength and vigor, but according to whom this most desirable condition might be postponed for years." See, also, *Atlanta Street Railway Co. v. Walker*, 93 Ga. 462, 21 S. E. 48; *Macon Railway Co. v. Streyer*, 123 Ga. 279, 51 S. E. 342. We think the question of the permanency of the injuries to the plaintiff was properly submitted to the jury.

2. There was evidence in behalf of the plaintiff which authorized the jury in finding that the allegations of the petition were proved, and that the plaintiff would be entitled to a recovery. Stress is laid by counsel for plaintiff in error upon the fact that the plaintiff's own testimony showed he had attempted to alight from a moving train and was thereby injured, and that this was such a lack of care and diligence on his part as would prevent him from recovering. Several cases were cited in support of this position, among them being *Blodgett v. Bartlett*, 50 Ga. 353; *Sanders v. So. Ry. Co.*, 107 Ga. 132, 32 S. E. 840, and *East Tenn. Ry. Co. v. Hughes*, 92 Ga. 388, 17 S. E. 949. It is unquestionably true that if a person attempt to alight from a moving train, when the danger of injury from such an act is obvious, so doing is such a lack of ordinary care and diligence as to bar a recovery. The mere fact that a person is injured while alighting from a moving train will not bar a recovery, but it is a question for determination by the jury whether, under all the circumstances, an ordinarily prudent person would have done such a thing. *Coursey v. So. Ry.*, 113 Ga. 299, 38 S. E. 866; *Simmons v. Seaboard Air Line Ry.*, 120 Ga. 226, 47 S. E. 570. There was no error in refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

(124 Ga. 960)

NOBLE et al. v. BURNEY.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. PRINCIPAL AND AGENT — AUTHORITY OF AGENT—EVIDENCE.

Proof that an agent has authority to receive payments of rent does not necessarily show that he is authorized to renew a lease of the rented property, but such fact is a circumstance that may throw light upon the extent of the agency when the right to renew the lease is in question.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 264.]

2. SAME—EVIDENCE.

When the issue is as to the authority of an agent to renew a lease, and there is evidence that the authority of the agent was at the time of the renewal the same as it was during the lifetime of the predecessor in title of the alleged lessor, evidence as to the transaction of the alleged agent during the lifetime of the predecessor in title of the alleged lessor is admissible.

3. SAME—RATIFICATION.

There was evidence authorizing an instruction to the jury on the subject of ratification of an unauthorized act of an agent.

4. LANDLORD AND TENANT—ACTION TO DIS-POSSESS.

The evidence, though conflicting, was sufficient to authorize the verdict. If any of the rulings complained of were erroneous, the error was not of such a character as to require the granting of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by A. S. Burney against M. W. Noble and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The plaintiffs sued out a warrant to dispossess the defendant from the possession of a certain storehouse in Rome. A counter-affidavit and bond were given by the defendant. At the trial it was agreed between the parties that the defendant occupied the building from February 1, 1902, to February 1, 1903, and that he had paid into court \$480 rent at the rate of \$40 per month; and the issue was whether the plaintiffs had rented the defendant the premises for the year named through M. D. McOsker, whether McOsker was authorized to act as agent for the plaintiffs, and, if not, whether the plaintiffs ratified the act of McOsker. If the plaintiffs' contentions were established, the defendant owed an additional \$480 as a balance of double rent, as a tenant holding over. The jury found for the defendant. The plaintiffs made a motion for a new trial, which was overruled, and they excepted.

Denny & Harris, for plaintiffs in error.
McHenry & Maddox, for defendant in error.

COBB, P. J. (after stating the foregoing facts). 1. Error was assigned upon the admission of the testimony of the defendant that he had made payments of rent upon the premises in dispute by checks payable to M. D. McOsker, for the reason that it was immaterial to whom the defendant paid rent, as the issue was whether McOsker was au-

thorized to make the contract of rent. We think this evidence was admissible. Proof that an agent has authority to receive payment of rent does not necessarily show that he is authorized to make a contract of rental, but it is a circumstance that the jury may consider in passing upon the issue, and throws light upon the relation in which the alleged agent stands to his principal. There was evidence that McOsker had, previously to February 1, 1902, asked the defendant if he wished to renew his contract of rental for the year following that date, and that the defendant had replied, "Yes." After this conversation, the defendant told McOsker he wished some repairs made in the building. In testifying to this conversation, the defendant added, "I did not care whether he did or did not do it." This testimony as to the state of defendant's mind at the time of the conversation was irrelevant. What he said to McOsker was pertinent. What he thought was immaterial. The evidence was inadmissible, but we do not think its admission was so harmful as to require the grant of a new trial.

2. Error was assigned upon the admission in evidence of a contract of rental between Mrs. Jenifer Noble, by her agent, M. D. McOsker, and the Rome Light Guards, to a portion of the building in which the store in controversy was located, and also upon the admission of the testimony of Walter Harris that he had rented a portion of the same building during the life of Mrs. Noble, and after her death, when the property went to her daughters, the plaintiffs in this case, and that he had made the rent contracts with McOsker, and had paid the rents to him. Ordinarily any evidence tending to show McOsker's relation to Mrs. Jenifer Noble would be foreign to the issues in this case. But there was evidence from one of the plaintiffs to the effect that the relation between the plaintiffs and McOsker was the same as the relation between Mrs. Noble and McOsker. In view of this statement, we think the evidence objected to was admissible.

Error was assigned upon the action of the court in excluding a letter from the plaintiffs to McOsker, which was dated August 27, 1901, and contained a rejection of a proposal from certain parties to rent the premises in dispute, and a statement of the amount for which the plaintiffs would lease the building. It is contended that this letter was evidence of the fact that McOsker had no authority to rent the property of the plaintiffs, and that the plaintiffs had retained complete control over their property. This letter amounted to nothing more than a declaration of a party in his own interest, and was properly excluded. The evidence of West who would have testified to what McOsker told him, about the same date, as to the extent of his (McOsker's) authority to rent the building, was also properly excluded, for the same reason.

Error is assigned upon the admission of the testimony of Govan as follows: "What was said about these improvements as a condition to that contract? A. I don't recollect anything at all." Govan was present when the conversation between McOsker and the defendant took place which, it was claimed, constituted the contract of rental. It is said that the admission of the above evidence was the witness' construction of the contract. We do not think so. The words spoken by McOsker or the defendant in this conversation made out the contract, and any saying of either during the conversation was pertinent and admissible.

3. In the last three grounds of the motion error is assigned upon portions of the charge of the court which state the issues to be whether a contract was made between the parties, whether McOsker had authority to make such a contract, and, if not, whether the plaintiffs ratified the acts of McOsker, and what would constitute agency and ratification. It is said that there was no evidence of any contract between the parties, no evidence of any authority for McOsker to make a contract, and no evidence of ratification, and that for these reasons the charge was erroneous, and further, that it stressed too strongly the contentions of the defendant. If there was no evidence upon these issues there was nothing for a jury to pass upon, and the court would have been authorized to direct a verdict for the plaintiffs. But we think the charge was proper under the evidence in the case, and as a whole it did not stress too strongly the contentions of the defendant.

4. It remains to be seen if there was sufficient evidence to authorize a finding in favor of the defendant. The defendant testified that "In August or September, McOsker came in and said, 'This is about time to rent houses for another year,' and wanted to know if the witness would stay on another year, and the witness told him, 'yes.' That was all there was to it." This would constitute a contract between the parties. The evidence as to McOsker's authority was very conflicting. Burney, the defendant, had gone into the possession of the premises some time before the beginning of the term in dispute, and had always dealt with McOsker as the agent of the plaintiff. He had paid all rents to McOsker, and had no dealings with any one else. The evidence of the plaintiffs and McOsker denied the authority of McOsker to make contracts, but admitted his agency in

many other respects. Their evidence was to the effect that McOsker dealt with the tenants of the building in collecting rents, etc., but submitted all proposed contracts to the plaintiffs for approval. There was also evidence to the effect that McOsker had made contracts of rent with other tenants of the building, dealing with them as one authorized to make rental contracts. The entry of the defendant upon the premises was made under McOsker, and he had been recognized as a tenant by the plaintiffs before the beginning of the disputed term. Whether or not McOsker was the authorized agent of the plaintiffs was a question for the jury, and was properly submitted to them. *Wilson v. Huguenin*, 117 Ga. 547, 43 S. E. 857. "It is true that agency may be proved from the habit and course of dealing between the parties; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do such acts." *Graves v. Horton* (Minn.) 35 N. W. 568. See *Mechem on Agency*, § 84; 1 Am. & Eng. Ency. Law, 859 et seq.

The evidence as to the ratification of McOsker's actions was not strong. A letter from one of the plaintiffs to the defendant, dated March 19, 1902, was as follows: "Your letter of the 16th just received. Mr. McOsker has nothing further to do with the collection of rents for the store, and would be obliged if you would pay to Mr. Denny who has now the collection of the rents." Upon its face this would seem a ratification of the alleged contract of rental with McOsker. It was said by counsel for the plaintiffs that this letter meant that Mr. Denny was the plaintiffs' attorney, and was in charge of the matter of dispossessing the defendant, and that, in telling the defendant to pay the rent to Mr. Denny, the plaintiffs were only referring defendant to their attorney. This construction of the letter cannot be derived from the record. "Slight circumstances and small matters will sometimes suffice to raise the presumption of ratification." *Haney Co. v. Hightower Institute*, 113 Ga. 296, 38 S. E. 764. The weight of the evidence might have been in favor of the plaintiffs, but it did not demand a verdict in their favor, and, as the trial judge has approved the finding of the jury, we will not control the exercise of his discretion.

Judgment affirmed. All the Justices concur.

(59 W. Va. 340)

PENNINGTON v. UNDERWOOD.(Supreme Court of Appeals of West Virginia.
April 10, 1906.)**1. EJECTMENT—TITLE TO MAINTAIN.**

In ejectment, the plaintiff must establish title to the identical land which he seeks to recover from the defendant. The defendant's possession thereof will be deemed to be lawful until the contrary appears.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 225, 240.]

2. SAME—BURDEN OF PROOF—LOCATION OF BOUNDARIES.

Where the plaintiff in ejectment claims under a grant of all the land within a given boundary, excluding certain parcels embraced therein, the burden is on the plaintiff to locate the outer boundary of his grant and the boundaries of the parcels excluded therefrom, and to show that the land he seeks to recover from the defendant is within the outer boundary of the plaintiff's grant and without the boundaries of the excluded parcels.

(Syllabus by the Court.)

Error to Circuit Court, Braxton County.

Action by M. A. Pennington against James T. Underwood. Judgment for defendant, and plaintiff brings error. Affirmed.

Hall Bros., for plaintiff in error. Haymond & Fox and Alex. Dulin, for defendant in error.

COX, J. This is a writ of error, allowed upon the petition of Mrs. M. A. Pennington, to a judgment of the circuit court of Braxton county dismissing an action of ejectment instituted by her against James Underwood. On trial before a jury, a motion to exclude all of plaintiff's evidence was sustained, and a verdict for defendant, and a judgment of dismissal followed.

The assignments of error are based on the action of the court in excluding plaintiff's evidence. The plaintiff seeks to recover a strip of land four and one-half poles wide and about 100 poles long, part of a tract of 121 acres, as described in her declaration. She alleges that the defendant has entered upon this strip, and unlawfully withholds the possession thereof. In ejectment, the plaintiff must recover on the strength of her own title, and must establish title to the identical land which she seeks to recover from the defendant. The possession of the defendant will be deemed to be lawful, until the contrary appears. The plaintiff does not trace her title to the state, or to the commonwealth of Virginia. She claims possession by her, and those under whom she claims, for the statutory period, under color of title. She claims immediately under a deed made to her by A. W. Corley, special commissioner, dated January 30, 1890. By this deed there was granted to the plaintiff all the land within a given boundary, "containing 121 acres, after excluding 14 acres and 6 acres from said boundary, and being the same land conveyed by W. L. J. Corley and wife to A. M. Skinner by deed dated 21st day of October, 1884."

The deed from W. L. J. Corley and wife to A. M. Skinner describes the land conveyed by metes and bounds, and as "containing 141 acres, more or less, excluding from this deed two lots of land embraced within the above calls, sold to Thomas Kennedy, one for 14 acres and the other for 6 acres, leaving a balance of 121 acres." The deed from A. M. Skinner to Lee H. Pennington contains the same description of the land granted thereby as the deed last mentioned. The plaintiff claims possession, by her and those under whom she claims, for the statutory period, under color of these deeds.

Plaintiff made no effort, and offered no evidence, to locate the parcels of 14 and 6 acres excluded from these grants, or to show that the strip of land which she seeks to recover is not within the excluded parcels. No actual possession by plaintiff, or those under whom she claims, of the strip of land which she seeks to recover, is shown, unless that strip is within the outer boundary of the land granted to her and without the boundaries of the excluded parcels. It is true that the plaintiff offered oral evidence tending to show possession somewhere on the land conveyed to her, but not actual possession of the strip which she seeks to recover, unless actual possession of some other part of the land may be extended to the strip because it is within the boundary of her grant and without the boundaries of the excluded parcels. The burden was on the plaintiff to locate the outer boundary of her grant, and to locate the boundaries of the excluded parcels, and to show that the land she seeks to recover from the defendant is within the outer boundary of her grant and without the boundaries of the excluded parcels. This is the settled law of this state. *Bryan v. Willard*, 21 W. Va. 65; *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531; *Buck v. Newberry*, 55 W. Va. 681, 47 S. E. 889. Since the decision of the case of *Stockton v. Morris*, this doctrine has been fully established in Virginia, by numerous decisions of the court of last resort of that state. See *Harman v. Stearns*, 95 Va. 58, 27 S. E. 601; *Kimball & Fink v. Carter*, 95 Va. 77, 27 S. E. 823, 38 L. R. A. 570; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Va. Coal & Iron Co. v. Keystone Coal & Iron Co.*, 101 Va. 723, 45 S. E. 291. The same doctrine has been laid down by the Supreme Court of the United States in *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279; *Corinne Mill Co. v. Johnson*, 156 U. S. 574, 15 Sup. Ct. 409, 39 L. Ed. 537; *Hawkins v. Barney*, 5 Pet. 457, 8 L. Ed. 190, and other cases. See, also, *Webb v. Phillips*, 80 Fed. 954, 28 C. C. A. 272.

The plaintiff, having failed to locate the land which she seeks to recover within the outer boundary of her grant, and without the boundaries of the excluded parcels, is not entitled to recover, and the judgment of the circuit court must be affirmed.

(59 W. Va. 353)

HEROLD et al. v. CRAIG.(Supreme Court of Appeals of West Virginia.
April 10, 1906.)**1. PARTITION—SALE—NECESSITY.**

A sale of real estate in a partition suit cannot be decreed, unless it affirmatively appears in the record that partition cannot be conveniently made, and that the interests of the parties entitled to such real estate will be promoted by a sale thereof.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 211-221.]

2. EQUITY—EVIDENCE—EX PARTE AFFIDAVIT.

An ex parte affidavit offered by one party cannot, over the objection of the adverse party, be considered by the court upon the hearing of a chancery cause upon its merits, in the determination of the issues raised by the pleadings, where there has been no previous consent that such affidavit may be so considered, and no consent to, or waiver of notice of, the taking of such affidavit.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 727.]

3. SAME—CONSENT DECREE.

A draft of a consent decree, agreed to, and signed out of court by the parties to a pending cause, cannot be entered as a consent decree, if, at the time such draft is offered for entry, consent thereto is withdrawn, and its entry is objected to by one of the parties who signed it, and who will be materially affected thereby.

(Syllabus by the Court.)

Appeal from Circuit Court, Nicholas County.

Bill by Henry W. Herold and others against James S. Craig. Decree for plaintiffs, and defendant appeals. Reversed and remanded.

A. W. Corley and Brown, Jackson & Knight, for appellant. Alderson & Horan, Linn, Bryne & Cato, and Mollohan, McClintic & Mathews, for appellees.

COX, J. This partition suit was instituted by Henry W. Herold, J. A. Mearns, John D. Alderson, Allen Rader, and A. W. Bobbitt against James S. Craig, in the circuit court of Nicholas county, and such proceedings were had therein that a decree for sale of the lots mentioned in the bill was entered. From this decree, defendant, Craig, appeals.

The bill alleges that certain lots of land in the town of Summersville are owned jointly and in fee by the plaintiffs and defendant, in the following undivided interests: Rader one-twelfth, Bobbitt one-twelfth, each of the other plaintiffs one-sixth, and the defendant one-third; that there is upon the lots a building erected for school purposes, which is not suitable for any other purpose, and is of greater value than the residue of the lots; that the lots cannot be conveniently partitioned among the owners thereof; that the interests of those entitled to the lots and their proceeds will be promoted by a sale and distribution of the proceeds; and prays that a sale of the lots and distribution of the proceeds be decreed, and for general relief. Defendant, Craig, answered the bill, admitting ownership of the lots to be as alleged

in the bill, and that the building on the lots was erected for school purposes, and denying that the building is not suitable for any other than school purposes, or that it is of greater value than the residue of the lots, and denying that the lots are not susceptible of convenient partition, or that the interests of those entitled thereto, or to the proceeds thereof will be promoted by a sale and distribution of the proceeds, and asking that the property be maintained for school purposes according to the original intention of the parties, or that the lots be partitioned in kind. No depositions were taken in the cause. The exact quantity of land contained in these lots does not appear by the bill, but the quantity is stated in the petition for appeal to be $3\frac{1}{4}$ acres. On the 28th day of January, 1905, the plaintiffs moved the court for the entry of the following paper as a consent decree in the cause:

"H. W. Herold et al., Pltffs, versus James S. Craig, Deft. In Chancery. This cause came on this day to be heard, upon plaintiff's bill, defendant's answer, and plaintiff's replication thereto, exhibits filed, former orders and decrees herein entered, and it is agreed by all the parties, and is adjudged, ordered and decreed by agreement as aforesaid, that A. J. Horan, who is hereby appointed a special commissioner for the purpose shall on some court day, for said county, sell at public auction the real estate in the bill and proceedings mentioned for cash, to the highest bidder, at the front door of the courthouse of said county, after first giving notice of the time, terms, and place of sale by notice published one a week for four successive weeks in the Nicholas Chronicle, a weekly newspaper published in said county; and said commissioner shall report his proceedings hereunder to court, in order to a further decree. But before making said sale said commissioner shall execute before the clerk a bond with approved security, in the penalty of \$3,000 and conditioned according to law. And plaintiff J. A. Mearns is directed to pay to the parties to this suit and entitled thereto the sum of \$150, and interest of rent money in his hands according to their respective interests, to wit, To James S. Craig one-third, to H. W. Herold and John D. Alderson one-sixth each, to Allen Rader and A. Bobbitt each a twelfth; and reserving a one-sixth his interest. The undersigned, the parties to the above-styled suit, hereby agree that the circuit court of said county of Nicholas, shall enter the above decree at its next term, this January 14, 1905. Allen Rader, by John D. Alderson. A. W. Bobbitt, by Alderson & Horan, His Attorneys. John D. Alderson. H. W. Herold. J. A. Mearns. James S. Craig."

To the entry of this paper as a consent decree, the defendant, Craig, filed his objections in writing, and in support thereof his affidavit, stating that the paper asked to be entered as a consent decree was signed by him in great haste, without mature delib-

eration, and without opportunity to consult his attorneys. The plaintiffs, in support of the motion to enter said paper as a consent decree, filed the affidavit of J. A. Mearns, stating matters tending to show that there was no great haste or lack of mature deliberation on the part of Craig in signing said paper, and that the real estate mentioned in the bill is not susceptible of convenient partition, and that the interests of those entitled thereto, or to the proceeds thereof will be promoted by a sale and distribution of the proceeds. By his objections in writing, the defendant also objected to the consideration of said paper, and of the affidavit of Mearns, upon the merits of the cause, and objected to the hearing of the cause. The decree complained of recites, among other things, that the cause was heard upon said paper offered as a consent decree, and upon said affidavits.

The paper offered was not entered as a consent decree; but the decree which was entered directed a sale of the lots for cash, substantially in accordance with the provisions of said paper. The question then is: Was the decree complained of justified by the state of the record at the time of its entry? Issues were made between the plaintiffs and the defendant as to whether or not the lots were susceptible of convenient partition, and as to whether or not the interests of those entitled to the lots, or to the proceeds thereof, will be promoted by a sale and distribution. It is settled by a long line of decisions, in this state and in Virginia, that the common-law right of partition in kind cannot be refused because of the provisions of our statute, section 3, c. 79, Code 1899, unless it affirmatively appears that partition cannot be conveniently made, and that the interests of the parties will be promoted by a sale of the property. *Croston v. Male*, 56 W. Va. 205, 49 S. E. 156; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223; *Roberts v. Coleman*, 87 W. Va. 143, 16 S. E. 482; and other cases. *Custis v. Sneed*, 12 Grat. (Va.) 260; *Cox v. McMullin*, 14 Grat. (Va.) 82; *Howery v. Helms*, 20 Grat. (Va.) 1; *Zirkle v. McCue*, 26 Grat. (Va.) 532. These two essential facts must affirmatively appear in the record, before a decree of sale can be entered. They did not appear by the pleadings, because the existence of these facts were put in issue by the pleadings. These facts did not appear in any way, unless the affidavit of Mearns could, over the objection of the defendant, have been considered for that purpose, or unless the paper offered as a consent decree could have been considered and was sufficient for that purpose.

The affidavit was *ex parte*. It was filed in support of a motion to enter the paper offered as a consent decree. It was objected to by the defendant. No consent to its consideration, in the determination of the issues raised by the pleadings, and no consent to, or waiver of notice of, its taking was shown.

The question here presented does not involve the right to have an *ex parte* affidavit considered upon a motion to grant or dissolve an injunction, or in support of or opposition to any interlocutory application, but the right to have this *ex parte* affidavit considered by the court upon the merits of the cause, in the determination of the issues raised by the pleadings. Our statute, section 35, c. 130, Code 1899, is conclusive as to this question. It provides that reasonable notice shall be given to the adverse party of the time and place of taking every deposition. As said by Dr. Minor, concerning the like Virginia statute, it leaves nothing to inference as to the necessity for notice. 4 Minor's Insts. 844. See, also, 2 Barton, Ch. Pr. § 220; 1 Hogg's Eq. Proceed. § 480; 2 Cyc. 35, note 1; *Peterson v. Ankron*, 25 W. Va. 56; *Lewis' Ex'r v. Bacon's Legatee* (Va.) 3 Hen. & M. 89; *Blincoe v. Berkeley*, 1 Call (Va.) 405; *Stubbs & Burwell*, 2 Hen. & M. (Va.) 536. It is clear that the affidavit could not properly have been considered by the court in the determination of the issues raised by the pleadings, under the circumstances appearing.

It is contended that it was proper for the court to consider the paper offered as a consent decree as an agreed statement of facts, and that as such the paper was sufficient to sustain the decree. It is also contended that, while the decree entered does not purport to be a consent decree, it should be so treated, as it embodies substantially the provisions of the paper. We do not think that the paper could have been considered as an agreed statement of facts. It does not purport to be an agreed statement of facts. Likewise, it does not purport to be an agreement of compromise of the matters in controversy in the cause. But it purports to be, and is, solely an agreement that the paper shall be entered as the decree of the court. The paper contains no words relating to the convenience of partition, or to the promotion of the interests of the parties by sale and distribution. If the paper could have been considered as an agreed statement of facts, it is without substance, and without facts upon which to determine the issues. As the decree entered embodies substantially the provisions of the paper offered as a consent decree, it may be true that the defendant cannot be said to have been prejudiced by the decree, if the paper should have been entered as a consent decree.

This brings us to the question: Should the paper have been entered as a consent decree? This paper is a draft of a consent decree agreed to and signed out of court, before the hearing of the cause, by the parties. When offered by the plaintiffs for entry, the consent of the defendant was withdrawn, and its entry objected to by him. A number of cases may be found holding that a party may withdraw consent, before entry of a decree, for inadvertence, misapprehension, or fraud; but whether or not a party may so withdraw

his consent arbitrarily and without cause, is a different question. The latest English case upon this subject which has come under our notice, and which refers to the previous English cases, is *Harvey v. Croydon Union Rural Sanitary Authority*, decided on appeal in 1884, 26 Ch. Div. Law. Rep. 249. Cotton, L. J., in the course of his opinion in that case, said: "There being, however, no authority which is binding on us to the contrary, we must decide according to what we think the right course, and it must be understood henceforth to be the rule that a consent given by the authority of the client cannot be arbitrarily withdrawn." With this view Lord Coleridge agreed. Upon the subject under discussion, see, also, 2 Daniel's Ch. Pl. & Pr. 974; *Hoyt v. Jesse*, 3 Ch. Div. 177; *Davis v. Davis*, 13 Ch. Div. 861; *Coultas v. Green*, 43 Ill. 277; *Horton v. Baptist Church*, etc., 5 Vt. 309. In the English case first mentioned, no previous authority is cited to sustain the holding of the court. In fact, the opinion states that the holding is without previous binding authority, and that the rule announced is to be the rule henceforth. How far the announcement of the rule in that case was controlled by the English system of equity procedure, which differs from our system in many respects, we are unable to say. We are cited to the exhaustive opinion on the subject of consent decrees delivered by Judge Green for this court in the case of *Manlon v. Fahy*, 11 W. Va. 482, wherein it is said: "The entry of a consent decree is a statement on the record, not that theretofore the parties agreed to enter such a decree, but that they now (when the decree is entered) consent to its entry. And if they do not when it is to be entered, consent to the court's entering it, it cannot be so entered."

The rule announced by this court in that case seems to us to be sustained by sound reasoning. Suppose, for illustration, that a draft of a consent decree, which purports to have been agreed to and signed by the parties, is offered for entry, and one of the parties objects and says that he did not agree to or sign such draft, or that if he did agree to and sign it he did so inadvertently or under misapprehension, or that his agreement was procured by fraud. In this manner, new controversies, foreign to the controversies raised by the pleadings, are encountered. These new controversies are often as important as the controversies raised by the pleadings. It does not seem reasonable that the court may proceed to try and determine these new controversies, in an irregular and informal way, without pleadings, and compel the entry by consent of a decree to which one of the parties does not then consent. The result of such a determination would practically be to compel the specific performance of the agreement to enter such draft as a consent decree, without formality and without pleadings. The entry of a consent decree requires the sanction or assent of the court. *Roemer v.*

Neumann et al. (C. C.) 26 Fed. 332. Parties may agree out of court as they choose; but the entry of a consent decree requires consent to its entry by the parties, and the sanction or assent of the court, at the time of its entry; and if one of the parties who will be materially affected thereby withdraws his consent and objects to its entry at the time it is offered, it cannot be entered. This is the principle stated by Judge Green for this court. It seems to us that it is the safer practice. This view leaves the parties free to agree as they may choose without consent of the court, and, if controversy arises, to litigate the validity of their agreement in any proper way. We, therefore, hold that the said paper offered as a consent decree was not sufficient to sustain the decree complained of; that the paper should not have been entered as a consent decree, under the circumstances existing at the time it was offered; and that the decree complained of cannot be treated as a consent decree. What we have said does not apply to a consent decree actually entered by consent of the parties and with the sanction and assent of the court. Upon that subject, see *Manlon v. Fahy*, supra; *Doss v. Tyack*, 14 How. (U. S.) 297, 14 L. Ed. 428.

It is unnecessary to discuss any other ground advanced for reversing the said decree. For the reasons stated, the decree complained of is reversed, and the cause remanded for further proceedings. The proper further proceedings in the cause are indicated by the opinion of this court in the case of *Stewart v. Tennant*, supra.

(50 W. Va. 334)

COLUMBIA FINANCE & TRUST CO. et al. v. FIERBAUGH et al.

(Supreme Court of Appeals of West Virginia.
April 10, 1906.)

1. EQUITY—PLEADING.

A pleading in equity is taken to be what it is in substance, regardless of its form or the name given to it by the pleader.

2. ACTION—COMMENCEMENT OF SUIT.

A suit in equity is commenced at the time process to answer the plaintiff's bill is issued, although the bill be not then filed. The bill, when filed, relates back to the time the process was issued.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 725-734.]

3. TAXATION—TAX SALE—SUIT TO SET ASIDE—BURDEN OF PROOF.

Where the validity of a sale of land for delinquent taxes is attacked by proper suit in equity to set the sale aside, before deed to the purchaser is made and recorded, for material irregularities and failure to comply with material provisions of the statutes in relation to the proceedings leading up to and including the sale, and the existence of such irregularities and failures is put in issue between the plaintiff and such purchaser, a defendant, by proper pleadings in the cause, the burden is on such purchaser claiming under the tax sale to show substantial compliance with all the material provisions of the statutes in relation to the proceedings leading up to and including the sale.

4. SAME.

The rule above stated is not changed by the fact that a deed to such purchaser is recorded pending the suit.

(Syllabus by the Court.)

Appeal from Circuit Court, Putnam County.

Action by the Columbia Finance & Trust Company and others against Robert S. Fierbaugh and others. Decree for plaintiffs, and defendant E. W. Wick appeals. Affirmed.

Gunn & Alexander, for appellant. Bowyer & Green, for appellees.

COX, J. The Columbia Finance & Trust Company, a corporation, instituted its suit in equity in the circuit court of Putnam county against Sarah Fierbaugh and others, and filed its bill therein at July rules, 1899, for the purpose of foreclosing a mortgage lien against a certain tract of land in said county, then owned by Sarah Fierbaugh, which lien the trust company claimed as assignee of the Columbia Building, Loan & Savings Association, also a corporation. The bill filed set up a trust lien against the land in favor of the administrator of Wm. Collins, deceased, and made such administrator and the trustee in the deed of trust parties defendant. Such proceedings were had in the suit that on the 29th day of July, 1901, a decree for the sale of the land was entered to satisfy said liens. In December, 1899, the land was sold by the sheriff of Putnam county for taxes assessed and returned delinquent for the year 1898 in the name of Sarah Fierbaugh. E. W. Wick became the purchaser at the tax sale for \$12.12. Afterwards, on the 3d day of August, 1901, the trust company caused process to be issued against the parties defendant to the original bill and E. W. Wick, the purchaser at the tax sale, to answer an amended and supplemental bill to be filed by the trust company. This bill was filed at December rules, 1901. It alleged the ownership of the land sold for taxes to be in Sarah Fierbaugh, and exhibited her title papers. It also alleged various irregularities and failures to comply with material provisions of the statutes in relation to the proceedings whereby the land was sold for taxes, and in relation to the sale and other proper matters, and asked to set aside the tax sale and deed made pursuant thereto. Wick, the purchaser at the tax sale, demurred to and answered this bill. Upon the hearing the circuit court entered a decree setting aside the tax sale and the deed made pursuant thereto, and carrying into effect the former decree of sale to satisfy the liens against the land. Wick appeals.

The principal controversy in this cause is whether or not the curative provision of our statute (section 25, c. 31, Code 1899) applies to the irregularities and failures alleged in the bill, under the circumstances here presented. The solution of this controversy de-

pends upon the time when the deed to the tax purchaser was admitted to record. The date of the admission of this deed to record is also controverted. The certificate of the clerk of the county court of Putnam county of the admission of this deed to record is dated the 5th day of August, 1901, and certifies that the deed, together with the sheriff's receipt, acknowledgment, etc., was on that day presented and admitted to record. By an amended answer appellant alleged that the deed was executed and delivered to him on the 29th of January, 1901, and was on that day delivered to said clerk for record, and that the clerk incorrectly and by mistake certified on the deed that it was presented and recorded on the 5th of August, 1901. To this amended answer, and to the original answer, there were general replications.

The evidence upon the issue made as to the date when the deed was admitted to record is conflicting. The certificate made by the clerk, under the sanctity of his official oath, says that the deed was admitted to record on the 5th of August, 1901. Appellant Wick testified that the deed was executed, stamped, and directed to be recorded on the 29th day of January, 1901, and that the stamps thereon were canceled on that day. The evidence of the notary who took the acknowledgment to the deed on the 29th of January, 1901, was taken on behalf of the appellant. He testified that he took the acknowledgment. He was not asked, and he did not say, whether the stamps were placed on the deed and canceled at the time he took the acknowledgment or not. The evidence of the clerk of the county court, who made the certificate of the admission of this deed to record, was taken on behalf of the appellant. So far as his evidence in any way tends to contradict his official certificate, it must be looked upon with suspicion. This witness testified that he could not remember when the stamps were placed on the deed. His attention was called to the date of his certificate, and he further testified that "the deed had been executed and acknowledged and stamped before the date of the certificate of record, and I had received instructions from Mr. Wick to place it to record, and it was continually in the office from the time of execution until I delivered it to Mr. Wick, some time after recording." He did not say whether the deed was ready for record one minute, one hour, one month, or longer, before the date of the certificate. He also testified that this deed was kept with the other unrecorded deeds in his office, meaning by other "unrecorded deeds" those which had been admitted to record, but not yet transcribed on the deed book. He did not say that he made any mistake or error in the date of the certificate. We do not consider that the evidence adduced from this witness in any manner contradicted his official certificate. A number of witnesses testified that they went to the clerk's office on different occasions be-

tween the 29th of January, 1901, and the 5th of August, 1901, and searched for this deed, although some of them did not disclose to the clerk the fact that the object of their reach was this deed. Some of these witnesses testified that they asked the clerk for the unrecorded deeds in his office; that the unrecorded deeds were delivered to them by the clerk; that these unrecorded deeds were examined by them; and that the deed to Wick was not found among these unrecorded deeds. Some of these witnesses testified that the clerk was asked for this particular deed, and that he said "there was none." It is true there is a conflict between the evidence of the clerk and one of these witnesses as to whether or not this deed was shown to him.

The decree of the lower court in effect defeated the contention of the appellant as to the date of the admission of this deed to record. Under all the facts and circumstances appearing in this record, and under the rule of law applicable, we cannot say that the lower court erred in its determination of this question of fact. This being true, it is unnecessary for us to discuss or decide whether or not the clerk's certificate may be impeached, in a collateral proceeding in equity, for mere error in date of admission to record, because the facts presented do not call for such adjudication. Considering the 5th day of August, 1901, as the date of the admission of this deed to record, the process to answer the amended and supplemental bill was issued two days previous. The amended and supplemental bill was in effect a new suit, in so far as its purpose was to litigate the validity of the tax sale and deed. A pleading in equity is taken for what it is in substance, regardless of its form or the name given to it by the pleader. *Sturm v. Fleming*, 22 W. Va. 404; *Mayo v. Murchie*, 3 Munf. (Va.) 384; *Kendrick v. Whitney*, 28 Grat. (Va.) 646; *Hill v. Bowyer*, 18 Grat. (Va.) 364; *Laidley v. Merrifield*, 7 Leigh (Va.) 346; *Mettert's Adm'r v. Hagan*, 18 Grat. (Va.) 231; *Sands v. Lynham*, 27 Grat. (Va.) 291, 21 Am. Rep. 348. The amended and supplemental bill was not actually filed until after the tax deed had been recorded; but, when filed, the bill related back to the time the process to answer it was issued. The issuance of process to answer the plaintiff's bill is the commencement of a suit in equity. *Gelser Mfg. Co. v. Chewing*, 52 W. Va. 523, 44 S. E. 193; *U. S. Blow Pipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

This bill, in addition to alleging the ownership of the land to be in Sarah Fierbaugh, and the irregularities and failures to comply with the provisions of the statutes, made the following allegation: "That before the institution of these proceedings to attack said sale and to have same declared null, and before the issuance of the process on this amended bill, the plaintiff caused to be tendered to said E. W. Wick the purchase money paid

by him at said pretended sale and purchase for said tract of land; said plaintiff having a right to charge it with the payment of its debt, together with interest allowed by law, and any further taxes he may have paid on the same, which tender and money he refused and refused to abandon his claim as purchaser of said land, or to allow the same to be released from said pretended sale, or to be redeemed in any way therefrom. Said offer or tender has been kept good, and plaintiff now makes the same offer." This allegation was not denied, but admitted, by the answer of appellant. The bill also alleged the admission of the tax deed to record after process was issued to answer the amended and supplemental bill and other proper matters. The answer of appellant denied the existence of the irregularities and failures to comply with the provisions of the statutes in relation to the proceedings leading up to and including the sale, to which answer the plaintiff replied generally. Under this state of the pleadings the burden was on the appellant, claiming under this tax sale, to show substantial compliance with all the material provisions of the statutes in relation to the proceedings leading up to and including the tax sale. 2 *Cooley on Taxation*, 914-916; *Black on Tax Tit.* (2d Ed.) 443; *Blackwell on Tax Tit.* § 1125; *Nalle's Representatives v. Fenwick*, 4 Rand. (Va.) 585; *Allen v. Smith*, 1 Leigh (Va.) 231; *Chapman v. Bennett*, 2 Leigh (Va.) 329; *Yancey v. Hopkins*, 1 Munf. (Va.) 419; *Christy v. Minor*, 4 Munf. (Va.) 431; *Jesse v. Preson*, 5 Grat. (Va.) 120; *Flanagan v. Grimmer*, 10 Grat. (Va.) 425; *Dequasie v. Harris*, 16 W. Va. 345; *Stead's Ex'r v. Course*, 4 Cranch (U. S.) 403, 2 L. Ed. 660; *Parker v. Rule's Lessee*, 9 Cranch (U. S.) 64, 3 L. Ed. 658; *Williams v. Peyton's Lessee*, 4 Wheat. (U. S.) 77, 4 L. Ed. 518; *Ronkendorff v. Taylor's Lessee*, 4 Pet. (U. S.) 349, 7 L. Ed. 882; *Early v. Homans*, 16 How. (U. S.) 610, 14 L. Ed. 1079. The fact that the tax deed was recorded after the process was issued does not change the rule as to the burden of proof. The rights of the parties must be determined as of the commencement of the suit. This being an attack upon the tax sale before deed recorded, the curative provision of the statute (section 25, c. 31, Code 1899) cannot apply to the proceedings leading up to and including the tax sale. *Bogges v. Scott*, 48 W. Va. 316, 37 S. E. 661; *Hays v. Heatherly*, 36 W. Va. 613, 15 S. E. 223; *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484.

The irregularities and failures alleged in the amended and supplemental bill are sufficient at common law to set aside the tax sale. The mention of a few of such irregularities and failures will serve to illustrate. The bill alleged that the sheriff did not, within 10 days after receiving from the auditor the list of lands to be sold by him for delinquent taxes for the year 1898, make out and cause

to be published an abstract of such list, in some weekly newspaper published in said county, once a week for four successive weeks prior to the date of sale, that the sheriff did not at such sale sell the said lands at the front door of the courthouse of said county, and that no copy of the delinquent list for the year 1898, including said tract of land, was posted at the front door of the courthouse at least two weeks before the session of the county court at which the sheriff presented his delinquent list for the taxes of 1898. These irregularities and failures are fatal to the tax sale before deed recorded. Notwithstanding the bill pointed out these material irregularities and failures, the appellant contented himself with the simple denial of their existence and of their materiality, when he carried the burden of showing a substantial compliance with all the material provisions of the statutes in relation to the proceedings leading up to and including the sale. The appellant offered no evidence to show compliance with the provisions of the statutes. We must hold, therefore, that he has failed to make out a defense to the plaintiff's amended and supplemental bill.

We have not discussed the demurrer to the amended and supplemental bill separately, because it seems entirely sufficient in law, if treated as a bill attacking the tax sale before deed recorded.

For the reasons stated, the decree of the circuit court is affirmed.

(59 W. Va. 370)

O'NEIL v. TAYLOR et al.

(Supreme Court of Appeals of West Virginia.
April 10, 1906.)

1. REFERENCE—REPORT OF COMMISSIONER.

A commissioner may authorize any person to write his report at his dictation and under his supervision. It is not essential that it should be in his own handwriting.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reference, § 119.]

2. MECHANICS' LIENS—ACCOUNT FILED—SUFFICIENCY.

In a contract directly with the owner our statute does not require of the contractor an itemized account of work done and material furnished to enable him to procure his mechanic's lien, but he is required to file "a just and true account of the amount due him after allowing all credits, together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner or owners of the property, if known."

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 214, 253, 254, 256-259.]

3. SAME.

A general statement of the demand of such contractor showing its nature and character, and the amount due or owing thereon after allowing all credits, is a compliance with the statute.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 253, 254, 256-259.]

4. SAME—FILING LIEN.

When repairs, improvements, and additions are made to a building under contract directly with the owner, and the work prosecuted to completion, dates when the several items of work were done and materials furnished are not material, except that it must appear that the last work done and the last material furnished necessary to the completion of the work was done and furnished within 60 days before the filing and recording of the mechanic's lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 248-252.]

5. SAME—TIME OF DOING WORK AND FURNISHING MATERIAL.

When a contractor undertakes with the owner to make such repairs, improvements, and additions, without a contract price as to the whole work, but in the course of the work it is agreed that a certain sum shall be paid for a particular part of the work which is done along with the rest of the work, such sum may constitute one item in the general account, and form a part of the mechanic's lien, although the work and material represented by said sum may have been done and furnished more than 60 days prior to the filing of the lien.

6. SAME—APPURTENANCES TO BUILDING.

Under such general contract with the owner for such work and repairs, where walks and fences on the premises are constructed as appurtenant to such building and at the same time, the contractor is entitled under our statute to include the same in his mechanic's lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 38.]

7. SAME—PROPERTY SUBJECT.

And so the price of a coalhouse and sample room constructed on the premises under such contract, appurtenant to and to be used with such building, used as a hotel, is proper to be included in such mechanic's lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 38.]

8. SAME.

A mechanic's lien may include an item for a drain pipe from the cellar of a house into a sewer in the street. Such drain pipe is a part of the house.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 38.]

9. SAME—ENFORCEMENT—COUNSEL FEES.

In a suit to enforce mechanic's liens, it is error to decree as part of plaintiff's costs "the sum of \$300, counsel fees hereby allowed counsel for plaintiff for conducting this suit."

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 653.]

10. LIENS—ACTIONS—SALE.

In a suit to sell real estate to satisfy mechanic's liens and judgment liens, and also a subsequent trust lien, which covers a part only of the real estate so to be sold, it is error to decree the sale of the property as a whole.

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County.

Bill by J. H. O'Neil against Charles B. Taylor and others. Decree for complainant, and defendant Chas. B. Taylor appeals. Affirmed in part and reversed in part, and remanded.

Holt & Duncan, for appellant. C. H. Jones, for appellees.

McWHORTER, P. J. H. O'Neil filed his bill in equity in the circuit court of Mingo county against Chas. B. Taylor, W. B. Cox,

Bank of Williamson, and others to enforce his mechanic's lien against lots 1, 2, 3, 4, and 5, in block No. 17, in the town of Williamson, the property of defendant Taylor, upon which was located an hotel building, and its appurtenances known as the "Hotel Moose," which mechanic's lien was duly recorded on the 31st day of January, 1903, claiming a balance then due of \$1,259.35 after allowing all credits to which the defendant was entitled. The defendant W. B. Cox also filed and recorded a mechanic's lien upon the same property, claiming a balance due him of \$1,544.57 for work and labor and material furnished, including heating apparatus for said hotel, the contract for which heating apparatus amounted to \$475, also the defendant Georgia Lumber Company filed its lien for material furnished in the construction and repair of the said hotel property, claiming a balance of \$1,273.24. The plaintiff in his bill set up his own lien, as well as alleging the other mechanics' liens and several judgments against the said C. B. Taylor, which were liens upon the said property, as well as a vendor's lien in favor of W. J. Williamson, who conveyed the said property to plaintiff for \$3,500 and interest, which was a lien on lots Nos. 1, 2, 3, and 5, and the undivided half of lot No. 4, in said block No. 17. A decree of reference was made in said suit on the 15th day of May, 1903, to a commissioner of the said court to ascertain the liens upon the said lots 1, 2, 3, 4, and 5, the holders of such liens and the amount and priorities thereof, the title of said defendant Chas. B. Taylor to said real estate, and whether or not the rents, issues, and profits of said estate for a period of five years thereof would pay off and discharge the said liens against it. Chas. B. Taylor filed his answer, denying the validity of the liens of the said plaintiff and of W. B. Cox and the said Georgia Lumber Company, and denying especially that, if liens at all, they covered lots 1 and 2 of said real estate. Defendants Cox and the Georgia Lumber Company filed their answers, setting up their respective liens. On the 15th of September, 1903, the commissioner filed his report showing the various liens upon the said property: First, the vendor's lien; second, the several mechanics' liens, including interest, that of plaintiff at \$1,110.18 and W. B. Cox \$1,413.44 and the Georgia Lumber Company \$992.28, which three liens were reported as the second lien upon lots Nos. 1, 2, 3, and 5, and the one half of lot No. 4, and the first lien upon the other half of lot No. 4, and, besides the judgment liens reported with their priorities, he reported as the ninth lien by virtue of a deed of trust in favor of C. H. Jones, trustee, to secure the payment of \$4,000 due by note dated July 31, 1903, four months after date to the Bank of Williamson, which was the ninth lien on lots 3, 4, and 5, of block 17. The Georgia Lumber Company excepted to the report because it did not report the

amount properly due on its mechanic's lien, to wit, the sum of \$1,330.53. The defendant Chas. B. Taylor filed in open court various exceptions to the said report. The depositions taken upon which the commissioner's report is based are filed in the record.

The cause came on to be heard on the 24th day of January, 1904, and the court sustained plaintiff's exceptions Nos. 3, 4, 5, and 10, affecting the lien of the plaintiff and eliminating therefrom the item of \$10 for unloading dry lumber, of \$7 for unloading framing, \$8 for hauling lumber, and \$3.95 for payment of freight on material, and sustained the exception No. 4 touching the lien of W. B. Cox and eliminating therefrom the item of \$100 for right of sewer on four lots and sustained exceptions to the report allowing several judgments, one in favor of Emmons Hawkins Hardware Company as the fourth lien, the judgment in favor of Valentine Newcomb & Carder as part of the fifth lien, the judgment in favor of W. H. H. Holwade as one of the fifth lien, and the judgment in favor of G. A. Northcott & Co., counsel for said lienors, stating in court that said judgment liens had been paid off and discharged, and sustained the exception of the Georgia Lumber Company to the said report and overruled all other exceptions, and confirmed the commissioner's report in all other things and decreed the liens upon the property as mentioned in said report as corrected, and decreed that said several liens be paid by the said Taylor, with interest on the same, respectively, from the 6th of September, 1903, until paid, and the costs of this suit decreed to be paid to the plaintiff, including the sum of \$300 for counsel fees, to be taxed as part of the costs. "It is further adjudged, ordered, and decreed that the said defendant C. B. Taylor do within 30 days from the rising of this court pay unto the said W. J. Williamson, J. H. O'Niel, W. B. Cox, the Georgia Lumber Company, a corporation, the Bank of Williamson, a corporation, and the Keystone Hardwood Lumber Company, their said lien debts and judgments, respectively, as hereinbefore ascertained and adjudicated, with interest thereon at such respective dates herein named until paid, and the costs of this suit, including the said sum of \$300, counsel fees allowed counsel for plaintiff for conducting this suit; and in default of such payment it is further adjudged, ordered, and decreed that the said property, to wit, lots Nos. 1, 2, 3, 4, and 5, in block No. 17, in the said town of Williamson, Mingo county, West Virginia, together with the buildings thereupon situate, or so much thereof as may be necessary to pay off and discharge all of the lien debts and judgments according to their respective priorities, as hereinbefore ascertained and adjudicated, and the costs of this suit, be sold at public auction to the highest bidder at the front door of the courthouse of said county, on the following terms, to wit: One-third of such

purchase money to be paid cash in hand on the day of sale, and the residue upon a credit of one and two years, the commissioners hereafter appointed to take from the purchaser interest-bearing notes with good security for the deferred payments." And appointed commissioners to make sale accordingly. From this decree the defendant Chas. B. Taylor appealed, and made eight assignments of error:

First, that the court erred in overruling the five exceptions to Commissioner Hatfield's report as a whole, which exceptions are: "First. That no notice was given to the attorney for defendant of the completion of said report by said commissioner. Second. Said report was not retained in said commissioner's office for exceptions thereto by said commissioner. Third. That said report is indefinite as to what credits were allowed the claimants of the several mechanic's liens, and no statement made to show what was allowed and what disallowed. Fourth. Said report was made by the commissioner without any examination of the evidence, reported by the stenographer, a portion of said evidence having been taken in the absence of the commissioner. Fifth. That said report was prepared and typewritten by counsel of one of the defendants, W. B. Cox, who was attempting to set up a mechanic's lien against this defendant, exceptor." As to the first, that no notice was given to the attorney for defendant of the completion of the said report by the said commissioner, and the second, that the report was not retained 10 days in his office, the commissioner's report shows and closes with the statement "that the attorneys representing the various parties to this case waived the retention of this report for the usual period of 10 days for exceptions thereto, and agreed that the same might be filed when completed." This clearly implies that it was the intention of the parties that it should be filed without notice of its completion, for the only object of retaining the report in the office of the commissioner for 10 days is to enable the parties in interest to make such exceptions as they desire, and the commissioner to "submit such remarks upon exceptions as he may deem pertinent," besides, the parties filed their exceptions in court after the filing of said report, the cause not being heard until January 22, 1904, when it was heard as well upon the exceptions as upon the report. As to the third exception in this group of exceptions, it will be treated with exception 14, going to the claim of plaintiff O'Neil. As to the fourth exception mentioned, if the evidence was taken by the commissioner and in his presence, it was not necessary that he should read and examine the evidence after it was written out in longhand by the stenographer, if the commissioner properly digested the evidence as it was given, which he did if he was attending to his duties properly, as he was presumed to do. It is said, however, that

a portion of the evidence was taken in the absence of the commissioner. The only evidence of this fact is the affidavit of H. K. Shumate, who says that he was present during the taking of nearly all the depositions filed with the commissioner's report, "that during the taking of said depositions said commissioner was frequently engaged in attending to business in the office of the clerk of said court, being a deputy therein, and was at different times absent from the room where taken while same was being taken by the stenographer." He does not say that the commissioner was out of the hearing of the witness being examined. For all that appears in the affidavit, the commissioner might have been in an adjoining room with the door open, and while attending to something else might have heard and understood everything that the witness was saying. The presumption is that the commissioner was giving attention to his official duties as commissioner, and there is not sufficient evidence of his absence and inattention to overcome such presumption. The fifth exception: "That said report was prepared and typewritten by counsel of one of the defendants, W. B. Cox, who was attempting to set up a mechanic's lien against this defendant, exceptor." In support of the fourth and fifth exceptions, the exceptor filed the affidavit of Bert Shumate, the stenographer who took down the evidence, and states that he did not deliver to the commissioner the evidence transcribed until September 15, 1903, after the commissioner had informed him that he had completed his report, "except that part of the evidence relating to the lien of plaintiff, which was delivered to the commissioner before the remainder." That part of the affidavit which is supposed to be the foundation of the fifth exception is: "The affiant would further state that he was informed by D. W. Brown, one of the attorneys for the plaintiff, that B. B. Campbell, of counsel for the defendant W. B. Cox, wrote the report for said commissioner." This is a mere second-hand statement as to what he had been told had been done. The commissioner would be entitled to constitute any one his amanuensis to write his report at his dictation. It is not shown that he had employed or authorized the said Campbell to prepare his report for him. It is not stated in the affidavit, as it is in the exception, "that said report was prepared and typewritten by counsel of one of the defendants," but merely that he "wrote the report" for said commissioner. A decree entered by the circuit court is a decree of the court, and yet it is the common practice for the attorney representing the party in whose favor the decree is rendered to prepare and submit the decree to the court which, if found correct, is entered by the court as its decree. Likewise the commissioner in making his report makes his calculations and arrives at his conclusions, and may authorize any one to write out the same under his direction

and supervision. It is not essential that he should write out his report in his own handwriting.

The next exception is: "First. That said pretended lien is defective and invalid, for the following reasons: (1) That said pretended account is not itemized as the law provides, especially as to the item of \$875 for erecting and constructing third-story addition to the building mentioned in said lien, and making alterations and improvements in the first two stories thereof; there being no specific contract for said work, at said sum. (2) No dates are given for any of the different jobs of work done on said building. (3) That the owner of said building and lots mentioned in said lien are not shown or stated therein, as required by statute." As to the item of \$875, the statute does not in a contract directly with the owner of the property require an itemized account of the work and material furnished, but the lienor shall file with the clerk of the county court of the county in which the property is situated "a just and true account of the amount due him, after allowing all credits together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner or owners of the property, if known, which account shall be sworn to by the person claiming the lien or some person in his behalf." In Phillips on Mechanics' Liens, § 353: "If the statute giving the lien do not require the notice to itemize the work or materials, it will not be necessary"—citing Patrick v. Smith, 120 Mass. 510, and gives an example: "Where the provision was that there should be filed 'a just and true account of the demand due him after deducting all proper credits and assets,' etc., it did not require the items to be set out. A general statement of the demand, showing its nature and character, and the amount due or owing thereon, would be a compliance." Brennan v. Swasey, 16 Cal. 140, 76 Am. Dec. 507; Selden v. Meeks, 17 Cal. 128. Counsel for defendant Taylor cite the case of Shackelford v. Beck, 80 Va. 573, where it is held: "The statute requires that a contractor seeking to secure the benefit of its provisions shall file in the clerk's office an account [which is an itemized or detailed statement of the transactions to which it relates] of work done and materials furnished, and therefore a paper in the following words, viz.: 'To balance of account rendered for work and labor done and material furnished for your house'—is not sufficient to create the lien provided by the statute." It will be seen that this decision is under a statute different from our own. In that case the lienor is required to file, within the time specified after the completion of the work, in the clerk's office, among other things, "a true account of the work done or material furnished," while our statute requires "a just and true account of the amount due him after allowing all credits." Counsel also cite sev-

eral cases from Pennsylvania and one other case under the Virginia statute (Withrow Lumber Company v. Glasgow Investment Company, 101 Fed. 863, 42 C. C. A. 61), also a case from Iowa and one from Nebraska, all of which are under different statutes from ours, and are not here controlling. As to the item of \$875 in plaintiff's lien, it is set out in the mechanic's lien, exhibited with the bill. "To erecting and constructing third-story addition to the said building, making alterations and improvements in the first two stories thereof as per contract, \$875.00." Plaintiff in his testimony concerning different items swears to the correctness of it, and says they had no contract for that work as to the price to be paid for it, and that Taylor told him to go ahead and do it and charge what was right, and he did so. This was for erecting and constructing a third-story addition to the building, making alterations and improvements on the first and second stories, for which the sum of \$875 was charged, and he states that, when he gave C. B. Taylor his account, the only item that "he kicked on" was the item of \$10 for a plank walk around the building. It is objected that no dates are given for any of the different jobs. This was a running account for a large amount of work done upon the building and appurtenances commencing in the summer of 1902, and it was shown that the work was completed on the 2d of December, 1902. In some of the cases cited by defendant's counsel the dates of performing the work and furnishing the material are required by the statutes to be given, but the only date material under our statute is as to the time the work was completed or the last of the material furnished, and it is proven in the case of each and all of the liens herein that the work and material furnished as to the last item necessary to the completion of the work were furnished and performed within the 60 days before the filing of the lien, as required by the statute. The item of \$275 for building and digging a cellar it is claimed was done under a specific contract and was completed in the summer of 1902, and that no lien was filed therefor within 60 days. Therefore it should not have been allowed. The record shows that this work was carried on along with the rest of the work and in connection with it, and was a part of the improvements put upon the same property, and the fact that a specific contract was made for any particular part of the work has no significance and does not change the fact that the improvements were being put upon the same property at the same time, and it was entirely proper to include all the work in one account. The question is, at the completion of the work, what was due and still owing for the work performed for which a lien might be taken? If the contract for the item of \$275, being as claimed a specific contract, could not be included in the lien because of that fact, then under a contract for the performance of

certain work any change made in the plan which change would be under a specific contract, for a stated amount would also preclude such change from the benefit of the general lien for the work, because under that theory everything in the nature of a specific contract during the performance of the work would have to be the subject of a separate lien. This exception is not well taken.

The sixth exception is the item of \$35 charged for the construction of a fence around the hotel building, and the seventh exception is an item of \$10 for constructing a board walk around the same. Our statute (section 2, c. 75, Code 1899), provides the lien "for constructing, altering, repairing or removing a house, mill, manufactory, or other building, appurtenances, fixtures, bridge, or other structure by virtue of a contract with the owner or his authorized agent." In *Henry v. Plitt*, 84 Mo. 237, it is held: "Our statute gives a lien for fences and walks on the premises, when they have been constructed as appurtenant to the buildings, and at the same time." In this case the judge, when rendering the opinion, says: "They have been so adjudged in other states under statutes more limited in the words employed than our own." And in *McDermott v. Claas*, 104 Mo. 14, 15 S. W. 995: "Where walks and fences are constructed under one entire contract for the erection of a building, the mechanic has a lien for the labor and material expended on them." The board walk and the fences around the house are appurtenant to and necessary for the convenient use and occupancy of the building, and are properly covered by the lien.

The eighth exception is as to the item of \$50, for erecting and constructing a sample room. It is contended that this item should not be allowed because it was a distinct contract and building. It was built in connection with the hotel and as a part of it, and for the reason given in relation to the item of \$275 the same was properly overruled. The same applies to the eleventh exception to the item of \$35 for the erection and construction of a coalhouse, and as to the twelfth exception to the item of \$18 for erecting and constructing a cross-fence the same was properly overruled for the reasons given as to the sixth and seventh exceptions touching the fence around the building and the board walk.

The thirteenth exception goes to the items of \$20.40 for 1,200 feet of ceiling and \$12 for hanging doors to closets and building, claiming that these items were under special contract and should have been the subject of a separate mechanic's lien, and the exception is not well taken for the reasons before given with reference to such special contracts.

The fourteenth exception is as follows: "Fourteenth. The commissioner refused to allow undisputed credits which should have been given exceptor. The Thacker work and

work on office amounts to \$852.50, crediting the two checks of \$250 each on Thacker work would leave \$352.50 due for which no lien is set up in this case. The other credits amount to \$1,523.55, and were to be credited on the Moose Hotel, reducing amount for removing house \$800. This would leave to go on said lien \$723.55, instead of \$200, which seems to have been deducted from lien by commissioner. All the disputed credits were disallowed. It was also shown that the item charged of \$575 was exorbitant, and three carpenters jointly testified that about \$600 was fair estimate for such, after adding 20 per cent. thereto for contractor. This large preponderance should have reduced that item at least \$275. Other items were likewise shown to be overcharged; commissioner failing to give any credit for such overcharge." This exception involves many credits claimed by defendant on account of the mechanic's lien of plaintiff. Considerable evidence was taken concerning these matters, and was very conflicting. The defendant filed many checks paid to plaintiff, some of which he claimed were to be applied on the plaintiff's mechanic's lien, and the commissioner failed to mention or pass upon any item of credit so as to enable the court to determine whether the same were properly allowed or rejected, nothing to show what credits, if any, other than those allowed, and they do not appear, should have been applied to the payment of the mechanic's lien and which were claimed by defendant should be so applied, and does not designate a single credit claimed and disallowed. In *Gage v. Arndt*, 121 Ill. 491, 13 N. E. 138, it is held: "Not sufficient on such a reference to report the testimony en masse, and the amounts in the aggregate, with no reference to items claimed and disallowed." *Ranson v. Davis*, 18 How. (U. S.) 295, 15 L. Ed. 388; *Dewing v. Hutton*, 40 W. Va. 521, 21 S. E. 780; *Hanly v. Potts*, 52 W. Va. 263, 43 S. E. 218. The exception 14 should have been sustained.

The rest of the exceptions taken to the report are to the account or lien of defendant Cox, and the exceptor refers to the first five general exceptions made to the lien of the plaintiff, and are adopted by the exceptor here. These have already been disposed of. The second exception is "that the account filed is insufficient and uncertain. The same shows not only work done on the Moose Hotel, but upon sample room, coalhouse, and sewer work for which no lien can be had upon said building." The sample room and coalhouse, as we have seen, are appurtenant to and a part of the hotel. In 20 A. & E. E. L., 310, it is said: "In Massachusetts it has been held that a mechanic's lien may be acquired for the construction of a drain pipe from the cellar of a house into a sewer in the street, for such drain pipe is a part of the house." In the Massachusetts case referred to Judge Allen says: "The piping, inside of the house, and outside of it to the sewer, was necessary to the use of the house and a

part of it, and was included in the contract for building it. The house would be incomplete and unfinished without the pipe, and it would pass by a deed of the house as a part of it. It is immaterial whether it was inside or outside the walls of the house, or whether it extended 1 foot or 80 feet." It is as much a part of the house and equally as essential as a chimney or a flue to carry off the smoke. Indeed, the house could not be used without it. The third exception to the lien of defendant Cox is as to the item of \$475 for heating contract, boiler \$50, and four radiators \$40. This was claimed to be under a separate and distinct contract for a specific sum and was completed more than 60 days before filing of said lien, and claiming that the heating could not be tacked upon the plumbing contract so as to bring it within the 60 days. The same argument applies to this as to the items of \$875 and \$275 in the lien of J. H. O'Neil. The account of Cox was a running account, beginning July 4 and ending December 10, 1902. The sixth exception is that the whole plumbing account on the hotel should not be allowed because not filed within 60 days, but we have seen that it closed on the 10th day of December, 1902, and was filed and recorded on the 9th day of February, 1903. This would be more than 60 days between the 10th of December and the 9th day of February, but in the year 1903 the 8th of February happened on Sunday, which under the statute not being counted brought the filing and recording within the 60 days. The seventh exception to the Cox lien, which is as follows: "Seventh. If the lien was well taken, the commissioner has failed to give credit for undisputed payments and offsets. Commissioner only decreased said lien from \$1,544.57 to \$1,346.44, less than \$200—in some way. A check for \$100 at first positively denied, but afterwards admitted, and a judgment of \$268.33 paid for Cox by defendant, which judgment was for material included in plumbing—making \$368.33 which should have been allowed instead of one less than \$200"—is subject to the same criticism as exception 14, to the claim or lien of plaintiff O'Neil as far as it concerns the failure to show what claims of credits were disallowed and which allowed. The eighth exception to the lien of defendant Cox is that the commissioner did not allow an abatement or recoupment for the failure of the heating apparatus to heat the building and a large abatement for bad plumbing. There was a good deal of testimony offered by defendant to prove the heating apparatus to be very defective and its failure to do the service it was intended to do, and, on the other side, to prove that it was entirely efficient when managed and controlled by one who understood it. There was evidence tending to prove that the defendant for a time had an ignorant, inefficient negro in charge of the heating apparatus, and that, when he discharged him, he employed an

indolent, careless white man who was but little, if any, better, some times drunk, and some times away from his duties. The evidence touching the efficiency of the heating apparatus and also the quality of the plumbing was very conflicting, and, the commissioner having found for the lienor on this matter and his finding having been confirmed by the court, this court will not disturb the decree in that respect.

It is assigned as error to decree the mechanic's lien of O'Neil and Cox, if they are held to be liens at all upon lots Nos. 1 and 2, as the Hotel Moose is claimed by defendant Taylor to be located on lots Nos. 3, 4, and 5. I find no evidence as to the location of the hotel on the square of ground as far as the numbers of the lots are concerned. The whole of lots Nos. 1, 2, 3, 4, and 5, of block 17, constitute one lot or piece of ground 125 x 100 feet, and it nowhere appears in the record that it is located on any particular part of said ground. The deed of trust of July 31, 1903, executed by Chas. B. Taylor to Chas. H. Jones, trustee, conveys "lots Nos. 3, 4, and 5 of block No. 17 as shown on the plat of the said town of Williamson and being what is locally known as 'Hotel Moose.'" This is the deed of trust given to secure to the Bank of Williamson the sum of \$4,000. The mechanics' liens describe the property upon which the hotel is located as lots Nos. 1, 2, 3, 4, and 5, and if the hotel had been confined to lots Nos. 3, 4, and 5, or any other particular lots in said plat of ground, it would have been an easy matter to show it. The property was conveyed by W. J. Williamson and wife by deed dated the 6th day of May, 1902, to Chas. B. Taylor, as lots Nos. 1, 2, 3, and 5 and an undivided half interest in lot No. 4; and on the same day Parlee Williamson and husband conveyed to said Taylor the one undivided half of said lot No. 4. It is true that defendant Taylor in his answer says that the building is situate on lots Nos. 3, 4, and 5, but not on lots Nos. 1 and 2 or either of them, but there is a replication to his answer and no proof taken on that point. It would appear from the record that the whole plat or block was under one inclosure.

The sixth assignment of error is that the court decreed the sum of \$300 as counsel fees for the plaintiff. This is conceded to be erroneous, and is not contended for by the defendant, but it appears from a supplemental record brought up on certiorari that the defendant gave notice that he would move to correct the decree by setting aside that part of it decreeing the said \$300 and tendered and filed in the clerk's office in vacation on the 16th day of June, 1904, a release of said decree for said \$300, but the circuit court refused to take any action upon it because it said it was without jurisdiction while the case was pending in the Supreme Court of Appeals.

The seventh error assigned is the over-

ruling of plaintiff's demurrer to the bill setting up the liens. This is disposed of by the liens being held sufficient.

The eighth assignment set out in the petition: "It was error to decree the sale of lots Nos. 1, 2, 3, 4, and 5, for the payment of the liens adjudged in favor of the Bank of Williamson on one of said liens, to wit, the sum of \$4,000, as it did not consist in a lien against lots Nos. 1 and 2." This assignment is well taken because the deed of trust to secure the \$4,000 was only executed upon the three lots Nos. 3, 4, and 5, and did not include lots Nos. 1 and 2. The commissioner's report, as well as the decree, was correct in that regard, except that part of the decree which provides for the sale, and it should not have decreed the sale of the whole property together, but the three lots Nos. 3, 4, and 5 should have been sold separately.

For the reasons herein stated, that part of the decree which provides for the sale of the property and as far as the decree overruling exception No. 14 to the commissioner's report touching the mechanic's liens of O'Niel, and the seventh exception concerning the lien of defendant Cox and the allowance of \$300, counsel fees to plaintiff, be, and the same is, reversed, and in all other respects the decree is affirmed; and the cause is remanded to the circuit court of Mingo county for recommitment to the commissioner to report upon the various credits which should be allowed and which should be disallowed as set out in the said fourteenth and seventh exceptions, respectively; and for further proceedings to be had therein according to the principles laid down in this opinion and the rules governing courts of equity.

(140 N. C. 620)

WEST v. ABERDEEN & R. R. CO.

(Supreme Court of North Carolina. March 27, 1906.)

1. APPEAL—AMENDMENT IN APPELLATE COURT—ADDITION OF PARTIES—WHEN PERMITTED.

Though the Supreme Court has power, under Revisal 1905, § 1545, and rule 26 (38 S. E. vii), to allow amendments after appeal by the addition of proper parties, this power is discretionary, and will not be exercised where objection for defect of parties was made below and overruled.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3620.]

2. HUSBAND AND WIFE—ESTATE BY ENTIRETIES—INJURY TO LAND—RIGHT TO SUE.

An action for damage by fire to land held by a husband and wife by entireties may be maintained by the husband alone.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Husband and Wife, § 757.]

Appeal from Superior Court, Cumberland County; Moore, Judge.

Action by W. A. West against the Aberdeen & Rockfish Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Robinson & Shaw, for appellant. H. L. Cook and Sinclair & Dye, for appellee.

CLARK, C. J. This is an action brought by the husband alone for damages sustained from fire by the woods on land which had been conveyed to the husband and wife, and which they held consequently by entireties. The plaintiff moved to amend in this court by making his wife a party. Revisal 1905, § 1545, and rule 26 of this court (39 S. E. vii), recognize that such power can be exercised in this court "to amend by making proper parties to any case where the court may deem it necessary and proper," and, indeed, this court could amend without the statute. *Horton v. Green*, 104 N. C. 400, 10 S. E. 470; *Herndon v. Ins. Co.*, 111 N. C. 385, 16 S. E. 465, 18 L. R. A. 547. But here the objection for defect of parties was made below and overruled, and this court will not exercise its discretionary power of amendment to destroy an exception duly taken below. *Grant v. Rogers*, 94 N. C. 755; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707.

Upon the point presented we are of the opinion that the wife was not a necessary party. It was so held as to an action of ejectment. *Topping v. Sadler*, 50 N. C. 359. In *Long v. Barnes*, 87 N. C. 333, it is held that the Constitution (article 10, § 6), as to the rights of married women, did not "destroy or change the properties and incidents belonging to the estates" held by entireties. In *Simonton v. Cornelius*, 98 N. C. 437, 4 S. E. 40, it is said: "So, too, the fruits accruing during their joint lives would belong to the husband" after separation from the land; though neither husband nor wife during their joint lives can convey or incumber the estate without the assent of the other, nor can a lien be acquired on it without such assent, nor can it be sold under execution. *Bruce v. Nicholson*, 109 N. C. 204, 13 S. E. 790, 26 Am. St. Rep. 562; 11 Am. & Eng. Enc. (2d Ed.) 49. The act of 1784 (Revisal 1905, § 1579), abolishing survivorship in joint tenancies, does not apply to estates by entireties. *Phillips v. Hodges*, 109 N. C. 250, 13 S. E. 769. "But while at common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to affect the right of the survivor, yet subject to this limitation the husband has the rights in it which are incident to his own property. * * * He is entitled during the coverture to the full control and the usufruct of the land, to the exclusion of the wife." 15 Am. & Eng. Enc. (2d Ed.) 849, and cases cited in note 2, among them *Pray v. Stebbins* (Mass.) 55 Am. Rep. 462; *Den v. Gardner* (N. J.) 45 Am. Dec. 388; *Hiles v. Fisher* (N. Y.) 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762. As to personality the same rule applies, and where shares of stock stand in the joint names of husband and wife he is entitled to the divi-

dends during their joint lives. 15 Am. & Eng. Enc. (2d Ed.) 851; Bramberry's Estate (Pa.) 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64. These are the incidents and properties of an estate by entirety when (as in this state) there has been no change by statute, and upon the above authorities the plaintiff can maintain this action without joining the wife. She is not entitled to sue for this damage nor to share in the recovery. If any change in the incidents and properties of this anomalous estate is desirable, legislation must be had upon it.

The other exceptions require no discussion. The charge of the court was fair and guarded. Phillips v. Railroad, 138 N. C. 12, 50 S. E. 462. The prayer of the defendant, so far as it was entitled to it, was substantially given in the charge. It was proper to give the instruction quoted from Black v. Railroad, 115 N. C. 669, 20 S. E. 713, 909, and the plaintiff was a competent witness as to the amount of damages he had sustained.

We do not pass upon the motion to dismiss for failure to comply with rules 19 and 28 as intimated in Sigman v. Railroad, 135 N. C. 181, 47 S. E. 420; Hicks v. Kanan, 139 N. C. 338, 51 S. E. 941. Those rules have been amended and made so plain in the revised rules, printed at the end of 140 N. C., and also in 53 S. E. xiv, xv, that we feel sure that appellants will not misconceive the requirements and will henceforward take pleasure in observing them.

No error.

(141 N. C. 95)

BYNUM v. WICKER et al.

(Supreme Court of North Carolina. April 10, 1906.)

1. LIFE ESTATES—RIGHTS OF LIFE TENANT—CUTTING TIMBER.

While a husband may, by a deed in which his wife does not join, convey an estate by entirety, so as to entitle the grantee to hold during the husband's life, such deed does not give the grantee a right to cut timber on the land.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Life Estates, § 32.]

2. SAME—RIGHTS CONVEYED—ESTOPPEL.

Where a husband, by deed in which the wife does not join, conveys an estate held by entirety, both he and his wife are estopped from interfering with the possession of the premises during their joint lives.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 82.]

Appeal from Superior Court, Moore County; Fred Moore, Judge.

Action by T. M. Bynum against J. M. Wicker and others. From the judgment for defendants, plaintiff appeals. Reversed.

U. L. Spence, for appellant. Seawell & McIver, for appellees.

CLARK, C. J. Edward Fields and wife were tenants by entirety of the tract in question. Edward Fields, without the joinder of

his wife, mortgaged the land to John R. Lane. The land was sold under the power of sale in the mortgage, and the plaintiff holds by mesne conveyances from the purchaser at such sale. This is a proceeding for an injunction against the defendants, who are the agents of Edward Fields and his wife, to prevent their cutting the timber on said land.

This estate by entirety is an anomaly, and it is perhaps an oversight that the Legislature has not changed it into a co-tenancy, as has been done in so many states. This not having been done, it still possesses here the same properties and incidents as at common law. Long v. Barnes, 87 N. C. 333; West v. Railroad (at this term) 53 S. E. 477. At common law "the fruits accruing during their joint lives would belong to the husband." Simonton v. Cornelius, 98 N. C. 437, 4 S. E. 40. Hence the husband could mortgage or convey it during the term of their joint lives—that is, the right to receive the rents and profits—but neither could incumber it or convey it, so as to destroy the right of the other, if survivor, to receive the land itself unimpaired. "He cannot alien or incumber it, if it be a freehold estate, so as to prevent the wife or her heirs, after his death, from enjoying it, discharged from his debts and engagements." 2 Kent's Com. 133; Bruce v. Nicholson, 109 N. C. 204, 13 S. E. 790, 26 Am. St. Rep. 562. It is clear, therefore, that, the timber being a part of the freehold, the plaintiff would have no right to cut the timber, claiming under a conveyance from the husband alone. The husband, having conveyed his interest, is estopped from interfering with the possession of the premises during the joint lives of himself and wife, and, of course, so is the wife. Whether, if he should be survivor, his deed is valid as a conveyance of his interest by survivorship is a point as to which the authorities are conflicting; but we are not now called upon to decide that point, as it is not before us.

In refusing an injunction to the hearing, there was error.

(141 N. C. 89)

BUCHANAN et al. v. HARRINGTON.

(Supreme Court of North Carolina. April 3, 1906.)

1. ESTOPPEL—DEEDS—SUBSEQUENT ACQUISITION OF TITLE.

Where a deed is sufficient in form to convey the grantor's whole interest, an interest afterwards acquired passes by way of estoppel to the grantee.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 330, 412; vol. 19, Cent. Dig. Estoppel § 91½.]

2. REFORMATION OF INSTRUMENTS—PLEADING.

In partition, a party could not obtain equitable relief by way of reformation of a deed without setting up the facts on which equitable jurisdiction depended.

3. PARTITION—EQUITABLE ISSUES—PLEADING.

In partition, equitable matter might have been alleged by amendment in the superior court after the case has been transferred, though it

was not originally within the jurisdiction of the clerk before whom the proceeding was commenced.

Appeal from Superior Court, Moore County; Ferguson, Judge.

Partition by J. B. Buchanan and others against A. B. Harrington. From a judgment determining the interests of the parties and awarding partition, petitioners appeal. Affirmed.

The petitioners alleged that they are tenants in common with the defendant of a tract of land containing 24 acres; they owning five-eighths thereof and the defendants the other three-eighths. The defendant admitted the tenancy in common but denied the allegation as to the interest of the respective parties, alleging on the contrary that the petitioners owned one half and he the other half. The land formerly belonged to W. B. Watson, and at his death descended to his four children, Virginia, Willie, Garner, and Bessie Watson. The first three, for the consideration of \$150, conveyed the land (not stating their interest therein) to the feme plaintiff on October 25, 1901, with full covenants of seisin and warranty. There is nothing in the deed to indicate that they did not have the entire estate in the land. On March 11, 1902, the plaintiffs conveyed a one-half interest in the land to the defendant, describing it as "containing 24 acres, more or less, and adjoining the lands of L. Acree and others, the same being the lands of Virginia Watson, Willie Watson, and Garner Watson, heirs of W. B. Watson, deceased, deeded to L. B. Buchanan on the 25th day of October 1901." It appears further that on the 14th March, 1903, Bessie Watson, for the consideration of \$37.50, conveyed her one-fourth interest in the land to the feme plaintiff. Issues as to the interests of the respective parties were submitted to the jury, who found for the defendant that he owned a one-half interest in the land. At the trial, the plaintiffs proposed to ask the witness T. N. Campbell, "What land was the deed [to the defendant] intended to convey?"—it being the purpose to show by the witness that it was intended to convey one-half of the interest which they alleged that they then had; that is, three-eighths, and not one-half, of the whole. The plaintiffs then proposed to prove by the witness that it was understood and agreed by the parties, at the time the deed was executed, that the petitioners were selling only one-half of three-fourths, and the defendant was buying one-half of three-fourths. All of this proposed evidence was excluded, and the plaintiffs excepted. The court charged the jury that if they believed the evidence they should answer the first issue, as to the feme petitioner's interest, one-half; and the second issue, as to the defendant's interest, one-half, which they did. Judgment was entered accordingly, and the petitioners appealed.

W. E. Murchison, for appellants. Seawell & McIver and W. J. Adams, for appellee.

WALKER, J. (after stating the case). The parties seem to have conceded that the proper construction of the deed from the petitioners to the defendant is in accordance with the defendant's contention, that it conveyed one-half of the entire interest in the land, and the words "the same being the lands of Virginia, Willie, and Garner Watson deeded to L. B. Buchanan" are merely descriptive of the land and cannot have the effect to limit or cut down the interest which would otherwise pass by the deed, and this we think was a proper concession. Indeed, the very words we have quoted import that the entire interest in the land belonged to the three grantors named in the deed, rather than the contrary. If it be suggested that the feme petitioner did not, at the time she conveyed, own the entire estate, but only three-fourths, the answer is that the law will not permit this to change the construction of the deed as it is written. Matter dehors cannot, under the circumstances of this case, be considered for any such purpose. If the deed was sufficient in form to convey one-half of the whole interest, the one-fourth interest afterwards acquired by the feme plaintiff from Bessie Watson would, by way of estoppel or rebutter, inure to the use and benefit of the defendant and thereby vest one-half of the entire estate in him. Taylor v. Shufford, 11 N. C., at page 127, 15 Am. Dec. 512 (opinion of Judge Henderson); Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Carter v. White, 134 N. C. 468, 46 S. E. 983, 101 Am. St. Rep. 853; Wool v. Fleetwood, 136 N. C. 467, 48 S. E. 785, 67 L. R. A. 444.

The proposed testimony of the witness Campbell was properly ruled out. It was necessarily offered on the theory that the deed of the petitioners to the defendant passed one-half of the entire interest in the land, and that it was necessary to correct it in order that it should speak the truth or conform to the real agreement and intention of the parties. The evidence could have been relevant to the controversy upon no other ground. But the pleadings do not raise any issue to which it was pertinent. If the petitioners desired to have the deed reformed, relying upon their right to the equity of correction, this matter should have been set up by proper averment and a corresponding issue submitted to the jury. They cannot be heard upon such a matter under the general allegations of their pleading; they merely alleging the ownership of five-eighths. If a party demands equitable relief, he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction. Farmer v. Daniel, 82 N. C. 152; McLaurin v. Cronly, 90 N. C. 50; Bodenhamer v. Welch, 89 N. C. 78; Tuttle v. Harrell, 85 N. C. 456. If the petitioner had alleged the mutual mistake and prayed

for a correction of the deed, so as to show that it passed only a three-eighths interest, the testimony offered by them might have been competent. Such equitable matter might have been alleged by amendment in the superior court after the case had been transferred, though it was not originally cognizable by the clerk before whom the proceeding was commenced. *Roseman v. Roseman*, 127 N. C. 497, 37 S. E. 518; *Ewbank v. Turner*, 134 N. C. 80, 46 S. E. 508, and cases cited.

In the present state of the pleadings the case was in all respects correctly tried.

No error.

(73 S. C. 289)

JENKINS v. SOUTHERN RY.

(Supreme Court of South Carolina. Feb. 23, 1906.)

1. CARRIERS — LOSS OF GOODS SHIPPED — LIMITATION OF VALUE.

In an action to recover for the loss of a box of household goods, the burden is on the carrier to show that it was shipped under a contract limiting the value.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 723.]

2. SAME—EVIDENCE.

In an action against a carrier for damage to freight, evidence held insufficient to show contract limiting value.

Appeal from Common Pleas Circuit Court of Cherokee County; Townsend, Judge.

Action by John M. Jenkins against the Southern Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

W. S. Hall, Jr., for appellant. Butler & Osborne, for respondent.

GARY, A. J. This action was commenced before a magistrate to recover the sum of \$100 for the loss of a box containing household goods, etc., delivered by the plaintiff to the defendant for transportation. The defendant set up the following defense: "That the defendant accepted from the plaintiff a box of goods, purporting to be household goods, for the purpose of transportation, upon a special agreement, that for and in consideration of the transportation of said goods by the defendant, at a low freight rate, the defendant, in case of loss or damage, would be liable to the plaintiff only to the extent of the sum of \$5 on every hundred pounds of said goods lost, which value was agreed upon by the plaintiff, and issued a bill of lading to the plaintiff to that effect, which bill of lading was accepted by the plaintiff." The jury rendered a verdict in favor of the plaintiff for \$100. On the face of the bill of lading, dimly stamped in red ink, are the words: "Release and value limited to \$5.00 per hundred pounds in case of loss or damage."

The plaintiff testified: "I took bill of lading and put it in my pocket. Mr. Cunningham gave me bill of lading. I put it in my pocket. He said nothing about the extent of railroad company's liability. He then asked me for it and I handed it to him, and he put

a stamp on it, but said nothing about it." Cross-examined: "I can read very good. I accepted the bill of lading without objections. Had opportunity to read it, if I had wanted to." Redirect: "Agent never said anything about the rate of freight. He never said anything about the extent of its liability, in the event the goods were lost. I never agreed that they should be responsible for a limited amount."

C. T. Clary testified in behalf of the defendant as follows: "I am agent of the Southern Railway at this place. The plaintiff got 4th class rate under this bill of lading. He got 27 cents rate, otherwise it would have been 55½ cents rate." Cross-examined: "Don't know when stamp was put on bill of lading. This contract does not bear on its face clearly what was intended to bear. I couldn't tell what was on it unless I was familiar with them."

The magistrate, in his return to the circuit court, says: "The evidence showed that there was some misunderstanding between the parties, as to the impression made on the bill of lading, whereby the evidence shows, the defendant meant to limit its liability; the stamp was not clear; as there was an issue as to what it was, I could not charge the jury what the bill of lading meant under the facts of the case."

In dismissing the appeal to the circuit court, the presiding judge makes the following finding of fact: "The evidence fails to show that the plaintiff contracted with the defendant, for a limited valuation to be placed upon the goods, in case of loss, or that the plaintiff consented or agreed to any such limitation. The bill of lading in evidence does not show plainly what limitation, if any, the railway company intended to place upon itself in regard to such limitation or reduction in value, in case of loss or damage."

The defendant appealed upon numerous exceptions, but they all, in different form, relate to the question whether the findings of fact by the circuit judge are wholly unsupported by the testimony. This is an action at law, and this court has no power to review the facts, except for the purpose of determining whether there is any testimony to sustain the findings of the circuit judge, which presents a question of law. In order for the plaintiff to make out his case, in the first instance, it was only necessary for him to show by the testimony (which he did), that he delivered the goods to the defendant as a common carrier, for transportation; that the defendant refused to make delivery of the goods at their destination, and that he thereby sustained damages. It was incumbent on the defendant to make out its defense by the testimony, which it failed to do, to the satisfaction of the jury, magistrate, or circuit judge.

As there is testimony to sustain the judgment of the circuit court, the appeal must be dismissed, and it is so adjudged.

(73 S. C. 222)

JENKINS v. SOUTHERN RY.

(Supreme Court of South Carolina. Feb. 23, 1906.)

1. APPEAL.—REVIEW.

On appeal to the Supreme Court from a judgment of the circuit court affirming a judgment of a magistrate, alleged errors in the findings of fact, or technical defects not affecting the merits, will not be reviewed.

2. APPEARANCE.—EFFECT.—JURISDICTION.—WAIVER OF OBJECTIONS.

In an action against a corporation, where it answers the complaint and contests the case on the merits, the question of jurisdiction is thereby waived.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 23-41, 70.]

Appeal from Common Pleas Circuit Court of Cherokee County; Townsend, Judge.

Action by John M. Jenkins against the Southern Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant appeals on the following exceptions: "(1) In not sustaining the first ground of appeal from the magistrate's court, for the reason therein stated, as follows: The magistrate erred in refusing to set aside the judgment, the error being that the cause of action, if any, arose in Greenville county, the point of destination of shipment, and where plaintiff is required by law to file his claim for loss or damage; that therefore the magistrate was without jurisdiction to try the case in Cherokee county. (2) In not sustaining the second ground of appeal, as follows: The magistrate erred in admitting the record of a judgment in plaintiff's favor against the defendant, in a former suit, the error being that such judgment was not pleaded, that the evidence was incompetent and irrelevant. (3) In not sustaining the third ground of appeal as follows: The magistrate erred in not dismissing the action, the reason being that at the time this action was brought, plaintiff had not recovered a judgment against the defendant for the full amount of his claim for loss, which is necessary under the law, that such judgment was recovered only a short while before the trial of this case; and in overruling defendant's objection that the court could not take notice of such former judgment unless brought before the court by a supplementary pleading. (4) In not sustaining the fourth ground of appeal, as follows: The magistrate erred in not holding that plaintiff was bound by the original claim for \$104 filed with the agent at Greers, and that there had been no recovery for the full amount of plaintiff's claim, and in not giving judgment for the defendant. (5) In not sustaining the fifth ground of appeal, as follows: The magistrate erred in sustaining plaintiff's objection to the testimony offered by defendant from a witness, R. L. Spencer, to show the value of the goods lost, on the ground that that issue has already been adjudicated, the error being that the judgment in the former case was not

pleaded as required by law; and that testimony tending to show that value of the goods was competent. (6) In not sustaining the sixth ground of appeal, as follows: The magistrate erred in sustaining objection to the testimony of C. T. Clary, a witness for defendant, the error being that such testimony was relevant and competent, to prove the contract between plaintiff and defendant; to explain any defects in the printed or stamped stipulation as to value; to show a consideration for value limitation; to show both by parol and stamp itself what the stipulation in red ink was intended to be, or really is; to show how the defect occurred; to show that plaintiff had full opportunity to find out what the stipulation and the terms of the contract were. (7) In not sustaining the seventh ground of appeal, as follows: The magistrate erred in refusing to admit as evidence the slip of paper with the stamped impression made by the stamp with which the value clause was stamped on the bill of lading, the error being that the same was competent to explain said stipulation. (8) In not sustaining the eighth ground of appeal, as follows: The magistrate erred in not holding that the bill of lading with the red ink clause was the contract between the parties, and that under the bill of lading defendant's liability did not exceed five dollars (\$5.00) per hundred pounds in case of loss or damage, and in not rendering his judgment for the defendant. In not finding for the defendant upon the whole case. (9) His honor further erred in his finding of fact that at least a portion of the cause of action did arise in Cherokee county, and that this action could be brought in the county where the main action was brought. The error being that there is no testimony to show that any part of the cause of action arose in Cherokee county."

W. S. Hall, Jr., for appellant. Butler & Osborne, for respondent.

GARY, A. J. The record contains the following statement of facts: "This action was begun in the magistrate's court in Cherokee county, April 15, 1905, by the plaintiff to recover the statutory penalty under Acts 1903, pp. 81, 82. On December 29, 1904, plaintiff delivered to the defendant, at Gaffney, S. C., for transportation to Greers, S. C., a lot of household goods. A box of these goods was never delivered to the plaintiff, but was lost or destroyed. After a part of the goods arrived at Greers, the plaintiff made some effort to get them. On March 4, 1905, plaintiff filed with agent at Greers, in Greenville county, a claim in writing for \$100, which is shown by the case in the damage suit as well as by the record in this case. He also brought this suit on the same day that his action for damages was commenced. The damage suit was tried on May 6, 1905, re-

sulting in a verdict of \$100 for plaintiff, upon which judgment was entered May 10, 1903. This case was subsequently tried on May 10, 1905, by the magistrate without a jury. He gave plaintiff judgment for the sum of \$50, May 11, 1905. Defendant then moved to set aside the judgment on the ground that the magistrate was without jurisdiction, the cause of action, if any, having arisen wholly in Greenville county, S. C. The magistrate overruled the motion. Defendant then appealed to the circuit court. The judgment of the circuit court affirmed the judgment of the magistrate's court, and all of defendant's exceptions were overruled. From judgment of the circuit court defendant gave due notice of appeal." The defendant interposed a general denial, and contested the case upon the merits.

In dismissing the appeal from the judgment rendered by the magistrate, the circuit judge said: "The cause comes before me upon appeal by defendant from the judgment of the magistrate in favor of the plaintiff for the full amount, and from the order of said magistrate, overruling defendant's motion to set aside said judgment on the ground that no part of the cause of action arose in this county. I agree with the magistrate in his findings and also in his action in overruling said motion, and his judgment and said order are hereby sustained and affirmed. I find as fact, also, that at least a portion of the cause of action did arise in this county, and that this action could be brought in the county where the main action was brought." The defendant's exceptions will be set out in the report of the case.

Section 88 of the Code of Civil Procedure of 1902, provides that certain rules shall be observed in the courts of magistrates, one of which is that "pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended." Section 368 of the Code, relative to appeals to the circuit court from inferior courts, contains the provision, "upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving the judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all of the parties, and for errors of law or fact."

1. If the circuit court, upon hearing the appeal from the magistrate, overrules or sustains the exceptions, his action cannot be assigned as error, as to any of the exceptions that involved questions of fact, or technical defects that did not affect the merits. All the exceptions of the appellant relate to questions of fact, or "technical errors and defects which do not affect the merits," except that which assigns error on the part of his honor, the circuit judge, in refusing to dis-

miss the action on the ground that the magistrate did not have jurisdiction.

2. The question of jurisdiction related to the person, and was waived when the defendant answered the complaint and contested the merits of the case. It is only necessary to refer to *Best v. Ry.*, 72 S. C. 479, 52 S. E. 223, and the cases therein cited, to show that this conclusion is amply supported by the authorities.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

(73 S. C. 314)

STATE v. THRAILKILL.

(Supreme Court of South Carolina. Feb. 23, 1906.)

1. HOMICIDE—EVIDENCE—MOTIVE.

On trial for murder, evidence that, when witness carried the message to deceased that his brother had been shot, deceased was sitting by the fire holding his child in his arms, was admissible to show that deceased had a motive to attack accused in revenge for shooting his brother.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 820-823.]

2. SAME.

Transactions clearly connected with a homicide, and leading up to it, and explanatory of it, and tending to show the mental attitude of defendant, are admissible in evidence.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 841-850.]

3. INFANTS—CRIMES—COERCION.

Coercion by a father is insufficient to excuse homicide committed by a son 17 years old.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 173.]

4. HOMICIDE—MOTIVE.

Motive, on trial for murder, need not be shown, though the absence of evidence of motive can be considered in determining the existence of criminal intent.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 491.]

Appeal from General Sessions Circuit Court of Saluda County; Purdy, Judge.

Clarence Thrailkill was convicted of manslaughter, and appeals. Affirmed.

Able & Blease, C. J. Ramage, and E. F. Strother, for appellant. R. A. Cooper, J. W. Thurmond, E. L. Asbill, and B. W. Crouch, for the State.

JONES, J. The defendant Clarence Thrailkill was indicted for the killing of Benjamin Burton at Monetta, Saluda county, on the 27th day of April, 1904, was found guilty of manslaughter, and sentenced to imprisonment upon the public works of Saluda county, or the penitentiary for three years. Morgan Thrailkill, the father of defendant, had been indicted for the same offense, was convicted of murder with a recommendation to mercy, and sentenced to life imprisonment, which judgment on appeal therefrom was affirmed by this court. *State v. Thrailkill*, 71 S. C. 136, 50 S. E. 551. It appears that on April 27, 1904, Morgan Thrailkill and Clar-

ence Thraillkill left home in a buggy, Morgan armed with a shotgun and Clarence armed with a pistol, and drove to the store of Lackey Burton, the brother of the deceased, Benjamin Burton, and Morgan Thraillkill demanded of Lackey Burton the return of a pistol claimed by him, which Lackey Burton testified had been pawned with him by a negro. Lackey Burton testified that he had offered to deliver the pistol to Morgan Thraillkill upon the payment of 35 cents, to secure which it had been pledged; that without any aggression on his part Morgan Thraillkill attempted to shoot him from the buggy with the shotgun; that he seized the gun to protect himself, and while Morgan Thraillkill and he both had hold of the gun, Clarence Thraillkill shot him with a pistol. Clarence Thraillkill testified that Lackey Burton refused to give up the pawned pistol and endeavored to take the gun from the buggy by force without any aggression on their part, and he further testified that he shot Lackey Burton in defense of his father, seeing Lackey Burton trying to draw a pistol while struggling for the possession of the gun. The shot frightened the mule hitched to the buggy, and while the Thraillkills were getting it under control, Lackey Burton started to run across the railroad to the store of Stevens & Catoe, 75 to 100 yards distant. Morgan Thraillkill got out of the buggy and followed Lackey Burton with his gun and, according to the testimony of a witness for the state, appeared to try to shoot Lackey Burton, but for some reason did not fire. Lackey Burton, limping from his wound, entered the store of Stevens & Catoe. According to the testimony of D. B. Busby, the principal witness for the state, Morgan Thraillkill did not enter the store but walked back and forth over the ground there, evidently looking for some one in the store, and that Clarence Thraillkill was walking up and down the street with a pistol in his hand. This witness testified that in a short while he saw the deceased, Benjamin Burton, come from the direction of his home walking towards the store of Stevens & Catoe with a gun under his left arm, and making no demonstration; that Morgan Thraillkill raised his gun, and fired in the direction of Benjamin Burton; that Benjamin Burton fell to the ground; that Clarence Thraillkill raised his pistol, and fired in the direction of Benjamin Burton after he fell. Clarence testified that the deceased was in the act of raising his gun when his father fired, and that if he (the defendant) fired, it was under excitement. It appears that Benjamin Burton left his home with a gun immediately after receiving a message delivered to his wife by Boyce Gantt a few minutes after the shooting of his brother, Lackey Burton.

1. Appellant's fourth exception alleges error in allowing the state's witness, Boyce Gantt, to testify that when he carried the message to Burton's home about Lackey be-

ing shot, he was sitting at the fire with his little baby in his arms. A similar exception was overruled in *State v. Thraillkill*, 71 S. C. 142, 50 S. E. 558, as to which the court, by Mr. Justice Woods, said: "Whether the deceased knew at the time he was killed of the shooting of his brother by Clarence Thraillkill, was a most important inquiry as to a substantive fact, because such knowledge would manifestly powerfully affect his feelings, and influence his conduct. Hence, proof that he was informed of the shooting of his brother tended to enlighten the jury as to his feelings towards the Thraillkills, and to interpret his action. Therefore, it was not only competent to prove that Boyce Gantt had informed him, through his wife, of the shooting of his brother, but the issue being whether the defendant killed in self-defense, it was clearly favorable to him to prove that deceased had a motive to attack in revenge for the shooting of his brother."

2. The fifth, sixth and seventh exceptions allege error in permitting the state's witnesses, Busby and Lackey Burton, to testify as to the matters which took place between Lackey Burton and the defendant and his father, as they did not tend to show the mental attitude of defendant towards the deceased, but towards another person, Lackey Burton. A similar exception was urged, but overruled, in *State v. Thraillkill*, 71 S. C. 140, 50 S. E. 552. The transactions narrated in the testimony were closely connected with the homicide, and led up to it, were explanatory of it, and tended to show the mental attitude of defendant acting in concert and sympathy with Morgan Thraillkill throughout. *State v. Miller* (S. C.) 53 S. E. 426.

3. The remaining exceptions, not abandoned, are the first and third, which relate to the charge to the jury. The first exception assigns error because the court refused to instruct the jury as follows: "A person required by and compelled by another to take part in the commission of a crime, or the doing of an unlawful act, is not guilty in the eyes of the law if the force or coercion, either actual or constructive, used to induce the person charged with such offense, was sufficient to compel a person of the same age and discretion and of ordinary firmness and reason to do such act of violence or other unlawful act." This is a most remarkable request to charge and was very properly refused. It had no application whatever to the case. The defendant was at the time of the homicide between 17 and 18 years old, and accountable for his unlawful acts. It does not even appear that he acted under the command or coercion of his father, and if he did, no command by a parent will justify a criminal act by a child, capax doll.

4. The third exception imputes error in the court's refusal to charge as follows: "Before the state is entitled to a verdict of guilty in a homicide case, it is incumbent to

prove beyond a reasonable doubt that the accused person had a motive for, or an intention to, commit the crime of which he is accused, and was not possessed of and prompted by a wicked, depraved, and wanton spirit, without regard for the rights of others, a verdict of guilty cannot be reached." The request was properly refused. Motive is not an essential element of crime and need not be shown, although the presence or absence of evidence of a motive may be considered in determining whether there was the criminal intent, which is an essential element in every common-law crime. Moreover, the request to charge might have been construed as eliminating manslaughter as a possible verdict. The charge given was explicit in stating to the jury what it was necessary for the state to prove in order to convict under the indictment.

The judgment of the circuit court is affirmed.

(73 S. C. 330)

STATE v. AMEKER.

(Supreme Court of South Carolina. Feb. 26, 1906.)

1. CONSPIRACY—DEFINITION.

An instruction on trial for conspiracy that "conspiracy" is an agreement by two persons to do an unlawful act or to do a lawful act by unlawful means, and it is the agreement to do the unlawful act that is the gist of the whole matter, and that if the defendants went to the place named and agreed to do the acts alleged they would be guilty of conspiracy, or if two or more of them went there and committed the acts alleged by virtue of an agreement so to do, then they would be guilty of conspiracy, properly described the offense.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, §§ 30-39.]

2. INDICTMENT—SURPLUSAGE.

Any words not absolutely necessary to an indictment will be treated as immaterial and need not be stricken out.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 311, 312.]

3. CONSPIRACY—COMMON-LAW OFFENSE.

Cr. Code 1902, § 233, providing for punishment of conspiracy does not abrogate the law of conspiracy in the state.

Appeal from General Sessions Circuit Court of Orangeburg County; Dantzler, Judge.

Abe Ameker and others were convicted of conspiracy, and appeal. Affirmed.

The judge charged the jury: "Mr. Foreman and Gentlemen of the Jury: The law gives the right to a defendant to take the stand or not, in the trial of any case, that is, he may or may not testify, and the jury, by virtue of that fact, is not to be prejudiced against such a defendant. The failure of a defendant or defendants to testify should not operate against them, or either of them, in any way. Now, it is incumbent on the state to prove each and every charge of the indictment beyond a reasonable doubt; that does not mean a fanciful or imaginary doubt,

but it must be, a reasonable doubt. It is incumbent on the state, I say, to prove every charge against any defendant beyond such a doubt. These defendants, Mr. Foreman and gentlemen, are charged under the indictment with conspiracy, and conspiracy, Mr. Foreman and gentlemen of the jury, is an agreement by two or more persons to do an unlawful act, or to do a lawful act by unlawful means. For instance, suppose, Mr. Foreman, that you and the gentleman on your left would go out on the streets of Orangeburg and commit an assault and battery on some other person, that would be an unlawful act, but it would not be a conspiracy, unless there was an agreement between you to do the act before doing it. It is an agreement to do an unlawful act that is the gist of the whole matter. Now, Mr. Foreman and gentlemen, you are to find the facts from the testimony brought out on the witness stand, and apply the law to the facts, giving the defendants the benefit of every reasonable doubt. If you find that these parties went to the place named and agreed to do the act or acts as alleged, they are guilty of conspiracy; or if you find that two or more of them went there and committed the acts alleged by virtue of an agreement so to do, then they are guilty of conspiracy. Now, where there is only one person concerned, there can be no conspiracy, because one person cannot make an agreement with himself. Therefore, if you find a verdict, you can find all guilty or all not guilty, or you can find two or more guilty, specifying which ones. Find your verdict from the testimony in the case, giving the defendants the benefit of every reasonable doubt. Take the record, gentlemen, and find your verdict. Mr. Foreman and gentlemen, a certain person named B. Lee Jeffcoat was mentioned in the indictment, but the case against him has been nolle prossed, so there is no case against B. Lee Jeffcoat."

W. H. Sharpe, Wolfe & Berry, and Jas. F. Izlar, for appellants. P. F. Hildebrand, for the State.

POPE, C. J. The defendants were tried under the following indictment: "The jurors of and for the county aforesaid, in the state aforesaid, upon their oath, present, that Abe Ameker, B. Lee Jeffcoat, J. B. Ameker, Cleveland Hooker, William Jamison, James McLeod, late of the county aforesaid, on the twenty-second day of April, in the year of our Lord one thousand and nine hundred and five, with force and arms, at Orangeburg, in the county and state aforesaid, then and there unlawfully, feloniously, and willfully conspired together, and banded themselves together at a certain public place in the county and state aforesaid, to wit, at Laurel Bay, for the purpose of hindering, preventing, and obstructing certain citizens of the United States and of this state of and from

the free exercise of their rights and privileges, accorded them under the laws of the United States and the laws of this state, by then and there obstructing, hindering, and preventing, L. P. Wisenhunt, T. A. Salley, E. J. Salley, Robert Salley, R. J. Salley, Charlie Hall, S. B. Hall, M. S. Williams, Mike Fanning, Arthur Robinson, Dan Davis, Mrs. Tom Salley, Mrs. R. E. Fanning, Mrs. S. B. Hall, Mrs. G. S. Davis, Willis Williams and divers other persons to the jurors aforesaid unknown, who, being then and there assembled for the purpose of engaging in social intercourse and peaceable pastimes, such as are commonly enjoyed at picnics, and were so engaged; they, the said Abe Ameker, B. Lee Jeffcoat, J. B. Ameker, Cleveland Hooker, William Jamison and James McLeod, in pursuance of the said conspiracy, then and there unlawfully, violently, riotously, tumultuously, with pistols and other weapons, and threats, routing and putting to flight the said L. P. Wisenhunt, T. A. Salley, E. J. Salley, Robert Salley, R. J. Salley, Charlie Hall, S. B. Hall, M. S. Williams, Mike Fanning, Arthur Robinson, Dan Davis, Mrs. Tom Salley, Mrs. R. E. Fanning, Mrs. S. B. Hall, Mrs. G. S. Davis, Willis Williams and divers other persons to the jurors aforesaid unknown, against the form of the statute in such cases made and provided, and against the peace and dignity of the state." After the introduction of testimony for the state and the charge of his honor, Judge C. C. Dantzler, the jury found the verdict of guilty, and the defendants, Abe Ameker, J. B. Ameker and Cleveland Hooker, were each sentenced to be imprisoned in the county jail of Orangeburg county at hard labor upon the public works of said county, for the term of two years, or be confined in the State Penitentiary at hard labor for a like period. The two defendants, William Williamson and James McLeod, were each sentenced to be imprisoned in the county jail of Orangeburg county at hard labor upon the public works of said county for a period of 18 months, or be confined in the State Penitentiary at hard labor for a like period.

From this judgment the defendants appealed to this court upon the following grounds: "(1) Because his honor erred, in holding that notwithstanding there was no statute making the offense criminal for which the defendants stood indicted, the said indictment was good at common law, and that the defendants could be tried thereunder, and if convicted could be punished as a common-law offense is punished. (2) Because his honor erred in holding that the offense with which the defendants were charged constituted a criminal conspiracy, and could be punished as such, at common law, if the defendants were convicted, notwithstanding the object in attending the picnic may have been lawful, if the means employed for attaining said object were unlawful. (3) Because his honor erred in holding that notwithstanding the gist of every conspiracy is the unlawful

combination of two or more persons to do an unlawful act, no previous agreement of the parties charged was necessary to complete the crime, but that the conspiracy might arise on the instant and be proven by the circumstances surrounding the act; whereas, he should have held that both under statute and at common law, some unlawful means should have been contemplated or used, some overt act committed, some combination of the defendants for carrying their plans into effect must be proved; and that under the circumstances here no such agreement could have been entered into between the defendants, or inferred from their conduct or acts. (4) Because his honor erred in holding that if the conduct of the defendants on the occasion was such as to tend a breach of the peace, they could be punished at common law; whereas, he should have held, that if each of the defendants acted singly and individually and for himself, on the occasion, the crime of conspiracy was not committed, and the defendants could not be punished under the said indictment for such crime, either under the statute law or at common law. (5) Because there is no such crime as conspiracy either by statute or at common law in attending a public picnic, the object being a lawful one, and there being no previous combination or agreement to commit any crime proved, and his honor erred in not so holding, and in not so instructing the jury. (6) Because the means used as shown by the acts of the defendants, and the testimony before the court at the trial, did not amount to an indictable crime either under the statute or at common law, but at the most merely a civil injury, and his honor erred in not so holding and charging the jury. (7) Because his honor erred in not quashing the indictment on the ground that it did not charge an indictable offense either under any statute or at common law. And after verdict against the defendants, the same being a misdemeanor, not making the sentence of the court fine and imprisonment, and in drawing a distinction therein, the verdict being guilty generally. (8) Because his honor erred in not making the prisoners arraigned, if the offense was felony, and made so by statute, as contended by the learned solicitor. (9) Because his honor erred, in holding that the indictment was one at common law; that no overt act was necessary to render the crime complete, and that the jury might infer the previous combination from the circumstances, such as the conduct and acts of the parties after their arrival on the picnic grounds; whereas, the circuit judge should have held and instructed the jury that there is no liability for acts not contemplated, and which are not within the purpose of the conspiracy or in the natural consequence of the execution of such purpose. (10) Because his honor erred in refusing a motion to strike out the surplusage in the indictment and to elect on which charge of

conspiracy the state would proceed against the defendants. (11) Because his honor erred in ruling that the defendants would go to trial on the charge of conspiracy contained in the indictment, and in refusing to require the state to elect the same, charging an offense both of common law and under the statute law, and in holding that the conspiracy charged by the indictment was a conspiracy at common law, and not under any statute law of the state; whereas, he should have granted the motion to elect on which charge the state would rely, and in not holding that the indictment attempted to charge a conspiracy under the statute law of this state, and that there was no statute applicable and no offense at common law charged; and he consequently should have quashed the indictment, and permitted the defendants to be discharged from custody, and to go without day. (12) Because his honor erred in his charge and in defining the crime of conspiracy when he charged the jury as follows: 'Conspiracy, Mr. Foreman and gentlemen of the jury, is an agreement by two or more persons to do an unlawful act, or to do a lawful act by unlawful means'; whereas, he should have charged the jury and defined the offense, as follows: 'Conspiracy is a combination of two or more persons to do an unlawful act, whether that be the final object of the combination, or only the means to the final end, or whether the act be a crime or an act hurtful to the public, a class of persons, or an individual,' as the offense is usually divided into three heads: (1) Where the end to be obtained is in itself a crime. (2) Where the object is lawful, but the means by which it is to be attained are unlawful; and (3) where the object is to do an injury to a third person, or a class, though, if the injury were inflicted by a single individual, it would be a civil injury and not a crime. The gist of the crime being the combination, there must be some understanding between the parties; the mere intention, or cognizance of another's intention, to commit a crime, cannot make a person a co-conspirator. There must be an unlawful combination to complete the conspiracy, whether the crime be at common law or under a special statute making the offense indictable commonly or generally."

It seems that on the 22d of April, 1905, about 200 people, men and women, were gathered together at a picnic at Laurel Bay, on the Edisto river, in Orangeburg county, in this state, and this kind of gathering was usual in each year. People began to assemble at about 11 o'clock in the morning. After dinner and at about 3 o'clock, the defendants appeared on the grounds. They first shot at a bottle in the river, and afterwards within 20 feet of the ladies and gentlemen who had arranged the picnic. Abe Ameker began to play his banjo, while Cleveland Hooker danced and cursed. The other defendants were gathered about these two, including the two negroes of the party. One of the defend-

ants had a paddle in his hand, and the inevitable pistol was also in hand. There was evidently some bad blood created among the picnickers by the presence of the two negroes, and also by the profane swearing, for some people made ready to go home, so as to avoid such bad conduct. It was perfectly natural for those white people to object to the presence of the negroes at their picnic, as well as the use of profanity in their hearing. It was natural, also, for the picnic party to object to the firing of the pistols, but still nothing was done by the picnic party. One of them had a dog, and Charles Cleveland knocked the dog, which caused a Mr. Wisenhunt to ask them not to hurt the dog. At once Cleveland said: "I will kick you." Mr. Fanning said: "I wouldn't take that." Abe Ameker said, "What in the hell have you got to do with it? What have you got to stick your mouth in it for?" And he said: "If there is nothing to do but a fight, you can get it." Abe Ameker walked up with a drawn knife. Mr. Hooker drew a pistol, and there was another knife in the crowd. Mr. Wisenhunt said: "I am not positive that Chicken Ameker drew it." He also said: "The colored men were there. I only saw them in a sort of a scrimmage. I heard some of the ladies ask the gentlemen not to have any row." The defendants were cursing. Chicken Ameker's name was John B. Ameker. Richard J. Salley testified: "I was at the picnic. The first thing I saw was these three white men, dancing and picking a banjo, and cursing before our ladies. I did not get into the row. I was trying to get my mother and family out of the way. The first thing I saw was this black negro knock Shelly Hall down with a boat paddle, knocked him senseless; and I saw Mr. Hooker draw a pistol. He said, 'I will kill the first d—d man that troubles my negro.' The yellow negro had Charlie Hall on the ground, and when Shelly Hall went to pull him off, the black negro knocked him. The question was asked him: 'Who did you see on the log?' and he answered, 'The two Mr. Amekers, these two negroes and Mr. Hooker. They were all there together.' The testimony tended to prove that the defendants were not invited to the picnic. That they were all together; each one of them took part in the difficulty. They were cursing. They shot their pistols. The picnic party were having a happy time until this party of five came upon the grounds. When the indictment was being considered, Mr. Izlar moved that the surplusage therein be stricken out. Motion was overruled. Mr. Sharpe moved that the indictment be specifically drawn as to whether defendants go to trial on the charge of conspiracy or not. The judge said, 'You will go to trial on the charge of conspiracy.' Thereupon Mr. Wolfe, for the defendants, moved that the solicitor elect. Motion refused.

1. It will be noticed that the surplusage which it was moved to have stricken from the

indictment, was not specifically noticed. But we will consider that this motion was directed to the expurging of such parts of the indictment as related to the history of the conspiracy by naming the persons who were interfered with by the defendants. The court ordered that the misdemeanor of a conspiracy at common law should be tried. This necessitates that the character of that offense should be considered. What is conspiracy? Under the law it may be defined as follows: "The combination of two or more persons to do something unlawful, either as a means or as an ultimate end" (Com. v. Waterman, 122 Mass. 43); or, as remarked by 6 A. & E. Ency. page 832: "Conspiracy, therefore, is rather described than defined, and the description which seems to have the widest recognition and approval by the authorities declares a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means." Now, what was the description given by the circuit judge of this offense? In his charge he said: "These defendants, Mr. Foreman and gentlemen, are charged under the indictment with conspiracy, and conspiracy, Mr. Foreman and gentlemen of the jury, is an agreement by two persons to do an unlawful act or to do a lawful act by unlawful means." But the circuit judge goes on and says: "For instance, suppose, Mr. Foreman, that you and the gentleman on your left would go out in the streets of Orangeburg and commit an assault and battery on some other person, that would be an unlawful act, but it would not be a conspiracy, unless there was an agreement between you to do the act before doing it. It is an agreement to do an unlawful act that is the gist of the whole matter." The circuit judge goes further and charges the jury: "If you find that these parties went to the place named and agreed to do the act or acts alleged, they are guilty of conspiracy, or if you find that two or more of them went there and committed the acts alleged by virtue of an agreement so to do, then they are guilty of a conspiracy." It seems to us the circuit judge has, by the charge thus made to the jury, correctly described the offense of conspiracy. So far, therefore, the circuit judge has committed no error in describing the offense of conspiracy.

2. Let us look and see if the circuit judge was in error in holding that there was no surplusage to be stricken out of the indictment. Chief Justice McIver, in his dissenting opinion in the case of State v. Harden, 11 S. C. 360, 374, said: "It is a well-established rule of criminal pleading that an indictment for an offense created by statute must follow the words of the statute; and if it does not, it cannot be sustained except by the rejection of the words *contra formam statuti*, and treating it as an indictment at

common law, which may be done in those cases where the offense existed at common law, and has not been abrogated by any statute." This opinion of Chief Justice McIver has been since affirmed by this entire court—State v. Wolfe, 61 S. C. 27, 39 S. E. 179. So, therefore, any words not absolutely necessary to the indictment would be treated as immaterial, and, therefore, need not be stricken out. State v. Crawford, 38 S. C. 330, 17 S. E. 36. The common-law offense of conspiracy, applying as it does to a riot, is set forth in the indictment. Chitty's Blackstone, vol. 2, 108. But it is alleged that the crime or offense of conspiracy no longer exists in this state. The case of State v. Martin De Witt and George Watts, 2 Hill, 282, 27 Am. Dec. 371, expressly rules that St. 33 Edw. I does not abrogate the law of conspiracy in this state, nor does our Criminal Code 1902, § 233, do so. See, also, State v. Buchanan, 9 Am. Dec. 534.

3. There is nothing in the charge of the circuit judge which is descriptive of the means of proof of this crime of conspiracy in its details, and, therefore, the exceptions which in whole or in part refer to the charge in these particulars, are unsupported. It will be necessary in the report of the case of appeal to set forth the entire charge of the circuit judge. We have considered all the exceptions and overruled them.

It is the judgment of this court, that the judgment of the circuit court is affirmed.

GARY, A. J., concurs in the result.

(73 S. C. 318)

STATE v. GILLIS.

(Supreme Court of South Carolina. Feb. 24, 1906.)

1. CRIMINAL LAW—FORMER JEOPARDY.

Where defendant was indicted for murder, and convicted of manslaughter, and the verdict was set aside on his own motion and a new trial granted, he may be again tried for murder, and such trial is not a violation of Const. art. 1, § 17, providing that no person shall be subject, for the same offense, to be twice put in jeopardy of life and liberty.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 375.]

2. HOMICIDE—CORPUS DELICTI—EVIDENCE.

All elements composing the corpus delicti on trial for murder may be established by circumstantial evidence.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 471, 472.]

Appeal from General Sessions Circuit Court of Barnwell County; Aldrich, Judge.

D. A. Gillis was convicted of manslaughter, and appeals. Affirmed.

G. M. Green, for appellant. Leroy F. Youmans, Asst. Atty. Gen., for the State.

JONES, J. The appellant was indicted and tried for the murder of Nellie Galphin, and was convicted of manslaughter. Upon his own motion a new trial was granted by the

court of general sessions. Thereafter the defendant was again put upon his trial under the same indictment, and entered a special plea that, having been already tried upon an indictment for murder and found guilty of manslaughter, he was thereby acquitted of murder, and could only, if at all, be tried for manslaughter. The trial court sustained the state's demurrer to the plea and ordered on the trial upon the original indictment. Upon the second trial appellant was again convicted of manslaughter and was sentenced to the penitentiary at hard labor for 30 years. By his exceptions appellant renews his contention in this court.

1. The authorities practically agree on the proposition that, when one indicted for murder is convicted of manslaughter, and, upon his own motion, secures a new trial, he may be tried upon the same indictment for manslaughter, upon the ground that he is deemed to have waived his right to plead former jeopardy as to the particular issue upon which he secured a new trial. Inasmuch, therefore, as appellant has only been convicted of manslaughter, we might dispose of this question by holding that, even if there was error in the ruling, appellant has not been prejudiced thereby. But the question sought to be raised is one of grave importance in the administration of criminal law, and we prefer to consider and decide it. Article 1, § 17, of the Constitution, provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life and liberty." This is a great right guaranteed by the Constitution, but, like other rights, may be waived by the accused. *State v. Falle*, 43 S. C. 57, 20 S. E. 798. The real question is as to the extent to which the accused is to be held to have waived this right when he procures a new trial on conviction for manslaughter on indictment for murder. As stated above, the authorities generally hold that the waiver certainly extends so far as to permit a new trial on the same indictment for the offense of which the accused was convicted. Our investigation discloses that the greater number of authorities in other states take the view that a verdict of manslaughter is an acquittal of murder, and that a new trial granted on motion of the accused upon conviction of the lesser offense is not to be considered as a new trial for the greater offense of which he was acquitted, as the accused should not be deemed to have waived his right, in so far as he was acquitted. Of the cases taking this view we cite: *State v. Hornsby* (La.) 41 Am. Dec. 314; *Hurt v. State* (Miss.) 59 Am. Dec. 225; *People v. Gilmore* (Cal.) 60 Am. Dec. 620. But see *People v. Keefer*, 65 Cal. 232, 3 Pac. 818, said to be in conflict; *Jones v. State* (Tex.) 62 Am. Dec. 550; *State v. Martin* (Wis.) 11 Am. Rep. 567; *Johnson v. State* (Ark.) 21 Am. Rep. 154; *State v. Cross* (W. Va.) 29 S. E. 527. There are states which have statutes providing that "the granting

of a new trial places the parties in the same position as if no trial had been had," and in such states it is held that the accused waives the constitutional safeguard against being twice put in jeopardy, and that he may be tried again for murder when he procures a new trial on conviction of manslaughter. *State v. McCord* (Kan.) 12 Am. Rep. 469; *Veatch v. State*, 60 Ind. 291; *People v. Palmer*, 109 N. Y. 413, 17 N. E. 213, 4 Am. St. Rep. 477; *Commonwealth v. Arnold* (Ky.) 4 Am. St. Rep. 114.

If the constitutional provision (article 1, § 17) guarantees that a conviction for manslaughter is an acquittal for murder, even though the conviction be set aside upon the accused's own motion, it is rather difficult to see how a statute providing that "the granting of a new trial places parties in the same position as if no trial had been had" could be valid to annul the constitutional right. If it be so that such statutes are valid and effective in enlarging the effect of the accused's waiver involved in procuring a new trial, then the same effect should follow when the decisions of the judicial department establish a like rule, as in both cases the question is the effect of a voluntary act of the accused proceeding under the rules or law. In the case of *State v. Commissioners*, 3 Hill, 239, the court held that, when a new trial is ordered at the instance of the defendants, upon a conviction on one of the counts in an indictment, the case stands as though it had never been tried, and that defendants may be tried anew on both counts. The court said: "The defendants were found guilty only on one count, and upon appeal the verdict was set aside and a new trial ordered. The verdict was set aside in favor of, and at the instance of, the defendants, who were found guilty. There is nothing in the record that could avail them by way of plea in bar to another prosecution. If the verdict of guilty had remained, it would have protected them, perhaps, from another indictment for the same offense. As long as the verdict of guilty remained on the record there was a finding, but what proceeding is there now on it? I consider all the proceedings on the indictment, since the finding of the grand jury, to be set aside; and set aside at the instance, and for the benefit, of the defendants. The case stands as though it never had been tried. The defendants contended that a verdict of guilty on one count led to the conclusion that they were acquitted on the other; that is, that omitting to find on one count and finding on the other is an exclusion of guilt to the extent not passed on by the jury. Such inference could not have been fairly drawn from what was apparent on the record; and the inference cannot be drawn when all the proceedings on the record are obliterated." The rule declared above was recognized and enforced in *State v. McGee*, 55 S. C. 247, 33 S. E. 353, 74 Am. St. Rep. 741, and the case was remanded for a

new trial on all the counts in the indictment, notwithstanding the defendant had been convicted on the first and third counts, and in legal effect acquitted on the second; but, a new trial having been granted on his motion, the effect was to remove the inference of acquittal on the second count. It is true this rule was applied as to offenses not capital, but the constitutional provision applies equally to offenses involving liberty as well as to offenses involving life as a penalty. The defendant must be held to have made his application for a new trial in view of the rule of law above declared, and must be deemed to have understood as plainly, as if a statute had so declared, that a new trial meant a rehearing upon the whole indictment as if no trial had taken place thereon. In the case of *State v. Stephenson*, 54 S. C. 234, 237, 32 S. E. 305, in considering section 17, article 1, of the Constitution, the court used this language: "According to the decisions of this state, and the weight of authority elsewhere, it may be stated, as a general rule, that one is in jeopardy when a legal jury is sworn and impaneled to try him, upon a valid indictment, in a competent court, unless the jury before reaching a verdict be discharged with the prisoner's consent, or upon some ground of legal necessity, or the verdict if rendered be set aside according to law." So in *State v. McGee*, supra, the court declared: "When a verdict is entered *which is not afterwards set aside at the instance of the defendant* [italics ours], and the jury discharged from the further consideration of the case, its effect is to acquit the defendant on all the counts in the indictment, although the jury may have found him guilty on a less number than the whole of the counts; otherwise he would be subject for the same offense to be twice put in jeopardy of life or liberty a second time."

It is undoubtedly true that the legal effect of a verdict of manslaughter on an indictment of murder is to acquit of the greater offense. This implication or inference, however, rests upon the existence of the verdict of manslaughter as the result of a trial upon the indictment for murder. Remove the fact upon which the inference is based, and necessarily the inference goes with it. The trial for murder involves three principal issues: (1) Whether there was an unlawful killing; (2) whether the defendant committed it; (3) whether it was done with or without malice. A verdict of manslaughter involves a finding on each of these issues, and the effect of setting aside such finding verdict must necessarily be to set aside the finding on all of said issues and leave them open for further trial. The jury said on the third issue there was no malice, but their finding on this issue was set aside on defendant's motion. The defendant concedes that the first and second issues must be relitigated. Can it be possible, under any proper view of the doctrine of waiver, that the third issue must forever re-

main settled in favor of the defendant, when to secure a new trial he must necessarily ask that it be retried? In the convincing language of the Ohio court, in *State v. Behlmer*, 20 Ohio St. 572, published in full in note 14 Am. Rep. 752: "The effect of setting aside the verdict finding the defendant guilty was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on this plea of not guilty was of his innocence; and the burden was on the state to prove every essential fact. The only effect therefore that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act while the fact of the existence of the act was undetermined. This would be a verdict to the effect that, if the defendant committed the homicide, he did it without 'deliberate and premeditated malice.' There can be no legal determination of the character of the malice of a defendant, in respect to a homicide which he is not found to have committed, or rather, of which, under his plea, he is, in law, presumed to be innocent. The indictment was for a single homicide. The defendant could therefore only be guilty of one offense, and could be subject to but one punishment. The degree of the offense differed only in the *quo animo* with which the act causing the homicide was committed. The question of fact was whether a criminal homicide had been committed, and, if so, whether the circumstances of aggravation were such as to raise it above the grade of manslaughter. If the finding as to the main fact be set aside, the finding as to the circumstances necessarily goes with it." The following cases hold to the same view: *Trono v. United States*, 26 Sup. Ct. 125, 50 L. Ed. —; *Bohanan v. State*, 18 Neb. 57, 24 N. W. 390, 53 Am. Rep. 791; *State v. Kessler* (Utah) 49 Pac. 293, 62 Am. St. Rep. 911; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238; *Bailey v. State*, 26 Ga. 579, appears to be the same effect. But see *Waller v. State* (Ga.) 30 S. E. 835, resting the view upon the provision in the Constitution of 1865. We think that the weight of reason is on the side of the cases holding this view, and that such is the logical result of the decision of our own court.

2. Another question raised by the exceptions is whether manslaughter can be proved by circumstantial evidence. The *corpus delicti* consists of two elements: (1) The death of a human being; (2) criminal agency in producing said death. The weight of modern authorities is to the effect that all the elements constituting the *corpus delicti* may be proved by circumstantial evidence. *State v. Martin*, 47 S. C. 71, 25 S. E. 113. See, also, note 68 L. R. A. 75. There is no reason to doubt that the connection of the accused with the homicide may be shown by circumstantial evidence. In all cases to justify a

conviction, the evidence, whether direct or circumstantial, must be of such a character as to leave no room for reasonable doubt that all the elements constituting the offense are established.

The judgment of the circuit court is affirmed.

(73 S. C. 296)

Ex parte REYNOLDS.

(Supreme Court of South Carolina. Feb. 26, 1906.)

1. PARENT AND CHILD—CUSTODY OF CHILD.

The right of a parent to the custody of a child cannot be defeated by a mere parole gift of the child by the parent to another.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, §§ 6, 7.]

2. SAME—CHARACTER OF PARENT.

To establish the charge that a parent's bad moral character and low financial condition make him unfit for the custody of his children, it is necessary to show that the provision for the ordinary comfort and contentment and the intellectual and moral development of the children is not to be expected at his hands.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 21.]

3. SAME.

Where the evidence shows that the father had, by his intemperate habits, brought reproach upon himself and his children, and that he had permitted others to provide for them, but that he has reformed, and is now in a financial and moral condition suitable to care for the children, he is entitled to their custody.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 21.]

4. SAME—WISHES OF CHILD.

The wishes of a child in determining its custody are to be consulted, as it is material for the court to understand them that it may be better prepared to exercise its discretion wisely.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 20.]

Petition by James B. Reynolds for writ of habeas corpus to recover possession of his children. Writ granted.

Sheppards, Grier & Park, for petitioner. B. T. Rice and Bellinger & Welch, for respondent.

WOODS, J. The solemn and painful duty is imposed on the court of determining, in this application for the writ of habeas corpus, the right to the custody of the children, William Osborne Reynolds, Mary Susan Reynolds, and Nannie Reynolds. Mrs. Mary Susan Reynolds, the mother of the children, died in August, 1899. The contest is between James B. Reynolds, petitioner, the father of the children, now residing in Greenwood, and Miss Lucy S. Peyton, their cousin, and Mrs. Mell Bellinger, their step-grandmother, with whom they live together in Barnwell; Miss Peyton claiming William and Nannie, and Mrs. Bellinger claiming Mary. These claims against the father rest upon the allegations (1) that he promised his wife on her deathbed that Miss Peyton should have the rearing of the children, and in pursuance of this

promise has allowed her to keep and support them since their mother's death, and that he is now estopped from taking them back after Miss Peyton has used her means in their support and such strong affection has grown up between her and the children that a separation would be deeply distressing; and (2) that the petitioner drinks to excess, is thriftless, immoral, and without means to maintain and educate his children, and should not be allowed to take them from a home of comfort and refinement where they will be supported and sent to school, and where they wish to remain.

It is important to set out the facts of the family history which gave rise to this deplorable controversy, and reconcile as far as possible the affidavits of witnesses of high character which bear materially on the issues. James B. Reynolds and Mary Susan Bellinger were married February 23, 1892, and thereafter Miss Peyton lived with them on land in Barnwell county in which she had at that time or subsequently acquired at least a life interest. It does not satisfactorily appear to what extent Miss Peyton and Reynolds respectively contributed to the support of the family, but it seems the family lived in agreement and without controversy about matters of property until some time after the death of Mrs. Reynolds, when Miss Peyton moved to Barnwell, taking with her the children, where they remained in Miss Peyton's home with the consent of Reynolds until a short time before this proceeding was instituted. Was this in pursuance of a promise given by Reynolds to Miss Peyton at the instance of his dying wife that she should have permanent custody and control of the children, as Miss Peyton contends, or was it merely a temporary arrangement intended to last until Reynolds could supply a suitable home for them? Mrs. Bellinger gives this statement of the promise: "Deponent was present at the death of said Mary Susan Reynolds, and at her request called her said husband, James B. Reynolds, to her bedside, and, in the presence of this deponent, stated to her said husband that she wished to commit her children to the care and training of Miss Lucy Peyton, and asked him if he would consent and promise that Miss Lucy Peyton should have the raising of her children, and the said James B. Reynolds then and there stated to his dying wife, 'I promise you that she [Miss Peyton] shall have the children.'" Miss Peyton's version is: "That Mary Susan Reynolds, the mother of said children, died at the house and home of the respondent about five years ago; that just a few hours previous to her death, she called the respondent and her said husband, James B. Reynolds, to her bedside, and there asked respondent to take her children and raise them, and then asked her said husband to consent and promise that he would see that the children were committed to the care and raising

of this respondent; that this respondent then and there agreed to accept the care and raising of the said children, and said James B. Reynolds at the same time promised his dying wife that this respondent should have the rearing of said children, and that he would aid in maintaining and supporting them." Dr. Cannon says that the promise was that "the children should be committed to the care of Miss Lucy Peyton, and that she should have the rearing and raising of them, and the said James B. Reynolds then and there agreed to the same, and promised his dying wife that Miss Lucy Peyton should have the raising of their children, and Miss Peyton agreed to raise said children."

When it is remembered that Miss Peyton (then an elderly maiden lady) and the husband were, at the time the promise was made to the dying wife of the same household, living in accord, and that it is not denied that the husband and wife had lived in affection and trust, it would not only be straining the meaning of the words used, but overlooking the environment of the parties and their relations to each other, as well as the motives and purposes to be found in the outflow of natural affection, to suppose that Mrs. Reynolds exacted and her husband promised an absolute surrender of his children. It would not be just to the dying wife and mother to attribute to her a desire, much less the exacting of a promise, that her husband should no longer have a father's care and responsibility for their children. The plain purpose and wish which prompted the request was that Miss Peyton should remain in the father's family and rear and care for the children; there is not a word to indicate that he was to cease to be the head of the family. A promise made under such compelling conditions should not be held to extend to and impose an obligation, legal or moral, which he who promised did not plainly and distinctly contemplate and assume. The utmost that can be said to have been in contemplation in this instance was that Miss Peyton should have the place and duties of a mother, not the rights and obligations of a father. It is true that the affidavit of Mr. H. L. O'Bannon is to the effect that petitioner, long afterwards, told him "that while his wife lay upon her dying bed she made a request of him that their children be given to Miss Lucy Peyton after her death, and to this he consented and promised then, but that he did not intend to abide by that contract now, because at the time it was made he was almost crazed with grief." Mr. O'Bannon does not undertake to give the exact words of the interview, and the petitioner insists that an admission that he had given his children to Miss Peyton was far from his meaning. The impression of Mr. O'Bannon, however, might well have been received from even an exact account of the last interview between the husband and wife by one not familiar with all the circumstan-

ces. However that may be, the accounts of the last interview given by Miss Peyton, Mrs. Bellinger, and Dr. Cannon, all eyewitnesses, warrant the conclusion that the petitioner did not give or promise to give his children to Miss Peyton in the sense of relinquishing to her his rights and duties as a father.

After the death of Mrs. Reynolds, in August, 1899, Miss Peyton, Reynolds, and the children continued to live together as one family until January, 1903, and there is no evidence or intimation that during all this period the petitioner did not claim and exercise the rights of a father. There is, it is true, a variance between Miss Peyton and petitioner as to the support of the family; her statement being that it came mainly from her means, while the petitioner swears she not only did not contribute to the support of the family, but, on the contrary, he contributed largely to her support. It is impossible from the affidavits to reach any satisfactory conclusion on this issue, but assuming that Miss Peyton did contribute generously to the support of the family, this would not imply the surrender of parental authority, especially when all were living as one household.

About January, 1903, Miss Peyton rented the farm on which the family was living and moved to the town of Barnwell, taking with her the children William Osborne and Nannie. She says this change was made necessary by the drinking habits of the petitioner, and that she now supports and sends to school the two children above named, who are living with her. Mrs. Bellinger has had the care of Mary Susan for five years, but she does not set up any promise of the father to her concerning the custody of this child. The petitioner gives this account of Miss Peyton's removal to Barnwell, and the present custody of his children by Miss Peyton and Mrs. Bellinger: "That in the year 1903, Miss Lucy S. Peyton decided to move to the town of Barnwell to the home of Mrs. Mell Bellinger, the widow and second wife of Dr. Martin Bellinger, and requested of this deponent that the said children be permitted to go with her and stay with her until such time as deponent could settle up his business affairs in that county and prepare and arrange for his children a home in Greenwood, where he had decided to remove, to which proposal deponent consented; that deponent stated at the time that he would not give his children to any one and would not give them to Miss Peyton or to Mrs. Bellinger, but would consent for them to remain away from him only for such length of time as was necessary for him to provide a suitable home for them, and he has never renounced his right as a father to their custody or control over or to them or either of them; that Mrs. Bellinger on more than one occasion tried to persuade deponent to give her his daughter Sue, which he has always refused to do." Though this important statement of the circumstances and

conditions under which Miss Peyton was allowed to take the children was made in the affidavit attached to the original petition, it is significant that it is not denied in any of the affidavits submitted on behalf of Miss Peyton and Mrs. Bellinger. The undisputed fact that the petitioner took one of the children, Eleanor Taft, to his home in Greenwood and is still keeping her there without objection on the part of Miss Peyton, and the further fact that Mrs. Bellinger has in her exclusive care another child, Mary Susan, goes very far to support the petitioner's statement that they were never given to Miss Peyton unconditionally, and that she did not so receive them.

The weight of authority sustains the doctrine that the right of a parent to the custody of a child cannot be defeated by a mere parol gift of the child by the parent to another. *Fletcher v. Hickman*, 88 Am. St. Rep. 869, note; 21 A. & E. Ency. Law, 1039; *Washaw v. Gimble* (Ark.) 7 S. W. 389; *Foulke v. People* (Colo. App.) 36 Pac. 640; *Brooke v. Logan* (Ind. Sup.) 13 N. E. 669, 2 Am. St. Rep. 177; *Hussey v. Whiting* (Ind. Sup.) 44 N. E. 639, 57 Am. St. Rep. 220; *Weir v. Marley* (Mo. Sup.) 12 S. W. 798, 6 L. R. A. 672; *Hibbette v. Baines* (Miss.) 29 South. 80, 51 L. R. A. 839; *State v. Libbey*, 82 Am. Dec. 223. The reason upon which this doctrine rests—that such a parol gift is against public policy—is strengthened in this state by the statute which sanctions the disposition by a parent of the custody and tuition of a child, but provides that such disposition shall be evidenced “by his or her deed executed and recorded according to law.” Code 1902, § 2689. Nevertheless, if a parent undertakes to make a parol contract absolutely bestowing the custody of the child upon another, and allows the child to acquire a new home, and strong attachments and tender associations to spring up, the court will not, at his instance, ruthlessly break these ties which have come into existence through his acquiescence and neglect to assert his right. In such case the parent is estopped, and the affection of those who have cared for the child and learned to love it will not be sacrificed unless the interests of the child require that it should be restored to the parent. *Enders v. Enders* (Pa.) 27 L. R. A. 60, note; *State v. Libbey* (N. H.) 82 Am. Dec. 223. By such a surrender, however, the parent does not escape the duty he owes the child and the state to provide for its support and education, if he to whom it is intrusted fails to do so. *Anderson v. Young*, 54 S. C. 393, 32 S. E. 448, 44 L. R. A. 277. Those who receive children from parents without the deed provided by statute, relying upon estoppel of the parents, are charged with notice that the presumption is very strong that a right so precious as that of a parent to a child will not be unconditionally given away except for very cogent reasons, especially when such gift does not free from parental obligation, and it devolves up-

on them to prove a certain and definite agreement and estoppel by conduct by evidence clear and convincing. *Brooke v. Logan* (Ind. Sup.) 2 Am. St. Rep. 184, note. As we have seen, the evidence in this case falls far short of leading to the conviction that there was a clear and definite parol agreement for unconditional surrender of the children by the parent, or that he ever acquiesced in their permanent residence with Miss Peyton and Mrs. Bellinger, or that Miss Peyton or Mrs. Bellinger were led to care for the children and became attached to them on account of any conduct or representation of the petitioner from which they had a right to infer that they would be allowed to keep them permanently.

The next question is whether it is true, as charged, that petitioner's bad moral character and low financial condition make him unfit for the custody of his children. To establish this charge it is necessary to show clearly that provision for the ordinary comfort and contentment and the intellectual and moral development of the children is not to be expected at his hands. Ex parte Davidge, 72 S. C. 18, 51 S. E. 269. We do not think the evidence warrants such a conclusion. It is true, a number of residents of Barnwell of high character made affidavits to the effect that the petitioner was known to them as a thriftless man, unable to provide for the support of his family, and addicted to the excessive use of liquor, and some of them say he pays no debts he can avoid, and has little, if any, regard for his moral obligations. On the other hand, petitioner himself swears that in Barnwell county he conducted a successful business, from which he supported his children, and that he owes no debts there; that he did not drink at all before the death of his wife, but admits that after her death he did to some extent, and on several occasions while living alone in the country in the year 1903, he became intoxicated, but alleges he has not been addicted to the use of liquor since moving to Greenwood in December, 1903. Many highly respectable citizens of Greenwood submit affidavits that petitioner has led there an exemplary life, is conducting a successful business, owns property of considerable value, and is generally regarded an estimable citizen. It appears from the affidavits of the petitioner and his mother and sisters that the children will be gladly received and cared for by petitioner's mother and sisters, with whom he resides. We cannot doubt that in the past the petitioner has brought reproach upon himself and his children by his intemperate habits, and that he has been in grave fault in allowing others to provide in large degree for the support of his children, but the evidence is plenary that a reformation has taken place and that petitioner is now a fit person in character and financial condition to have the custody and rearing of his children. It would be harsh to hold that for such faults as these

a parent should be forever deprived of his children, notwithstanding his subsequent reformation.

In the meantime, however, the children William Osborne and Nannie have become deeply attached to Miss Peyton, and Mary Susan to Mrs. Bellinger, and earnestly ask to be allowed to remain with them. William Osborne is now 13, Mary Susan is 12, and Nannie is 9 years of age. Under the English rule, it seems that the wishes of a child under the age of nurture, which is 14 years, are not to be consulted as to its custody against the claim of its guardian by nurture, and this rule seems to receive recognition in *Ex parte Schumpert*, 6 Rich. Law, 344, and *Ex parte Reed*, 19 S. C. 604, but it does not appear that the point was in either case necessarily involved or adjudicated. It was held, on the other hand, in *Ex parte Williams*, 11 Rich. Law, 452, that the discretion of the court was not to be controlled by the choice of a boy of 15 years. The rule which we think has the support of common sense as well as authority is thus stated in *Hurd on Habeas Corpus*, 532: "The welfare of the child, then, being the object to be attained, no consideration calculated to influence the decision of the question should be overlooked. Hence the wishes of the child are consulted, not because it has a legal right to demand it, but because it is material for the court to understand them, that it may be the better prepared to exercise its discretion wisely. It is not the whim or caprice of the child which the court respects, but its feelings, its attachments, its reasonable preference, and its probable contentment. Consulting the wishes of the infant, we may conclude, is a mere rule of procedure founded upon the duty of the court to exercise a wise circumspection, and not upon any legal right of the infant to decide for himself and the court the question of custody." In this case, Miss Peyton, who claims a gift of the children, is quite advanced in years, and in the course of nature would not probably live to rear the children to maturity. To decree that the children should remain with her would result in permanent separation from their father and sister, who is now with him, and the opportunity of the father to influence and discipline their lives, and regain their filial love and confidence. While the kindness and generosity of Miss Peyton and Mrs. Bellinger, which has elicited the loyal affection of the children, cannot be too highly commended, the evidence is that the children would have, at their father's home, comfort, educational advantages, and affection. It would be unnatural if they did not object to leaving those from whom they have received so much kindness, but their preference is only one factor to be considered by the court in trying to decide for their best interests.

Upon careful consideration of all the facts, the court is satisfied the children should be restored to their father, the petitioner, and

it is so adjudged. Since the rights and duties of the parties are established, there is increased incentive to amicable adjustment. There should be on the one side cheerful recognition of the rights of the parent, and on the other the exercise of those rights by the father with such tenderness and consideration as to ward off all needless pain, and to express his appreciation of the care and labor bestowed upon his offspring by Miss Peyton and Mrs. Bellinger.

(73 S. C. 340)

STATE v. CLARDY et al.

(Supreme Court of South Carolina. Feb. 27, 1906.)

1. CRIMINAL LAW—NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

Where two persons were jointly tried for manslaughter, and there was no evidence tending to show that one of them was guilty, it was error of law, on his conviction, to refuse a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2297, 2298.]

2. HOMICIDE—INSTRUCTIONS—CRIMINAL NEGLIGENCE.

On trial for the killing of a person in a struggle over the possession of a pistol known by accused to be loaded without the giving of any warning of that fact by him, a charge that a criminal intent is attributed to a person who does a grossly careless act was not error.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 586.]

3. SAME.

An instruction that the state must prove beyond a reasonable doubt that defendant killed the deceased intentionally, with criminal intent, and that criminal intent usually leads a person to do the act complained of, and is attributed to a person who does a grossly careless act as the law imputes the unlawfulness of his gross carelessness to the result of it, and also imputes the intent to be grossly careless, and therefore, to act unlawfully, and so make the criminal intent, is not erroneous as instructing the jury that the burden of showing an accidental killing was on defendant.

Appeal from General Sessions Circuit Court of Laurens County; Klugh, Judge.

Coogler Clardy and Dick Davis were convicted of manslaughter, and appeal. Affirmed as to Clardy, and reversed as to Davis.

Ferguson & Featherstone, for appellants. R. A. Cooper and W. R. Richey, for the State.

JONES, J. The defendants, indicted for the murder of Chris Herron, were convicted of manslaughter, and sentenced each to seven years in the penitentiary.

On the 19th day of March, 1905, at Bethel Grove Church, in Laurens county, Chris Herron received a pistol-shot wound from a pistol fired while in the hands of Coogler Clardy, from which he died about two weeks later. Coogler Clardy claimed that the shooting was done accidentally while he and the deceased were engaged in a friendly struggle over the possession of the pistol, while Herron was trying to take the pistol from Clardy's pocket, with no intention on the part of

either to fire the pistol. The testimony for the state tended to show that in the woods near by the church a party of negroes were engaged on Sunday, the 19th day of March, 1905, in gambling with cards, and drinking liquor pretty freely. The deceased, Chris Herron, and Jim Fuller, were partners playing against defendant, Dick Davis and George Fuller. During the progress of the game, Dick Davis charged Jim Fuller with making a misdeal, and a dispute arose. This quieted down, and they began to play again. About this time a message was sent by defendant Dick Davis to the defendant Coogler Clardy, who was some 200 yards away at the home of Addie Henderson, some witnesses saying that the message was, "Come up here, these damn negroes are trying to run over me"; others said that the message was, "Come on and bring my liquor." Then another misdeal was charged, and the game ended in a dispute between Jim Fuller and Dick Davis, in which Dick Davis attempted to strike him with a small walking stick, but Jim Fuller got out of his reach. About this time, or just previous to this, the defendant Clardy arrived on the ground with his hat off, and, as some of the witnesses testified, with his pistol in his hand; others, however, said his pistol was not in his hand when he arrived. We take the following extracts from the testimony of the eye-witnesses.

Jim Fuller testified: "Q. What trouble did you have? A. The trouble we had, the first game we played me and Chris beat the first game, and on the next game we made four and they made one, and then Chris, the cards were dealt to him and he stood the cards and Dick came up with a misdeal, and I seed him when he slipped a card—me and Chris both seed him—and he said it was a misdeal, and I told him no such thing, and he told me it was a damn lie, it was, and then another one back. I says, 'That is all right, Dick.' I says, 'I won't give you no damn lie back.' He says, 'By God, you need not do it.' By that time Chris spoke and says, 'You all quit your foolishness.' He kept on at me to go and play. I says, 'I will just quit now.' As soon as I said that Dick, he ups and says—he didn't call nobody's name, but says, 'Some of you go and call Waitus'—Q. Who is Waitus? A. I don't know what he goes by; he stays at Gray Court. He said to tell him to come up there, those damn negroes were trying to run over us. Q. Who did he send for to come? A. Waitus. Q. Who went for him? A. Waitus. Q. Who did Waitus go for? A. He went for Coogler for Dick Davis. Q. Did Coogler come? A. Waitus went and they were so long coming Pete Williams, he went, but after awhile, after Pete left, after awhile Coogler come up through the woods with no hat on his head and his pistol 'n his hand; he come running up there, and when he got to where he was he wanted to know who in the hell was trying to run over Dick Davis. I says, 'Nobody,

shut your mouth.' He asked me then who was that talking to him. I says, 'Jim Fuller.' He looked down on me then and says, 'Is that you, Jim?' I says, 'Yes.' He says, 'Well, by God, I wouldn't hurt a hair on your head.' Then he asked Dick again who in the hell was trying to run over him. Chris says, 'Coot, quit so much of your foolishness,' and Coot asked him what in the hell did he have to do with it, and he told him nothing, and he told him that, and he just walked up to him and shoved him back and he shoved Chris back, and Chris told him, 'Don't be shoving me that way,' and before he could get straight he run his hand in his pocket and jerked out his pistol and shot him. Q. What was Chris doing, nothing? A. Nothing. * * * Q. What did Coogler do after he shot him? A. When Coogler shot him Chris slapped one hand right here and the other one here (indicating), and says, 'Coogler, you have shot me, and you know I never did bother nobody,' and he walked off a little piece and went to get down, and Coot threw his arms around Chris's neck and says, 'I wouldn't have done this for nothing.' I says, 'Coot, what did you shoot Chris for?' He says, 'I don't know, Jim; I don't know what I shot him for.' Q. Where had Coogler been after the shooting before he came back and said to Chris, 'I wouldn't have done this for anything?' A. He had not been anywhere. Q. Had he walked about any at all? A. No, sir; he had not. Q. Did Coogler say any thing to you after the shooting that day? A. No, sir; Coogler didn't; Dick did. Q. What did Dick say? A. After the shooting had taken place Coot and Dick went on out through the woods. They were gone about five minutes, as near as I can come at it, and come back together and told me to come there. They come as near to Chris as you is to me and told me to come there. I asked them what they wanted. He says, 'Come here.' The money me and Chris had won from Dick he had taken it, and he offered me the money back, and I told him I didn't want it, and he put it in my pocket and says, 'Jim, here, I will give you a dollar to stick to me and Coot, and I told him I didn't want no money, and turned around and walked off, and while I was standing there Coot's pistol dropped out of his pants on the ground, and Dick picked the pistol up and said, 'Come on, let's go,' and they put off back down towards the church. Q. Dick and Coot? A. Yes, sir. Q. What did Dick Davis have in his hand that day? A. A stick. Q. What did he try to do with the stick, if anything? A. He drew it on me twice. Q. What did he say when he drew it on you? A. He was cursing me and daring me to curse him back. Q. After Coogler had shot Chris Herron, what did Dick say to you? A. After he had shot Chris, when Chris went and lied down and Coot went with him, he went and catch hold to Coot and told him to come on; 'Let

the damn son of a bitch go.' Then after he done that he went up in the woods and come back and spoke what I said."

Pete Williams testified: "Q. Were you a looker-on? A. Yes, sir. Q. You were taking no part in the game? A. No, sir. Q. Did you hear any fuss between them? A. Yes, sir. Q. Tell us about it. A. Well, they were gambling, and as far as I heard they gambled a while, and Dick Davis rose up with a stick and 'lowed to Jim, 'God damn your soul, you have been making a misdeal; if you don't play me square I am going to get up and quit.' Q. Who said that? A. Dick Davis to Jim Fuller. So they set back down and went to gambling on, and Dick Davis called this here Waitus Morris and was talking to him and Waitus went down to Addie Henderson's and stayed a long while, and he says to me, 'Pete, you go to tell Coogler to come on and bring my liquor, and I will give you some of it.' I went on down there and met them out down the path, and come on back with them. Q. Who did you meet in the path? A. This here Waitus Morris and Coogler Clardy. I come on back with them and got mighty near there and they stopped and went to talking, and I seed Coogler go in his inside pocket and put a bottle of liquor in there, and take his pistol out and hold it on his side, and went up to the crowd and said, 'Who, in hell, is that after Dick Davis?' They said, 'Nobody; go ahead on about your business.' Q. Who said that? A. Jim Fuller. And then the row sort of started, and about that time Coogler stepped off and Dick Davis jumped off and said, 'You God damn son of a bitch, you been making a misdeal; if you don't give me my money back I will beat hell out of you,' and they got to going around a tree, Dick after him with a stick. Q. Who was he after? A. Jim Fuller. And Coogler walked back up there and says, 'Jim, you are in the wrong,' and Chris got up and said, 'You are in the wrong,' and pushed him back, and Coogler says, 'God damn your soul, don't fool with me,' and pulled his pistol and shot him. And Dick Davis says, 'Yes, that is the way to plug it to a God damn son of a bitch,' and Jim got scared and handed up the money, and Coogler said, 'Chris I wouldn't have shot you for nothing'; and he looked like he was going to die. Q. What was Chris doing when Coogler shot him? A. Nothing."

Allen Parks testified: "Q. Were you playing? A. No, sir, I wasn't playing. Q. You and Pete Williams were looking on? Yes, sir. Q. Tell us what took place during that game? A. Well, they were playing, and they all got up a dispute about something. Q. What was the dispute about? A. In the game, something about a misdeal; that is, Dick and Jim Fuller. Dick, he sends up for Coogler to come up there. Q. Who did he send? A. Waitus. Q. Waitus Morris? A. I don't know, sir; Waitus, all I know is Waitus. Q. He sent after who? A. Coogler.

Q. What did he tell Waitus to tell Coogler? A. To tell Coogler to come up there, the negroes were trying to run over him. Q. What negroes were trying to run over him? A. The Henderson negroes. Coogler come up there. Q. Before Coogler came what did Pete Williams do? A. Pete was still there. Dick told Pete to go down there to tell Coogler to come on up there and bring his liquor, he wanted a dram. Q. How long after Pete left was it before Coogler came? A. About 10 minutes, I reckon. Q. When Coogler came what did he have? A. He come up there and asked what in the hell was the matter with Dick? Q. What did he have? A. He had his pistol. Q. Where was his pistol? A. He had it in his hand sort of this way (indicating). They said there wasn't nothing to matter. Q. Who said there wasn't nothing to matter? A. Jim Fuller, I think it was. Q. Go on. A. And they kept disputing along and disputing and he shot him. That is all I know. Q. Did you see Coogler Clardy when he was hugging and kissing Jim Fuller? A. I seed him when he come up, I never seed the kiss. Q. What did Jim Fuller say to Coogler when he came up? A. Told Coogler there wasn't nothing the matter. Q. Then what did Coogler say to him? A. He said, 'Well, that is all right.' Q. What did Chris say? A. Chris wasn't saying nothing, only telling them to be quiet, boys. Q. Is that all he said? A. That is all Chris was saying. Q. Is that all he did? A. After they all got up, Chris said, 'There wasn't any use of you all trying to run over Jim.' Q. Who was trying to run over Jim? A. Nobody. Q. What was Dick Davis doing? He had a stick drawn on Jim. Q. What was Dick Davis saying? A. He told Jim he had been cussing all day, and he was tired of it. Q. What did Chris Herron say? A. He wasn't saying anything. Q. What did he do? A. He didn't do anything. Q. Did he walk up to where they were? A. He was already there, and after they all begun to shove on Jim, he walked up and says, 'Boys, be quiet.' Coogler pushed him back and shot him. Q. Where did Coogler get his pistol? A. Out of his fore pants pocket. Q. What was Chris doing to Coogler when he shot him? A. Nothing. Q. What did he have in his hand? A. Nothing. Q. After Chris was shot what did he do? A. He turned round and said, 'Lord, you have shot me.' Coogler said, 'I did shoot you. I wouldn't have shot you for nothing,' and he asked him if he wanted him to carry him home. Q. Did you have any talk with Dick and Coogler after they came back? A. After Chris was carried home I was. Q. What did they say to you? A. They were telling something about how to tell it. I forget how they said now. Q. Something about how to tell what? A. The shooting. Q. How did they tell you how to tell it? A. To tell I didn't know who done the shooting. Q. Coogler and Dick Davis told you to tell that?

A. Yes, sir. Q. Where was that? A. Pretty close to where it was done. Q. Did they offer you anything? A. They didn't offer me anything. They offered Jim Fuller a dollar. Q. Who offered him a dollar? A. Dick. Q. In your presence? A. Yes, sir. Q. Did he take it? A. No, sir. Q. What did they offer him a dollar for? A. To tell he didn't know who done the shooting. Q. Did he agree to do it? A. No, sir. Q. Did they offer you the same thing. A. Yes, sir. Q. Did you agree to do it? A. No, sir."

Henry Abercromble testified: "Q. Did you see the difficulty between Chris Herron and Coogler Clardy? A. I did. Q. Tell us what it commenced about and everything about it? A. Just as I walked up they were playing a game, and there was a misdeal, and Dick Davis says, there is another misdeal; and Jim Fuller spoke and says, 'If it is, your damn partner made'; and Dick says, 'Jim, you have been cussing me all day, don't cuss me no more'; and Jim says, 'What is the matter, Dick'; and George says, 'Yes, I meant it go on back.' And that time they raised up and Dick Davis had a stick in his hand and made two licks towards Jim. Coogler and Allen Parks and Jim Wharton were standing off, and Coogler come up and says, 'Who in the hell is trying to run over Dick.' Jim Fuller says, 'Nobody'; and he spoke that again and he says, 'Who is this talking to me?' Jim says, 'It is me.' He looked up at him, and says, 'Is that you? I wouldn't hurt a hair in your head.' He turned around then and says, 'Chris, who is that trying to run over Dick Davis?' Chris says, 'Nobody,' and he spoke the word again, and Chris pushed him back and says, 'Get back, Coogler, damn Dick, quit your foolishness,' and about that time he fired. Q. You were not there when Dick Davis sent Waltus for Coogler? A. No, sir. Q. You came up how long before Waltus and Coogler came up? A. I wasn't there when they came up. Q. Was Coogler there when you went up? A. Yes, sir, standing off a piece talking. Q. You came up after the row had started. A. In time of it. Q. Now, you say Dick Davis had his stick drawn on who? A. Jim Fuller. Q. And what did Jim say? A. He didn't say anything. He asked him what is the matter? Dick spoke and says, 'You have been cussing me all day; don't cuss me no more'; Jim pushed on back. Q. What did Chris Herron do? A. He wasn't doing a thing as I could see. He was looking at them. Q. What did he do to Chris that caused him to shoot him? A. Just pushed him. Q. Why did he push him? A. Coogler asked him who in the hell was trying to run over Dick, and Chris says, 'Oh, damn, Dick, go on and quit your foolishness.' Q. Then what did Coogler do? A. Just shot him. Q. Did he fall? A. No, sir; he just squatted down and said, 'Coogler, you shot me.' He says, 'No, I didn't; if I did, I didn't mean to do it.' Coogler says, 'You want me to carry you home? If I shot you

I didn't mean to do it; I wouldn't do it for nothing in the world.' Coogler says, 'I will carry you home.' That time I was passing by Chris and Chris looked and seed me and says, Henry, come back and carry me home, don't leave me. And I come back to where he was at, and Coogler had his arms around him and says, 'You know I am with you, Chris.' And Chris says, 'Yes, you are too late; you have shot me.'"

For the defense, Jim Wharton testified: "Q. How did it happen? A. I don't know, sir, when I seed it they were all in a huddle. Q. Who was in a huddle? A. Chris and Coot and all of them. Q. Did you hear any threats or fuss there? A. Never heard a bit. Q. Was anybody mad? A. No, sir; they didn't seem to be. Q. Who was together in the scuffle when the pistol went off? A. They were all so packed up together I couldn't tell. Q. Could you tell that Coogler and Chris were there? A. Yes, sir; I know they were there. Q. Did they have hold of each other or not? A. I couldn't tell." This witness testified that he did not see Dick Davis do anything, only when the misdeal came up Dick cursed and Jim cursed too, that Jim picked up the stick, but he did not see him strike anybody with it.

Waltus Morris testified: "Q. Jim Fuller and these boys say that Dick Davis sent you down there for Coogler to come up there, those boys were running over him? A. He couldn't send me when I had not been there. Q. Did any such thing happen? A. I had not been there until Pete come for Coot for Dick's liquor. Q. How did you happen to go up there? A. Coogler asked me to come walk up there with him. Q. You went up there together? A. Yes, sir. Q. Did you have any liquor? A. I had a half pint that belonged to Chris. Q. When did you give it to Chris? A. I didn't give it to him. Q. When you and Coogler walked up there what did Coogler have in his hand? A. Nothing. Q. He didn't have a pistol? A. No, sir; not a thing in his hand. Q. What happened after you got up there? A. When I got up there they begun to try to bring up—there was a little row, I suppose, before I got there. Q. Tell what happened? A. Coot and Chris and all of them got to squabbling, and they run in there together squabbling and hugging up, and the pistol fired. Q. Did you see anybody mad? A. If they did, I couldn't tell it. Q. You could tell whether they were in a good humor or mad, couldn't you? A. It looked to me like everything was going on lovely. Q. Who had hold of each other when the pistol went off? A. I couldn't tell. Q. Could you see Coogler and Chris there? A. Yes, sir; they were there. Q. They were there together? A. Yes, sir. Q. It had been testified that Dick Davis was cutting up and snorting around? A. Dick and Jim Fuller were quarreling a little. Q. Did Dick try to hit anybody? A. Dick had a stick. Q. Did he try to hit anybody? A. Not as I

know of. I didn't pay much attention to it. Q. Jim and Allen and these boys say that Coogler came up there bareheaded, and wanted to know who in the hell was trying to run over Dick Davis? A. If he said that I didn't hear him. Q. You were there? A. Yes, sir. Q. And after that they sort of quieted down, and then Chris Herron said something and sort of pushed at Coot, and Coot pushed him back and drew his pistol and shot him? A. Coot and Chris were pushing when I seen them, and the boys gathering around them. Q. Did they have hold of each other or not? A. It appeared to me like they did, but the whole entire thing was drunk so a man couldn't tell how it was."

George Fuller testified: "Q. It has been testified by Jim Fuller and a lot of these negroes that Dick got into a row and Dick sent Waitus Morris to tell Coot to come up quick, the boys were trying to run over him. A. If he did I didn't hear him say it. Q. You were playing partner with who? A. Old man Dick. Q. When was the first time you saw Waitus? A. We met in the road, and Chris sent him off to get a half pint of liquor. Q. When did Waitus get to where you all were? A. He come up with Coogler. Q. What did Coogler have in his hand? A. I didn't see anything at all. Q. What happened then? A. Nothing, only old man Jim and Dick were sort of cussing one another. Q. What did Dick do? A. He didn't do anything, only told Jim he had been cussing him all day, and jumped up and got his stick. Q. After that? A. They were all standing up in a huddle. Q. Did they stay mad or not? A. No, sir; they didn't look like to me they were mad. Q. Did you see the shooting? A. No, sir; I had my back to them. Q. How were Coogler and Chris Herron standing; what were they doing when the pistol shot? A. They wasn't doing anything as I knows of. Q. How close were they together? A. When I turned around and looked to see who shot, Coogler had caught around Chris to help him up. Q. This is the first you saw of it? A. Yes, sir. Q. You didn't see the actual shooting? A. No, sir. Q. Do you know anything else about this thing? A. No, sir; not nothing much. Q. What did Chris say when he was shot and what did Coogler say? A. Chris said, 'Oh, Lord, I am shot,' and Coogler says, 'Chris, I wouldn't have shot you for nothing; I will carry you home and go and get a doctor for you; you know I am with you.' Chris says, 'I know you is, but it is too late now, I am shot.'"

The defendant Coogler Clardy testified: "Q. How did you happen to go up there? A. Pete come down where me and Waitus was and said Uncle Dick said come up there and bring his liquor. Q. Tell those gentlemen what happened when you got there? A. When I got there they had been playing, and they were arguing, and Jim and Uncle

Dick— Q. Doing what? A. Arguing. They stopped talking to each other. I says, 'Dick, what you want?' and Dick says, 'I want my liquor, give me a drink.' And I stood there and asked Jim what was the matter, and Jim says, 'Nothing,' and I looked and says, 'Who is this; you, Jim?' Jim says, 'Yes.' Me and him hugged and kissed and I says to Jim Wharton, 'Come here,' and me and Jim walked off a piece and I told him to get some liquor, I was going home. Jim said he didn't want any, to give Allen Parks his. About that time they were talking again and Allen Parks come up and got a drink, and Jim Fuller and Uncle Dick got to talking again, and Uncle Dick had a stick in his hand, and Jim Fuller was going backwards with his hand in his hip pocket, telling Dick not to get up on him, and Jim went backwards the distance from here to the door. Q. What did Dick have in his hand? A. A little walking stick, and I went to Jim and begged him not to have no fuss, if he couldn't play without fussing I would quit, and Jim said he would and turned and went off. I went back and says, 'Chris, what is the matter?' And Chris says, 'Nothing, Uncle Dick is going on; give me a drink of liquor.' I give him a drink and took one myself, and that time me and Chris got to scuffling. Q. Were you mad? A. No, sir. My pistol was in my right coat pocket with the barrel up. Chris reached and got it, and time he got it I got it, and we reached and were pulling over it and it went off. Q. What part of the pistol did you have hold of when it went off? A. I had hold of the handle. Q. Did you pull the trigger or not? A. I don't know, sir, how it went off; I was drinking. Q. You were scuffling? A. Yes, sir. Q. What kind of a pistol was it? A. A 32. Q. What kind of action? A. A self-acting. Q. Where did you have your pistol when you went up there? A. In my coat pocket. Q. What happened immediately after the shooting? A. Nothing, only Chris started to lay down; he laid back on one hand and I picked him up. He says, 'Lord, I am shot,' and I says, 'You know I wouldn't have shot you for nothing in the world,' and he says, 'No, but it is too late, I am shot.' And I picked him up and asked him did he want me to carry him home. Q. Where did you go then? A. I stayed there awhile and talked with him. Q. Then where did you go? A. To the road where I had left from."

Defendant Dick Davis testified: "Q. Tell those gentlemen what happened? A. We go up there and set down to take a game of cards, and I said to the boys, 'Let's play for a quarter,' and they said, 'No, not for but 10 cents.' I said, 'If I had knowed that, I wouldn't have come up here fooling with you.' So we set down and went to playing. We played on, and directly a misdeal come up. Jim made that misdeal; the first one made; well, we got that settled and set in

again, and I says to him, 'Now here come up another damn misdeal,' after we played the hand nearly out. Jim commenced cussing again—he had been cussing all the morning—and I says, 'I want you to quit cussing me. I haven't done anything to you,' and he cussed on and after this misdeal, we didn't play any more. We gets up then and stands there talking about it. I got a little light black walking cane. I bought it from the store, and I picked up the stick and says, 'Jim, you been cussing me all day and I am tired of it; don't cuss me any more.' Jim walked backwards from me— Q. What was Jim doing at that time? A. Jim walked backwards a few seconds and put his hand under his coat and says, he wasn't afraid of me. I says, 'I ain't no bear, either a panther.' He walked back and cussed me, walked back around a bush and went off. Coogler come up— Q. Before that? A. Who sent for Coogler? Q. Who did you send? A. Pete Williams. Q. What for? A. For my whisky. Q. Did you tell Pete to tell him that? A. Yes, sir; to come up there and fetch my whisky and I would give him a drink, and directly Pete got back and he never got his whisky. Q. Did you draw your stick? A. No, sir; I just had it in my hand. Q. What did you do with it? A. Carried it home. Q. Did you hit anybody that day? A. No, sir, never hit nobody. Q. When Coogler came up who came with him? A. Waitus Morris and Pete Williams. Q. What happened then? A. They came up there. They were playing and Coogler asked them, 'What are you boys fussing about?' Jim said, 'Nothing.' Chris is the man that said, 'Nothing, there ain't nobody fussing; you know me and Dick never do fuss.' Coogler walks around here by Jim and says to Jim, 'Who is this?' Jim says, 'It is me.' He got down and hugged and kissed Jim, and Jim says, 'Me and you are kin.' He got up and him and Jim Wharton walked off a piece and Allen Parks, and when they come back, when I saw them I was still talking to Jim and I saw Chris and Coogler together. Q. What were they doing? A. It seemed like they were pushing and pulling over one another. Q. What happened then? A. I turned around, still talking to Jim, and just as I turned around the pistol fired. Q. Did Chris and Coogler have hold of each other when the pistol fired? A. Yes, sir."

Both defendants denied that they had offered anybody any money to swear that Coogler didn't do the shooting, as testified by two witnesses for the state.

1. Having thus set out in detail the material testimony of the eyewitnesses, we proceed to consider, first, the question raised in behalf of appellant Dick Davis, whether the circuit court committed error in refusing his motion for a new trial, made on the ground that there was absolutely no testimony upon which to convict him of manslaughter. When there is no testimony upon

which to base a verdict, it is error of law to refuse a new trial. A careful examination of the testimony satisfies us there was no testimony to convict Dick Davis of murder or manslaughter, and that he should have a new trial. He certainly did not assault or strike the deceased, and there was no evidence that he was present aiding or abetting Clardy in his struggle with deceased. His controversy was with another party, Jim Fuller, a relative and friend of his co-defendant, and there is nothing to show concert of action between him and Clardy against Herron and Fuller. However reprehensible in other respects his conduct may have been, before and after the homicide, it will not serve society, or vindicate the law to convict him of an offense which he did not commit. The remaining exceptions relate to the following charge to the jury: "It is incumbent upon the state to prove beyond all reasonable doubt, not only that the defendant killed the deceased, but that he did it intentionally, with a criminal intent, before you can find that he is guilty with reference to the killing. Now, that criminal intent usually leads a person intentionally or voluntarily to do the act complained of, and a criminal intent is attributed to a person who even does a grossly careless act; the law presumes that he intended to do what he actually did do, and if he did an act that was grossly careless, and therefore unlawful, the law imputes the unlawfulness of his gross carelessness to the result of it, and also imputes the intent to be grossly careless, and therefore, to act unlawfully, and so make the criminal intent, which is necessary to make out a case of guilty of crime in any case."

It is contended that these instructions were erroneous: "(1) In charging the jury that the law implies a criminal intent from the performance of a grossly careless act—instead of submitting to the jury the question as to whether or not there was a criminal intent. (2) In charging the jury that he intended to do what he actually did do—when it is respectfully submitted that the intent with which the defendants did the act was the identical question at issue, and which question should have been passed upon by the jury. (3) In charging the jury that if the defendants did an act that was grossly careless, and therefore unlawful, the law imputes the unlawfulness of their gross carelessness to the result of it—which it is respectfully submitted was, in effect, a charge upon the facts, and was, in effect, telling the jury that the law imputes an unlawful killing from the mere fact of the killing. (4) In charging the jury that the law imputes the intention to be grossly careless, when such question should have been submitted to the jury for determination. (5) In charging the jury that the law presumes a criminal intent, or that there is any presumption arising from the killing, when all the facts and circumstances

are brought out. (6) That the charge put the burden of proof that the killing was accidental upon the defendant, whereas the burden was upon the state. (7) That the charge was inapplicable in a case where the defense was accidental killing."

2. At first blush, this appears to be a formidable attack upon the above instructions to the jury, but a careful consideration will, we think, show that the exceptions should not be sustained. In the first place, it must be remembered that the defendants were convicted of manslaughter and that, therefore, it is not material to inquire whether the charge may have been erroneous, misleading, or confusing as applied to the question of malice, an essential element of murder as distinguished from criminal intent, an essential element of all crimes at common law. There being no conviction for murder, all questions touching malice go out of the case. This observation relates especially to that portion of the above charge which states that the law in a case of homicide by gross carelessness "imputes the intention to be grossly careless." Inasmuch as an intention to be grossly careless indicates active wantonness and willfulness, which may be construed as malice, there would have been more ground for criticism of the charge, if the verdict had been for murder. In the case of homicide by gross carelessness in the handling of a deadly weapon, the verdict should be either murder or manslaughter, according as the jury may determine the presence or absence of malice. But as stated, the verdict being for manslaughter, we are only to inquire whether the charge was incorrect with respect to manslaughter. We would remark next that it must be borne in mind that the undisputed fact was that the deceased came to his death from a wound inflicted with a deadly weapon, a loaded pistol, in the hand of the defendant Clardy, and it was not contended by defendant that it was done lawfully in self-defense or otherwise, but that it was accidental. The case of *State v. Morgan*, 40 S. C. 346, 18 S. E. 937, holds: "Where one seeks to be excused for taking the life of another with a deadly weapon on the ground of accident, it must appear that due care was exercised in handling such weapon." It is true, as contended by appellant, that accidental killing is not an affirmative defense, but that the burden is on the state to show an intentional killing. *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661. But the court nowhere in the charge placed the burden to show an accidental killing on the defendant. The charge throughout squarely and explicitly placed the burden upon the state to prove every element necessary to show a criminal homicide. In the particular portion of the charge complained of the court had no reference to the burden of proof to show an accidental killing, but was endeavoring to state the law touching homicide with a deadly weapon through gross

carelessness. To show how carefully the court guarded the rights of the appellant, we quote from the charge: "Unless it appears to your satisfaction beyond all reasonable doubt that there was a criminal intent on the part of these parties or whichever one of them did the act, if either of them did it, then you cannot find that it was an intentional act, and therefore you must attribute it to the doctrine of accidental killing and find a verdict of not guilty. It is incumbent upon the state to prove beyond all reasonable doubt not only that the defendant killed the deceased, but that he did it intentionally with a criminal intent, before you can find that he is guilty with reference to the killing. So, if you have any reasonable doubt as to whether it was an accidental killing or not, find that it was an accidental killing and acquit them. If you are satisfied beyond all reasonable doubt that it was not an accidental killing and you should conclude that they are guilty of either murder or manslaughter, and have a reasonable doubt as to which, find manslaughter rather than murder." Finally, in response to appellant's request, the last words given to the jury were the following: "'If the jury believe from the evidence that Coogler Clardy had a pistol in his pocket, and that Chris Herron undertook to take the pistol away from him, and in a good-natured way they scuffled over the pistol, and in the scuffle the pistol went off, without either party intending it to go off, then I charge you that the defendant Coogler Clardy should be acquitted.' I so charge you."

3. From the foregoing extracts, it is manifest that the appellant could not claim that the plea of accidental killing was not with great fairness submitted to the jury and that the burden of proof was not properly placed upon the state throughout. The verdict of the jury under these instructions establishes the fact that the killing was not accidental. With the foregoing facts and principles in view, we now examine whether the charge was harmfully erroneous with reference to the crime of manslaughter. The court charged that "a criminal intent is attributed to a person who even does a grossly careless act," which, in the light of undisputed facts, meant, that "a criminal intent is attributed to a person who kills another with a deadly weapon from gross carelessness," but the jury were left to determine whether such act was done with gross carelessness. So the language of the charge, "the law presumes that he intended to do what he actually did do," in the light of the facts, simply means, "the law, in the case of a homicide with a deadly weapon under circumstances showing gross carelessness, presumes that he intended to do what he actually did do." In like manner, and eliminating the question of malice and murder, we must view the other expressions in the charge. The circuit judge, recognizing the rule that there must be a criminal intent for every common-law crime, and hav-

ing previously clearly stated the law concerning murder and voluntary manslaughter, was submitting to the jury the law as to voluntary manslaughter, in which gross negligence supplies the place of criminal intent. In such a case, it is not material whether we say the law "attributes" or "presumes" or "imputes" or "infers" or merely "supplies" the necessary criminal intent from gross carelessness. No one can be permitted to say that he committed a homicide with a deadly weapon accidentally, if it appears that it was the result of his gross carelessness. *State v. Morgan*, 40 S. C. 347, 18 S. E. 937. In 90 Am. St. Rep. 571-581, there is an able and elaborate annotation on the subject of "unintentional homicide in the commission of an unlawful act," where the cases are collected. The learned annotator defines involuntary manslaughter as "the unlawful killing of a human being without malice either express or implied, and without intent to kill or inflict an injury causing death, committed accidentally in the commission of some unlawful act not felonious or in the improper or negligent performance of an act lawful in itself." That author further says, "This definition includes homicides resulting from negligent performance, without actual criminal intent, of a lawful act. And undoubtedly the common-law rule is that criminality may be affirmed of a lawful act carelessly or negligently done. The negligence, however, must be aggravated, culpable, gross. That is, it must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as evidences a disregard of human life or indifference to consequences. The negligence in such cases supplies in a measure the direct criminal intent." In Bishop's *Crim. Law* (6th Ed.) par. 313, the author says, "There is little distinction, except in degree, between a positive will to do wrong and an indifference whether wrong is done or not. Therefore, carelessness is criminal, and within limits supplies the place of the direct criminal intent. Thus—homicide from carelessness—every act of gross negligence, even in the performance of what is lawful and a priori of what is not lawful, and every negligent commission of a legal duty whereby death ensues, is indictable either as murder or manslaughter." In note 3 L. R. A. 645, cases are cited to the effect that gross carelessness is criminal, even if the act done is lawful, and that such negligence supplies the place of criminal intent. See Clark's *Crim. Law*, par. 76; Wharton's *Crim. Law* (8th Ed.) par. 125; Roscoe's *Crim. Ev.* 670; Archbold's *Crim. Pr. & Pl.* 655; *State v. Vines*, 93 N. C. 493; 53 Am. Rep. 466; *State v. Emery*, 78 Mo. 77, 47 Am. Rep. 92; *State v. Dorsey*, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111; *Austin v. State*, 110 Ga. 743, 36 S. E. 52, 78 Am. St. Rep. 134. These authorities and others that might be cited show that gross carelessness in the handling of firearms which

results in killing a human being is at least manslaughter. Even if the defendant Clardy's narrative of the circumstances might have been accepted as true, although there is little support therefor beyond his own statement, still the verdict as to Clardy should not be disturbed on any extremely technical or hypercritical view of the charge. In the light of the authorities above cited, we hold it substantially correct as applied to the facts of this case. In view of the many shocking deaths resulting from the reckless handling of firearms, we think it would be highly dangerous to say that struggling over possession of a loaded pistol in a crowd is a lawful sport or recreation, but even if we should go so far as to say that defendant was lawfully engaged in a friendly struggle with the deceased over the pistol, still there was good ground for the jury to hold him grossly negligent. The defendant knew the pistol was loaded and he had hold of the handle, and yet there is no evidence that he warned or informed the deceased of this fact, or that he exercised any care to avoid the unfortunate result.

The judgment of this court is that with respect to defendant Dick Davis the judgment of the circuit court is reversed, and the case remanded for a new trial, but that with respect to the defendant Coogler Clardy the judgment of the circuit court is affirmed.

(73 S. C. 368)

BATSON v. PARIS MOUNTAIN WATER CO.

(Supreme Court of South Carolina. Feb. 27, 1906.)

1. INJUNCTION—DISSOLUTION—ACTION FOR DAMAGES.

No action lies to recover damages from obedience of temporary injunction thereafter dissolved, no injunction bond having been executed according to the order granting the injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 606.]

2. PLEADING—COMPLAINT—AMENDMENT.

Where a complaint alleges that plaintiff was damaged because of obeying a temporary injunction which was thereafter dissolved but in which no bond has been executed, the complaint may be amended under Code Civ. Proc. § 194, authorizing amendments in the furtherance of justice, to compel defendant to pay damages because of the injunction improperly obtained; malice and want of probable cause being charged and the precise damages being set forth from the complaint.

Appeal from Common Pleas Circuit Court of Greenville County; Gage, Judge.

Action by Eugene Batson against Paris Mountain Water Company. From order overruling demurrer and allowing plaintiff to amend his complaint, defendant appeals. Affirmed.

Cothran, Dean & Cothran, for appellant McCullough & McSwain, for respondent.

POPE, C. J. This action was instituted in the court of common pleas for Greenville county, June 20, 1904. On July 10, 1904, the defendant served demurrer. On July 22, 1904, plaintiff served notice of amendment to the complaint. The case was heard upon demurrer and motion to amend, by Judge Gage, at Greenville, November term, 1904. On April 14, 1905, he filed an order overruling the demurrer and allowing the amendment. From this order the defendant in due time gave notice of intention to appeal. To understand this appeal, it will be necessary to copy the complaint, the demurrer, the amendment allowed, the order of the circuit judge and the grounds of appeal.

The complaint: "(1) That the defendant is and was at the times herein mentioned a corporation duly chartered by and under the laws of the state of South Carolina, with power to sue and be sued, and exercising a franchise for the purpose of supplying water to the residents of the city of Greenville. (2) That on or about the 28th day of July, 1903, the defendant above named instituted an action against this plaintiff for the purpose of restraining and enjoining this plaintiff from exercising the rights of ownership over certain real estate owned by this plaintiff in said county and state. That defendant secured a restraining order forbidding this plaintiff to use his premises in certain respects therein set forth, and requiring this plaintiff to show cause on August 1, 1903, why such order should not be made permanent, or continued until the final hearing of the cause, and the condition existing on said premises and characterized by the defendants as a nuisance should be removed. That, upon the hearing of said case upon the return thereto by this plaintiff, his honor, Judge James Aldrich, passed an order requiring this plaintiff to remove the hogpen and hogs from the locality in which they were placed, as alleged in the bill of complaint, and further it was ordered that this plaintiff be restrained and enjoined during the pendency of that action, or until the further order of the court, from locating, maintaining, and keeping any hogs or hogpens upon the streams running through his premises and into Mountain Creek, the source of the water supply of the defendant. Said order further provided that the Paris Mountain Water Company execute a bond in the sum of \$300, to indemnify this plaintiff against any loss to him occasioned on account of said injunction, and furthermore ordered said bond to be executed within 10 days from the date, of said order. (3) That thereupon this plaintiff complied with the terms of said order, and continued so to do until the final hearing of the cause. That at the November term, 1903, of this court, said cause could not be brought to trial over the objection of defendant's counsel, that the same had not been placed upon the docket the requisite

length of time, and thereupon this plaintiff made an effort to have the amount of said bond increased from \$300 to \$1,000, in order to more fully indemnify this plaintiff for such damages as he had already sustained and was then imminent on account of said injunction order. (4) That at the March term of court, 1904, the said cause was called for trial and issues were duly framed by his honor, the presiding judge, James C. Klugh, and submitted to a jury, and answers were duly rendered by said jury in all respects agreeing to the contention of this plaintiff with reference to the merits of said controversy, and finding that this plaintiff did not, at the time of the service of the amended complaint in the original action brought by the Paris Mountain Water Company against this plaintiff, maintain a nuisance such as would seriously affect the health of the citizens of Greenville. (5) That thereafter, on April 14, 1904, his honor, Judge James C. Klugh, passed an order dismissing the complaint of the Paris Mountain Water Company against this plaintiff, and the said action then and there ended, and thereafter the costs in said action were duly taxed and judgment therefor entered up against the defendant herein. (6) That on account of the observance by plaintiff of the terms of the order of injunction of his honor, Judge James Aldrich, this plaintiff has been greatly damaged by reason of the interruption of his usual and ordinary business as a dairyman by reason of this prevention of his raising hogs for his own use and for sale, which was a profitable business, and also by reason of this plaintiff's inability to secure good and suitable tenants and laborers for his farm lands on account of the existence of said injunction order, and this plaintiff has been put to great annoyance and expense in order to attend court, to prepare for a proper defense to the action of the defendant herein, and also in retaining and employing counsel, consisting of two law firms, for the purpose of having the action brought by the plaintiff, Paris Mountain Water Company, dismissed, and for the purpose of dissolving the injunction laid upon this plaintiff, which was the sole purpose of the original action instituted by the defendant herein against this plaintiff. That by reason of all the damages arising on account of the matters hereinabove alleged, this plaintiff has been damaged in excess of the amount of \$300, the sum fixed in the order of his honor, Judge James Aldrich, as the amount for which bond should be given by the defendant herein, and has been further damaged in the sum of \$1,000. Wherefore, this plaintiff prays judgment against the defendant for the sum of \$300 on account of said bond by reason of damages sustained by this plaintiff as aforesaid, and for the further sum of \$700 damage sustained by this plaintiff on account of the unlawful and improvident securing of said injunction or-

der and sustained by this plaintiff in the observance of the terms of said order."

Demurrer: "The defendant demurs to the complaint herein upon the ground that it does not state facts sufficient to constitute a cause of action. Wherefore, the defendant demands judgment that the complaint be dismissed."

Specifications of demurrer: "(1) The complaint does not allege that any bond in injunction was given by the defendant; it is, therefore, not based upon any injunction bond and does not state a cause of action thereon. (2) The complaint shows that the plaintiff voluntarily complied with the order of Judge Aldrich, which was effective only upon the water company giving the injunction bond required. (3) The defendant is not liable in damages for simply serving out the injunction conditioned upon its giving bond, nor for damages incurred by Batson in complying with the order of injunction before the bond was given. (4) The complaint discloses a suit for damages against the defendant for simply having prosecuted against the plaintiff an unsuccessful suit for injunction, which manifestly states no cause of action."

Motion to amend complaint by adding: "First, that said action was instituted by the Paris Mountain Water Company against the plaintiff without probable cause, and for the purpose of maliciously vexing, annoying, and harassing the plaintiff into a sale of said property to the defendant herein at a price far below the value thereof, and for the purpose of distracting the public mind from the real cause of the impure and insufficient supply of water then being furnished to the public of the city of Greenville by the defendant herein; and the seeking and securing of an order of injunction herein was an abuse by the defendant, Paris Mountain Water Company, of the judicial process of this court, and the failure of the defendant, Paris Mountain Water Company, to file a bond pursuant to the order of this court for the purpose of indemnifying this plaintiff against damages suffered by reason of said injunction order was a wrong to this plaintiff and an abuse of the process of this court."

Order of Judge Gage: "A formal order, without argument, was made herein December 19, 1904. It turns out that counsel desired to argue the issues and elaborate arguments have been submitted on each side. The defendant demurred to the complaint, upon the ground it does not state facts sufficient to constitute a cause of action. Thereupon plaintiff moved to amend complaint by adding a new paragraph thereto. So that there are two motions, one by the defendant to dismiss the complaint, and one by the plaintiff to amend the complaint. On the demurrer the complaint must speak for itself; it cannot be added to or subtracted from by statement of counsel, nor by the record in another cause out of which this cause sprang. It is not clear from a close inspection of the

complaint whether it was intended for a suit on the injunction bond, or a suit for simply an unsuccessful action for injunction prosecuted against Batson by the water company, or a suit for a malicious prosecution of Batson by the water company. It might be inferred from the complaint that it was a suit on the bond. True, the pleading does not allege, in so many words, the execution of the bond; but it does so inferentially, for it alleges that Judge Aldrich ordered the bond to be executed within 10 days from the date of the order, and it further alleges that in November, 1903, Batson 'made an effort to have the amount of the bond increased from \$300 to \$1,000, in order to more fully indemnify him.' The first pleading gives no hint that the bond was never executed, but on the other hand asks for 'judgment for the sum of \$300 on account of said bond.' etc. I think the complaint might be sustained as one on the injunction bond, subject, however, to the right of the water company to have it made more definite. If the complaint was intended for a suit against the water company for simply having prosecuted against Batson an unsuccessful action for injunction, it will manifestly not lie. The penalty of an unsuccessful civil action is not in turn another action by the successful defendant against the unsuccessful plaintiff. Every citizen has the legal right to prosecute his suit against another citizen when he does so in good faith; and the only penalty if he lose, is the loss. Again, it is clear the complaint cannot be sustained as one for 'malicious prosecution,' for there is no allegation in it tending to charge the water company with malice in the suit for injunction it brought against Batson, nor is there any allegation that the water company had no probable cause for bringing suit for injunction. It may be these allegations were omitted through oversight. The proposed amendment makes these allegations. It also appears in the proposed amendment, for the first time in the pleadings, that the injunction bond ordered by Judge Aldrich was never, in fact, executed. If the first pleading states a case on the bond, then there is something to amend, and the amendment is allowable, even though it sets up another cause of action: for they sprang out of the same transaction, or transactions connected with the same subject of action. If, however, the first pleading stated no case, the amendment is yet allowable, and that though it sets up a wholly different cause of action in the place of that attempted to be set up in the complaint. It is true, our courts have held in several cases, that where the complaint fails to state a case it is not subject to amendment. It is true, also, that our courts have held that even though a complaint fails to state a case, yet it may be subject to amendment. The line which divides the two classes of opinions is not always discernible. In this case, however, it

is plain that Batson based his cause of action on the wrong which the water company is charged to have done him by the injunction suit. If in reciting that wrong he has omitted these allegations which the law of pleading requires to be made, shall he be now hushed? The law of pleading itself demands that allegations shall be liberally construed; and that a plaintiff may insert other allegations material to the case. The denial now of the amendment would not preclude the plaintiff from yet making the allegations in a new action. It would not end the case. But defendant's counsel earnestly urges that the amendment is not in furtherance of justice. That depends on the truth of the facts alleged in the proposed amendment. If the water company proceeded against Batson in good faith, then it had a right so to proceed, and ought not to be molested for its action. If the water company proceeded against Batson with an evil heart, to vex and injure him, and without probable cause for a suit, then it ought to be liable to him for any wrong done him. Why the water company did proceed against Batson, is a question of fact which a jury of just men ought to determine rightly. I am of the opinion that the demurrer is not well taken, for the reasons stated; but that even though it be well taken, the proposed amendment is allowable."

From this order the defendant has appealed on the following grounds: "(1) His honor erred in not sustaining the defendant's demurrer to the complaint upon the ground that the complaint does not state facts sufficient to constitute a cause of action, in that it appears upon the face of the complaint that the plaintiff voluntarily complied with the order of Judge Aldrich, therein referred to, which order was effective only in the event of the plaintiff in that action giving bond as required, and it is not alleged that any such bond was ever given. (2) The facts in the complaint did not present a cause of action in favor of the plaintiff against the defendant for the reason that the defendant was not liable in damages to the plaintiff for suing out an order of injunction which was obtained conditional upon its giving bond; nor for damages incurred by the plaintiff in this action for complying with said order before a bond was given. (3) The complaint does not allege that any bond in injunction was given by the defendant; it is, therefore, not based upon any injunction bond, and does not state a cause of action thereon. (4) The complaint discloses a suit for damages against the defendant for simply having prosecuted against the plaintiff an unsuccessful suit for injunction, which manifestly states no cause of action. (5) His honor erred in allowing the amendment proposed by the plaintiff in this action, for the reason that the said proposed amendment changes entirely and substantially the cause of action alleged in the original complaint. (6) His honor erred in holding that the amendment propos-

ed is allowable under section 194 of the Code of Civil Procedure of 1902, for the reason that the amendment proposed entirely and substantially changes the cause of action stated in the original complaint and states a wholly different and new cause of action when the original complaint stated none. (7) Error in holding: 'It might be inferred from the complaint that it was a suit on the bond.' Specifications: The complaint does not purport at any point to allege a cause of action upon an injunction bond; it is not alleged that any such bond was executed; it is not alleged that any breach of such bond was committed by defendant; the complaint alleges that the plaintiff suffered certain specified damages by reason of his observance of the order of injunction; the complaint alleges damages in excess of the amount of the bond required to be given; it was intended to state a cause of action independent of the bond. (8) Error in holding: 'I think the complaint might be sustained as one on the injunction bond.' Specifications: The complaint does not purport at any point to allege a cause of action upon an injunction bond; it is not alleged that any such bond was executed; it is not alleged that any breach of bond was committed by defendant; the complaint alleges that the plaintiff suffered certain specified damages by reason of his observance of the order of injunction; the complaint alleges damages in excess of the amount of the bond required to be given; it was intended to state a cause of action independent of the bond. (9) Error in holding: 'If the first pleading states a case on the bond, then there is something to amend and the amendment is allowable even though it sets up another cause of action; for they spring out of the same transactions connected with the same subject of action.' Specifications: (a) The first pleading did not state a case on the bond. (b) If it did, the proposed amendment did not purport to add allegations material to such cause of action. (c) It does not purport to allege a second cause of action springing out of the same transaction or transactions connected with the same subject of action. (d) It purports to change the cause of action (if it be on the bond) to one of malicious prosecution, an entirely new, distinct, and separate cause of action. (e) The complaint was intended for a suit against the defendant for simply having prosecuted against Batson an unsuccessful action for injunction. It states no cause of action at all. There was, therefore, nothing to amend by. (10) Error in holding: 'If, however, the first pleading stated no case, the amendment is yet allowable, and that though it sets up a wholly different cause of action in the place of that attempted to be set up in the complaint.' Specifications: Amendments are allowable for the purpose of adding allegations material to the case defectively stated in the complaint and not for the pur-

pose of stating a wholly different or new cause of action than that attempted to be set up in the original complaint. (11) The amendment is improper for the reason that an action for malicious prosecution of a civil action lies wholly where the defendant upon such prosecution has been arrested without cause and deprived of liberty, or made to suffer either special grievance in person or property different from and superadded to the ordinary expense of a defense, none of which are alleged in said amended complaint."

We will now examine these exceptions under the two heads. First, the demurrer interposed by the defendant to the plaintiff's complaint. We have reproduced the complaint so that we may the more readily pass upon the causes of action set up therein. From its inspection it appears that Eugene Batson claims that he was damaged by the injunction sought and obtained from his honor, Judge Aldrich, by which the said Batson was to be enjoined from having his hogs with his hogs placed near the streams through Batson's land emptying into Mountain Creek, the stream from which the Paris Mountain Water Company obtained water to supply the people of Greenville. His damages in said complaint were alleged to consist, first, in the loss itself from the hogs; second, in the cost of attendance upon court in looking after said lawsuit, and also in hiring two firms of attorneys to upset the injunction; and third, the losses following upon his inability to obtain hands or farm laborers on account of said injunction. The said Batson in said complaint declares that the injunction was "the sole purpose of the original action instituted by the defendant herein against this plaintiff." The prayer of the complaint was both for the sum of \$300, on account of the bond ordered by Judge Aldrich, and the further sum of \$700, on account of the unlawful and improvident securing said injunction order, and sustained by the plaintiff in the observance of the terms of said order. It seems to us that the complaint falls to state that the bond was signed by said Paris Mountain Water Company, but the claim growing out of the said bond is mentioned. Under these circumstances we conclude that the complaint falls to state a cause of action. The circuit judge, in effect, so holds. It may be remarked just here that there can be no cause of action predicted upon a right of action against the water company for simply having prosecuted against Batson an unsuccessful action for injunction. As was well remarked by Judge Brevard, in the case of *Thomas v. Rouse*, 2 Brev. 75: "To bring a civil action, though there should be no ground for it, is not actionable, unless for consequential damages." We sustain, therefore, the first four grounds of appeal.

But we have still remaining the exceptions relating to the amendment of the complaint. The section of the Code of Civil Procedure

of 1902, which is claimed by the circuit judge to authorize the amendment is section 194, which is as follows: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding * * * or by inserting other allegations material to the case." It seems to us that the circuit judge committed no error when he allowed the amendment. Certainly the plaintiff did complain of the injury wrought to him by the obtaining the injunction. All that the plaintiff seeks in the complaint as amended is to compel the defendant to pay damages to the extent of \$1,000, because of said injunction improperly, as he alleges, and improvidently obtained, and these precise damages were set forth in the complaint. It seems to us that the two cases of *Ruberg v. Brown*, 50 S. C. 397, 27 S. E. 873, and *Sutton v. Catawba Power Company*, 70 S. C. 266, 49 S. E. 863, are directly in point. We must, therefore, overrule all the exceptions relating to the amendment of the complaint.

It is the judgment of this court that the order of the circuit court be, and it is, affirmed.

(124 Ga. 1003)

TUCKER v. MANN.

(Supreme Court of Georgia. Feb. 19, 1906.)

CHATTEL MORTGAGES — SALE OF PROPERTY MORTGAGE—CONSENT OF MORTGAGEE.

A. executed and delivered to B. a promissory note which contained a clause conveying to B. the title to a certain mule as security. B. had the note recorded in the county of A.'s residence. Before the note was fully paid, B. authorized A. to sell the animal and to turn the proceeds of the sale over to him. A. sold the mule to D. against whom B. then brought an action of trover to recover the animal. Upon the trial of the case the court charged: "If you believe from the evidence that plaintiff * * * gave * * * the maker of the note permission to sell the mule sued for, coupled with the condition that [A.] was to pay to him the money that he received from the sale of the mule, and the defendant * * * bought the mule in good faith from [A.] and without the knowledge of this condition, then the plaintiff cannot recover. The defendant would not be required to see that the conditions were complied with, and would get a good title to the mule and you should find for the defendant." *Held*: (1) That the charge quoted was not error; and (2) that, the evidence showing the facts to be as stated above, the verdict for the defendant was proper. See *Guill v. Northern*, 67 Ga. 345.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Suit between R. W. Tucker and J. J. Mann. There was judgment for the latter, and the former brings error. Affirmed.

Gleaton & Gleaton and Jno. R. Maddox, for plaintiff in error. E. M. Smith, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(124 Ga. 896)

ZIPPERER v. DOYLE.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. AGRICULTURE — SALE OF FERTILIZERS — FAILURE TO TAG SACKS.

A plaintiff cannot recover on an account for the sale of fertilizer, made on February 12, 1902, if it be made to appear, by the evidence, that the sacks containing the fertilizer were not tagged according to law (*Holt v. Navassa Guano Co.*, 40 S. E. 735, 114 Ga. 668); and a charge of the court excluding from the consideration of the jury any evidence tending to show that they were not so tagged constitutes reversible error.

2. APPEAL — QUESTIONS OF FACT — CONCLUSIVENESS OF TRIAL COURT'S ACTION—ADMISSION OF EVIDENCE.

Under the rule, that "when the competency of a witness depends upon the determination of a question of fact, the decision of the judge will not generally be disturbed, if there is any evidence to authorize his finding" (*Carroll v. Barber*, 47 S. E. 181, 119 Ga. 856, citing *Dowdy v. Watson*, 41 S. E. 266, 115 Ga. 42), the ruling of the court below in excluding the testimony of the defendant as to a conversation had with the deceased member of the plaintiff's firm, alleged to have been heard by the surviving member who was at the time engaged in writing at a desk in the same room, but who denied having heard any such conversation, will not be interfered with.

3. SAME.

No reversible error, other than that indicated in the first headnote, was committed, either in the charge to the jury or in the rulings of the court upon the admissibility of evidence.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action between D. W. Zipperer against J. A. Doyle. There was judgment for the latter, and the former brings error. Reversed.

Twiggs & Oliver, for plaintiff in error.
Walter G. Charlton, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur, except ATKINSON, J., who did not preside.

(124 Ga. 1024)

WETHINGTON v. G. S. BAXTER & CO.

(Supreme Court of Georgia. Feb. 19, 1906.)

INJUNCTION — CUTTING TIMBER — GIVING OF BOND BY DEFENDANT—DISSOLUTION OF INJUNCTION.

Where an equitable petition was filed for the purpose of enjoining the cutting of timber, and on an interlocutory hearing it was shown that the damages which the plaintiff would suffer would be irreparable and incapable of ascertainment and computation, if the presiding judge reached the conclusion that the plaintiff had established his right, it was error to allow the injunction or restraining order to be dissolved upon the giving of a bond by the defendant to answer for any recovery which the plaintiff might have upon the final trial. In such a case the bond would not afford adequate protection to the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by Joseph Wethington against G. S. Baxter & Co. There was judgment for de-

fendant, and plaintiff brings error. Reversed.

Wilcox & Patterson, for plaintiff in error. Toomer & Reynolds, for defendant in error.

LUMPKIN, J. 1. Wethington filed his equitable petition against Baxter & Co., seeking to enjoin them from cutting timber on certain land. He alleged that he had a perfect title by chain from the state, and attached an abstract to his petition. In addition to this he also made the following allegations in regard to the irreparable nature of the damages which would ensue, and with reference to the financial condition of the defendant: "That the timber now standing and being upon that part of said lot uninclosed constitutes the chief value thereof, and that it varies in size and distribution upon the lot; and if the defendants are permitted to cut, remove, and utilize the same, plaintiff will, after the same has been cut and carried away, be without any adequate means of ascertaining the exact quantity of lumber manufactured therefrom, and will thus be deprived of any knowledge of the extent of his injury. That the said defendants are not possessed of sufficient means, clear of incumbrances, above their other liabilities and the amount allowed under the homestead exemption laws of said state, or otherwise financially able to respond in damages to plaintiff aforesaid." The answer of the defendants denied that the plaintiff owned the land, and asserted ownership thereof. It admitted their intention to cut and manufacture for their own benefit all the timber on the land in controversy. It further denied inability to respond in damages. In answer to that portion of the petition in respect to the irreparable character of the injury and the difficulty in computing the damages which would result from cutting the timber, the defendants admitted the statements of the petition, "except the implied allegation of the fifth paragraph, that cutting the timber on the lot of land would result in injury to the petitioner." On the hearing the plaintiff introduced a chain of title from the state of Georgia to himself. Objection was made by the defendants to the introduction of several of the instruments constituting parts of this claim. The presiding judge made no ruling upon their admissibility, but let them in, stating that he would consider the objections "with the other issues involved." The plaintiff also amended his petition by alleging that he had a good prescriptive title, and introduced an affidavit in support of that contention. In regard to the irreparable nature of the damages which would accrue to him if injunction were not granted, and the difficulty of computing them, he stated as follows: "Affiant further swears that the timber on the lot claimed by him is indispensable in keeping his plan-

tation and buildings in repair, and that he has no available timber other than that claimed, and the small timber on the other two lots described, that can be used for this purpose. That the timber upon that part of the lot in dispute, uninclosed, constitutes the chief value of the lot, and in view of the fact that it varies in size and distribution, it will, when cut and carried away, be impossible to ascertain the exact quantity of lumber manufactured therefrom. That the damages sustained will not be capable of exact computation and cannot be accurately and completely measured in money."

The defendants objected to the allowance of the amendment, and also to the admission of the affidavit of the plaintiff above referred to when offered as evidence, but their objections were overruled, and no exception was taken to the rulings of the court in regard to them. The defendants introduced a counter claim of title under which they claimed, but made no denial of the evidence contained in the plaintiff's affidavit. The presiding judge granted an order to the effect that the restraining order should be dissolved and the defendants allowed to cut the timber upon giving a bond to the plaintiff in the sum of \$500, conditioned to pay the plaintiff any judgment he might recover at the final trial of the case. To this judgment the plaintiff excepted, and assigned error in the provision of the order allowing the defendants to dissolve the restraining order upon giving bond.

The order which the presiding judge passed showed that he thought the plaintiff was entitled to some protection. Had he been of the opinion that the plaintiff was without title, he would have doubtless refused the injunction unconditionally. The order which he granted, in effect, continued the injunction of force unless the defendants would give the bond. In other words, he substantially held that the plaintiff was entitled to have an injunction or a bond. The evidence that the damages would be irreparable and incapable of ready computation and ascertainment was undisputed, and the allegation in the petition to this effect was practically not denied. Under such circumstances, if the plaintiff is entitled to an injunction at all, permitting the defendant to give a bond and dissolve it does not afford the plaintiff adequate protection. *Stoner v. Patten* (Ga.; filed Jan. 13, 1906) 52 S. E. 894. On the subject of irreparable damages which will authorize an injunction, see *Camp v. Dixon*, 112 Ga. 872, 876-881, 38 S. E. 71, 52 L. R. A. 755, and *ctt.*; *Murphey v. Harker*, 115 Ga. 77, 41 S. E. 585; *Gillis v. Hilton & Dodge Lumber Co.*, 113 Ga. 622, 38 S. E. 940; *Wiggins v. Middleton*, 117 Ga. 162, 43 S. E. 432; *Enterprise Lumber Co. v. Clegg*, 117 Ga. 901, 45 S. E. 281; *Stonecipher v. Wilson*, 120 Ga. 466, 47 S. E. 936; *St. Amand v. Lehman*, 120 Ga. 253, 47 S. E. 949; *Huxford*

v. Southern Pine Co., 124 Ga. 181, 52 S. E. 439. If injunction is granted under what is known as "the timber cutter's act," provision in respect to requiring bond of the plaintiff is stated in Civ. Code 1895, § 4927.

Judgment reversed. All the Justices concur.

(124 Ga. 898)

MOORE v. HOUSTON COUNTY.

(Supreme Court of Georgia. Feb. 19, 1906.)

PLEADING—CONSTITUTIONALITY OF STATUTE.

A general allegation in a petition that an act of the legislature is unconstitutional, without in any way specifying the particular provisions of the Constitution with which it is claimed to conflict, is too vague and indefinite to raise any question for determination.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 39.]

(Syllabus by the Court.)

Error from Superior Court, Houston County.

Action by M. J. Moore against Houston County. Judgment for defendant, and plaintiff brings error. Affirmed.

R. N. Holtzclaus, for plaintiff in error.
A. C. Riley, H. A. Mathews, and C. E. Brunson, for defendant in error.

BECK, J. This is an action by former county treasurer of Houston county to recover a balance of some \$900 alleged to be due him by the county in payment of his legal commissions on sums received and disbursed by him in the discharge of his official duties. It is admitted in the petition that plaintiff had received \$400 per annum during his tenure of office, which amount was paid him under and by virtue of the act approved March 2, 1875 (Acts 1875, p. 286), but he insists that the act is unconstitutional and void, and that he is entitled to the regular commissions allowed to county treasurers by section 472 of the Political Code of 1895. The court sustained the defendant's demurrer upon the ground that the petitioner's compensation was fixed by said act, and the plaintiff excepted.

In his petition the plaintiff avers in general terms that the act was and is unconstitutional and void. The demurrer of the defendant merely stated that the petitioner was not due the amount sued for, because the act fixed his compensation. In the bill of exceptions the plaintiff alleges that "said demurrer should have been overruled and denied on each and every ground thereof." The plaintiff in his petition undertook to, and did, set out the act of the Legislature limiting and fixing the compensation of the county treasurer of Houston county; and all of the plaintiff's claims against said county had been fully paid and satisfied according to the terms of that act, and his right to a recovery in this case was precluded by the terms thereof if this act was valid. This the plaintiff realized, and to avoid the force of

the act he alleged that "said local act was and is unconstitutional and void." Such a general objection to an act of the Legislature, however, raises no question for decision. No attempt was made in the petition, nor in the bill of exceptions, to point out the particular provision of the Constitution contravened by the act in question, and under numerous decisions of this court such an averment as to the unconstitutionality of a statute is too vague and indefinite to raise any question for determination. *Newkirk v. Southern R. Co.*, 120 Ga. 1048, 48 S. E. 426, and numerous cases there cited.

Judgment affirmed. All the Justices concurring, except ATKINSON, J., not presiding.

(124 Ga. 874)

THOMPSON v. THOMPSON.

(Supreme Court of Georgia. Feb. 19, 1906.)

ERROR, WRIT OF — DIVORCE — CUSTODY OF CHILDREN — FAST WRIT OF ERROR.

An order modifying a previous order passed on a motion for alimony, determining the custody of children pending the litigation, cannot be reviewed on fast writ of error.

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by Maude C. Thompson against William C. Thompson for divorce. From an order awarding custody of child to petitioner pending trial, defendant excepts, and also to overruling of the demurrer, and brings error. Dismissed.

Mrs. Maude C. Thompson brought a petition for divorce against William C. Thompson, and an application for alimony, counsel's fees, and the custody of her two children. After a hearing upon the application, an allowance was made for temporary alimony and counsel's fees, and the custody of the two children was awarded the defendant. This order was granted November 30, 1905. On December 7, 1905, Mrs. Thompson moved for a modification of the order above referred to, reciting that, when the youngest child, a girl of six years, was being delivered into the custody of the defendant, physical force was necessary to take the child from the petitioner, that the child bitterly resisted the separation, and that the separation had induced in the petitioner great anguish, so that at the time of filing the motion the petitioner was on the verge of nervous prostration. The defendant demurred to the motion, on the ground that the order passed by the court, in the absence of subsequent occurrences, was final and res adjudicata between the parties, and objected to any modification of the order upon the same ground. By consent, the motion was used as evidence for the plaintiff, and the defendant offered testimony in rebuttal, concerning the unwillingness of the child to be taken into his custody, and the effect thereof upon the plaintiff. An order was granted

modifying the order of November 30, 1905, and the custody of the youngest child was awarded the petitioner, pending the trial of the cause. To this order the defendant excepted, and also to the overruling of his demurrer.

A. H. Cox, C. P. Thompson, and J. D. Kilpatrick, for plaintiff in error. J. F. Rogers, F. C. Foster, and J. E. McClelland, for defendant in error.

COBB, P. J. (after stating the foregoing facts). A motion was made to dismiss the writ of error on the ground that exception was taken to an interlocutory order which is not of such a character that this court can review it on a fast writ of error. The Code provides that in suits for divorce the judge presiding may either in term time or vacation grant alimony, "and may also on said motion hear and determine who shall be entitled to the custody of the children pending the litigation, as if the same were before him on a writ of habeas corpus." Civ. Code 1895, § 2461. Among the cases enumerated in the Code which may be brought to this court by fast writ of error are those involving "the granting or refusing of an application for alimony." It is contended that this case "sounds in alimony," and that, therefore, any order in an alimony proceeding may be reviewed on a fast writ of error. The general rule is that cases must come to this court on an ordinary writ of error, and the statute making an exception to this rule has always been strictly construed. A fast writ of error lies to review an order granting or refusing alimony, and not to every order that may have been passed while such application for alimony was pending. See *Gordon v. Gordon*, 109 Ga. 262, 34 S. E. 324.

But it was said that this was in fact a habeas corpus case, and that under the act of 1897 (Acts 1897, p. 53) all bills of exceptions in habeas corpus cases shall, as regards the practice of the lower court and of the Supreme Court, be governed in all respects, where applicable, by the laws of force in reference to bills of exceptions in cases of injunction. Where an application for injunction is granted or refused, the ruling complained of may be reviewed on fast writ of error. Civ. Code 1895, § 5540. An order modifying an interlocutory injunction is not reviewable by a fast writ of error. *Stubbs v. McConnell*, 119 Ga. 21, 45 S. E. 710, and cit. Even if the case be treated as a habeas corpus case, the order complained of is one modifying the judgment in the habeas corpus case, and, applying the rule applicable in cases of injunction, the order cannot be reviewed on fast writ of error. The order complained of cannot, under any circumstances, be treated as one granting or refusing alimony. It is really not a habeas corpus case. It is mere-

ly an interlocutory order in a divorce case which is still pending. It belongs to the numerous class of cases which, unfortunately for the parties, cannot, under the existing law, be reviewed on writ of error. The law of the state as laid down by the law-making power, and as interpreted by the decisions of this court, must be obeyed. We are therefore constrained to dismiss the writ of error.

Writ of error dismissed. All the Justices concur.

(124 Ga. 1004)

SOUTHERN RY. CO. v. COMBS.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. HIGHWAYS—DEFINITION.

Every thoroughfare which is used by the public, and is common to all the public, and which the public has a right to use, is a highway.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 1-11.]

2. SAME—ESTABLISHMENT.

A highway may have its origin in a legislative act, or in the order of a court of competent jurisdiction, or may come into existence by dedication or by prescription.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 1-11, 25-27.]

3. RAILROADS—CROSSING SIGNALS—PUBLIC ROADS.

A public road, within the meaning of the blow-post law, is a highway originating in one or the other of the methods above referred to.

4. SAME—PRIVATE WAYS.

The words "established pursuant to law," appearing in Civ. Code 1895, § 2220, following the words "the public roads or private ways," limit and qualify only the words, "private ways," and have no reference to the words "public roads."

5. SAME—TRIAL—EVIDENCE.

There was no error in the rulings on the admission of evidence, the charges complained of were not erroneous for any reason assigned, the evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by W. J. Combs against the Southern Railway Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

W. J. Combs brought suit against the Southern Railway Company, and alleged: On September 5, 1900, there existed near petitioner's residence, in Henry county, a public road crossing, where the Peeksville and Hampton public road, legally recognized as a public road for 30 years, more or less, crossed the track of the defendant company at the same grade, and was recognized as a public road by the defendant. On September 5, 1900, a servant of petitioner was driving two mules and a wagon over the crossing, when the mules and wagon were struck by a train of the defendant, the two mules killed, the wagon demolished, and the harness destroyed. The train approached and ran over the cross-

ing at a speed of 30 miles an hour, without checking its speed. No bell was rung, no whistle blown, nor other warning given. A cut prevented the driver from seeing the approaching train until too late to get off the track. By amendment the plaintiff alleged that the public road crossing over the defendant's track was used and maintained by the public, and persons were accustomed to pass over the defendant's track at that point with the full knowledge of the defendant, and that the crossing was built and maintained by the defendant. The jury found a verdict for the plaintiff. The defendant moved for a new trial, upon the general grounds, and upon numerous special grounds relating to the admission of evidence and instructions of the court. The motion was overruled, and the defendant excepted.

C. E. Battle, for plaintiff in error. J. F. Wall and E. M. Smith, for defendant in error.

COBB, P. J. (after stating the foregoing facts). 1-4. The term "highway," in its popular sense, is a road or way open to the use of the public; a main road or thoroughfare. Webster's Int. Dict. A way open to all the people is a highway. Though every public thoroughfare is a highway, it is not essential that every highway should be a thoroughfare. Elliott on Roads and Streets, (2d Ed.) § 1 et seq. A road which leads only to the residence of a single individual may be a highway. Every thoroughfare which is used by the public, and, in the language of the English books, is common to all the King's subjects, is a highway. 15 Am. & Eng. Enc. Law (2d Ed.) 350. Highways are created by legislative authority, by dedication, or by prescription. The construction of the term "highway," when used in a statute, depends upon the legislative intent, and no fixed rule in regard to its meaning can be given. The term "road" is frequently used as synonymous with "highway," but it does not appear to have any fixed legal meaning. 15 Am. & Eng. Enc. Law (2d Ed.) 350 et seq. In order to properly determine what is a public road, within the meaning of the blow-post law as is contained in Civ. Code 1895, § 2220 et seq., it becomes necessary to take a review of the legislation finally culminating in these sections.

In 1838 the General Assembly passed an act with the following title: "To amend the road laws of this state so far as to cause to be kept in good repair all places where any railroad which now is or hereafter may be chartered crosses or may cross any public highway in this state." The act made it the duty of all railroad companies "to put and keep in good travelling order and repair the public road at such point or points where the same may be crossed by their respective railroads"; and then proceeded to provide for removing obstructions from such crossings, and requiring that railroad companies put

the crossings in good condition for travel. Acts 1838, p. 216; Cobb's Dig. p. 955, § 58. No further duty in reference to the crossings than that of maintenance in good order was imposed by this statute. The duty of a railroad company to erect blow-posts and give signals of the approach of trains at crossings had its origin in the act of January 22, 1852 (Acts 1852, p. 108). On December 14, 1851, there was at a road crossing in Monroe county a collision between the train of the Macon & Western Railroad Company and a carriage, containing a lady and her four children, driven by a negro slave, which resulted in the death of two of the children and the driver, and serious injuries to some of the other occupants. The catastrophe was of such a distressing nature that the General Assembly, then in session, promptly passed the act above referred to. This accident was the foundation of the cases of *M. & W. R. Co. v. Davis*, 18 Ga. 679; *M. & W. R. Co. v. Winn*, 19 Ga. 440; and *M. & W. R. Co. v. Winn*, 26 Ga. 250. The title of the act of 1852 was "An act to prescribe certain rules and regulations to be observed by railroad companies in running engines upon their respective tracks, and fixing a penalty for violating the same." The act provided that the several railroad companies in this state should be required, by the 1st of February following, to prepare and put up signboards, parallel with their tracks, "over each and every public road where the same crosses the railroad track," with the following words painted thereon in large letters: "Look Out for the Engine When the Whistle Blows." It also provided that there should be fixed on the line of the track, at a distance of 200 yards from the center of each public road, on each side of the road, a post, and the engineer should be required, when he arrived at either of the posts, to blow the whistle of the engine until the engine arrived at the public road, and, moreover check the speed of the engine so that the same might be stopped should any person or thing be crossing the track on the public road. A failure to erect these signboards was declared to be a misdemeanor, for which the president and directors of the company were indictable. The failure of the engineer to comply with the provisions of the act was also declared to be a misdemeanor.

By an act approved December 17, 1859 (Acts 1859, p. 64), the act of 1852 was amended so as to repeal that provision in reference to the signboards, and to require the blow-posts to be placed at a distance of 400 yards from "the center of each public road on each side of said road," making the president and directors indictable only for failure to erect the posts. That portion of the act of 1852 which required the engineer to blow and check as he approached the crossing, and making him indictable for failure to comply with these provisions of the act, were unaffected by the act of 1859. Such was the condition of the law in regard to the duty

of railroad companies in reference to the maintenance of public road crossings, and the manner of operating their trains over the same, at the time that the Code of 1861 went into effect. The duty in regard to maintenance of public road crossings had its origin in the act of 1838, which made no reference to the manner in which trains should be operated over the crossings, and this duty applied to all public roads. As indicated by the title of the act, the term "public roads" was used in the sense of "highways." The acts of 1852 and 1859 make no reference whatever to the act of 1838, but in each of these acts the provisions are such as to be applicable to "each public road" in this state. There is no reference whatever in any of these acts to private ways, nor anything to indicate a classification of public roads.

The compilers of the Code of 1861 placed in one article, under the title "Railroad and Other Crossings," the different provisions of law in reference to railroad crossings. A large part of this title is traceable directly to the three acts above referred to, though there were some changes made by the compilers. The act of 1838 finds expression in section 678 of the Code of 1861, which has been brought forward into the Code of 1895, as section 2220, in the exact language in which it appeared in the Code of 1861, which is as follows: "All railroad companies shall keep in good order, at their expense, the public roads or private ways established pursuant to law, where crossed by their several roads, and build suitable bridges and make proper excavations or embankments, according to the spirit of the road laws." In this section, for the first time, appears the expression "or private ways established pursuant to law," which follows the words "public roads." As this is the first reference to private ways, and as the words "public roads," without any qualifying expression, can be traced directly to the act of 1838, it is to be presumed that they were used in the Code exactly in the same sense in which they were used in the act of 1838, and that the qualifying expression applies only to the words "private ways."

The duty of maintenance of public road crossings, therefore, under the Code, is the same duty that arose under the act of 1838, and applies to all public roads of any kind and nature whatsoever. And even if the words "established pursuant to law" would have the effect to classify public roads into roads established by the General Assembly and by the ordinary and by county commissioners into one class, and public roads established in other ways into another class, the words "public roads," used in the Code evidently in the broad and comprehensive sense of "highways," embraces every public road of every class. The provisions in reference to the blow-post and the duty of the engineer on reaching such posts, taken from

the acts of 1852 and 1859, are found in section 2222 of the Code of 1895, in identically the same language as they appear in section 680 of the Code of 1861. The section is connected with the preceding sections by the use of the words "said roads." That is, the effect of the codification was to provide that the provisions of the acts of 1852 and 1859 should be applicable to every road to which the act of 1838 applied. And all three of the acts in the original applied to each and every public road in the state. Though there were some other changes made by the codifiers in the provisions of what we now call the "blow-post law," they are not material to the present discussion. For instance, under the Code, the superintendent, instead of the president and directors, is made indictable for failure to erect a blow-post. Civ. Code, 1895, § 2223. The engineer is still indictable for a failure to blow the whistle and check the speed of the train; but, by an act passed in 1875 (Acts 1875, p. 17), the tolling of the bell of the locomotive is declared to be a compliance of the act when the train is within the limits of a municipal corporation. While the duty of maintenance applies, since the Code of 1861, to "private ways established pursuant to law," the duty as to blow-posts and giving signals and checking the train upon approaching the crossing does not apply to private ways. *Ga. R. Co. v. Cox*, 61 Ga. 455.

So as far as we have been able to find, there is no direct ruling by this court that the words "established pursuant to law" apply to private ways and do not qualify public roads. There are expressions used in a number of opinions which would indicate that it was in the minds of the judges who prepared the opinions that these words qualified both public roads and private ways. See *Comer v. Shaw*, 98 Ga. 543, 25 S. E. 733; *Ga. R. Co. v. Partee*, 107 Ga. 791, 33 S. E. 608; *Ga. R. Co. v. Cromer*, 106 Ga. 296, 31 S. E. 759; *Ga. R. Co. v. Cox*, 61 Ga. 455; *Willingham v. Macon & B. Ry. Co.*, 113 Ga. 377, 38 S. E. 843. There are also expressions in some of the opinions leading to the conclusion that a public road established pursuant to law would be only a road laid out by the General Assembly or by the positive action of the county authorities, and that the provisions of the blow-post law apply only to such roads; that is, roads of such a character that their existence can be shown as a matter of public record. The writer has for a number of years entertained this view; that is, that the blow-post law had no application to a public road which was not of record in some public office where the law provides for public roads to be recorded or registered. When he prepared the opinion in *Ga. R. Co. v. Cromer*, 106 Ga. 296, 31 S. E. 759, he entertained the view that the words "established pursuant to law" qualified both public roads and private ways, and that public roads thus qualified

were roads, the existence of which could be shown by a public record. The case just referred to involved a road which had been in existence as a highway for a century or more, and still the case was tried in the superior court and disposed of in this court on the theory that the blow-post law was not applicable, for the reason that the existence of the road as a public road did not appear of record in the county record or elsewhere.

The present investigation into the history of the law requiring railroad companies to keep in good order the public road crossings, and regulating the manner in which trains should be operated over the crossings, has constrained the writer to abandon his former views in reference to the matter, and brought him to the conclusion that the purpose of the act of 1838, and of the acts of 1852 and 1859 in reference to the manner in which railroad trains should be operated over public road crossings, was to require railroad companies to take the precautions specified by those acts, wherever there was a public road crossed by a railroad, without reference to how such public road became a public road—whether it became so by the public using the same and the county authorities keeping it in repair for such a length of time that it was to be treated by the law as a public road, or whether it was established as a public road in a more formal manner, and registered and recorded as such. It is certain that a road may become a public road when it has been used by the public and worked by the public authorities for 20 years, and it is unnecessary now to determine whether a use by the public and a working by the public authorities for a less period would make a road a public road. A public road can come into existence by public use and public work, and when such use and work is continuous for 20 years it is certainly a public road, so far as the right of the people to use the same as a highway is concerned. See *Sav. Ry. Co. v. Gill*, 118 Ga. 748, 45 S. E. 623; *Habersham v. Sav. & Ogeechee Canal Co.*, 26 Ga. 665; *Branan v. May*, 17 Ga. 136. The act of 1838 was intended to require railroad companies to keep in repair crossings at highways; that is, roads used by the public. The acts of 1852 and 1859 were to protect the users of the highways where the highways crossed the railroads. And at last the controlling and material question is not so much where is the public record which identifies the public road? but does a highway exist which is used by the public, which is being worked by the public, and in the use of which danger to the public results when a railroad crosses the same? The purpose of the blow-post law was to prevent, as far as possible, such accidents as occurred in Monroe county in 1851, and there is nothing in the acts of 1852 or 1859, or in the Code, to indicate that there was in the legislative mind, at the time when these acts were passed, the idea of a classification

of public roads, either as to their width, or as to the manner of their creation, or otherwise. The existence of the public road over the railroad was the thing which was calculated to bring about casualties of the character intended to be prevented. Where the public are crossing railroad tracks, and where they have a right to cross them, the danger exists, and the blow-post law was intended to protect them at these points.

In reaching the conclusions just stated, we have not been unmindful of the fact that the Code declares: "All roads laid out for public use by an act of the General Assembly, if not otherwise provided, or by an order of the ordinary, are declared to be public roads." Pol. Code 1895, § 509. Nor of the various provisions following the section just quoted, which relates to the width of roads, and the manner of laying out, altering, and working the same. Nor have we overlooked that section of the Code which declares: "All public roads established without a substantial compliance with the provisions of the last named section are void." Pol. Code 1895, § 523. The act of December 4, 1799, declared: "All the roads in the several counties of this state that have been laid out by virtue of any act of the General Assembly, or by virtue of any order of court, are hereby declared to be public roads." Cobb's Dig. p. 943, § 1. It will be at once seen that the section of the Code first above quoted is a mere codification of this act. In making this declaration the Legislature did not intend to declare that the roads established by the General Assembly, or by the order of court, were the only public roads, but the purpose was to make all public roads belonging to either of these classes public roads of the state without reference to other considerations. It was never intended by this act to abrogate the well-settled rule of the common law, that a public road might come into existence by prescription. In *Branan v. May*, 17 Ga. 136, a decision delivered in 1855, Judge Lumpkin said: "This was a public road existing by prescription, and consequently required no written authority emanating from the inferior court to prove its existence as a highway." In that case the plaintiff was suing the defendant for the value of two mules alleged to have been drowned by reason of defendants erecting a mill race across the public road, without authority of law. The court admitted evidence of the use of the road as a highway. The objection was that there was higher evidence—the order of the inferior court. A road established by the General Assembly is a public road. A road established by the proper county authorities is also a public road. A road established by prescription is no less a public road. That is, when for a period of 20 years the public have been accustomed to travel a road, and the authorities of a county having charge of the working and repairing of

roads work the same, and keep it in repair, the road becomes a public road, so far as the right of the public are concerned.

We have not failed to consider the argument of counsel as to the inconvenience which might result to railroad companies in determining when a road is such a public road as that the blow-post law must be complied with, but the inconvenience resulting to the railroad companies is no greater than the inconvenience resulting to any citizen who may desire to use the road in some way by which the public may be inconvenienced, as was *Branan's Case*, where the mill owner erected his mill race across the highway. If the road is a public road of record—that is, a road established by the General Assembly, or by an order entered upon the county records—the traveling public must be protected by the erection of a blow-post, and by the engineer's complying with the provisions of law relating to public road crossings, and they are equally entitled to protection at any other public road crossing, no matter how the road came into existence as a public road. When the railroad company fails to erect a blow-post at the crossing, it does so at its peril, if the road crossed is, in fact, a public road of any class. The company's failure to erect blow-posts would render the company liable to any one injured as a result of such failure. That provision of the Political Code which declares void roads not laid out in a given manner does not have the effect to destroy the right of the public in a road established by dedication or prescription. If the county authorities attempt to lay out a public road and do not comply with the provisions of the Code, then the road is void, and the county authorities are under no obligation to work the same and keep it in repair. But if the road be actually laid out, though not in conformity to law, and even in violation of the law, and it be actually worked by the county authorities, and used by the public for a period of 20 years, the road becomes a public road of this state, not by virtue of the irregular order of the court, but by virtue of public use and public work in maintaining it for the period referred to. The foregoing discussion disposes of all of the assignments of error in the motion for a new trial, which relate to the admission of evidence in reference to the use of the road by the public, and the charge of the court as to the duty of the engineer in giving signals and checking his train as it approached the crossing.

5. The court instructed the jury, in substance, that if they found that the road crossed by the railroad was a public road, and the company had failed to erect blow-posts 400 yards on each side of the crossing, that this failure would be negligence on the part of the railway company. This portion of the charge was assigned as error, for the reason that there was nothing in the peti-

tion complaining of negligence resulting from the failure to erect a blow-post at the crossing. If a railroad company fails to erect a blow-post at a public road crossing the superintendent of the company is indictable, and the railroad company is negligent, and the judge is authorized to instruct the jury that a failure of the company to comply with the law in reference to erecting blow-posts would be negligence, as a matter of law. If the company erects the blow-posts and the engineer fails to give the signals and check the train as required by law, the engineer is negligent, the railroad is negligent, and the engineer is indictable. But the superintendent would not be indictable. If the company fails to erect the blow-posts the superintendent is indictable. The engineer would not, under such circumstances, be subject to indictment for failure to give the signal of approach to the crossing, for the essential element in the crime would be lacking; that is, a failure on his part to give a signal at a post erected at a proper place. While the engineer would not be indictable for failing to give a signal in approaching such a crossing, such failure on his part would be negligence on the part of the railroad company, and the judge would be authorized to instruct the jury, as matter of law, that the failure of the engineer to give the signal was negligence, as well as to give an instruction that, as matter of law, the company would be negligent in failing to erect the blow-posts. In other words, as matter of law, the company is negligent in the failure of the superintendent to have the blow-posts erected; and the conduct of the engineer, resulting from this negligent act of the company, would be, as a matter of law, negligence on the part of the company. It is apparent from an examination of the petition that it was the intention of the pleader to state a case of negligence resulting from a failure of the company to comply with the provisions of the blow-post law. While the petition does not allege that there was a blow-post on each side of the crossing, the petition does distinctly allege that the road was "a legally recognized public road" and "was so recognized" by the defendant. The failure of the engineer to sound the whistle and check the train on the approach to the crossing was negligence on the part of the company, without reference to the presence of blow-posts.

The charge complained of was pertinent and authorized by the pleadings. The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

Judgment affirmed. All the Justices concur, except EVANS and BECK, JJ., dissatisfied.

(124 Ga. 1063)

MONTGOMERY v. REYNOLDS et al.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. WRIT OF ERROR—ASSIGNMENTS OF ERROR—DIRECT BILL OF EXCEPTIONS.

A direct bill of exceptions to a ruling, made pendente lite, which does not assign error upon any final judgment will not be entertained by this court. *Newberry v. Tenant*, 49 S. E. 621, 121 Ga. 561; *Kibben v. Coastwise Dredging Co.*, 48 S. E. 330, 120 Ga. 899; *Harrell v. Tift*, 70 Ga. 730; *Trustees, etc., v. Merchants' & Planters' National Bank*, 62 Ga. 284; *Barge v. Robinson*, 41 S. E. 258, 115 Ga. 41.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 344-425.]

2. SAME—CASES OVERRULED.

In so far as the case of *Haskins v. Bank of the State of Georgia*, 27 S. E. 985, 100 Ga. 216, and cases which follow it, are in conflict with the ruling here made, they have been practically overruled. *Kibben v. Coastwise Dredging Co.*, 48 S. E. 330, 120 Ga. 899-901.

3. SAME—DISMISSAL.

In the case of *Newberry v. Tenant*, 49 S. E. 621, 121 Ga. 561, it was held that "a statement in a bill of exceptions, that 'plaintiff excepts to said verdict and judgment as being contrary to law,' is not a valid assignment of error and will not be considered by this court. * * * Accordingly, where the only attempt to assign error upon a final judgment was ineffective for the reason stated in the first headnote above, and every other assignment of error was in the form of a direct exception to a ruling made pendente lite, the writ of error must be dismissed." This judgment was rendered by a full bench, and is binding until reviewed and reversed, or modified. It is conclusive in the present case.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action between A. A. Montgomery and H. T. Reynolds and others. There was judgment for the latter, and the former brings error. Writ dismissed.

Henry Walker, for plaintiff in error. R. T. Fouchi and M. B. Eubanks, for defendants in error.

LUMPKIN, J. Writ of error dismissed. All the Justices concur.

(141 N. C. 245)

HEAVENER v. NORTH CAROLINA R. CO.
(Supreme Court of North Carolina. May 11,
1906.)

RAILROADS—INJURIES TO PERSON ON TRACKS
—INSTRUCTION.

In an action for the death of plaintiff's intestate, an instruction that if defendant's train, while running, on a track much used by the public both in crossing and in walking thereon, at a rapid rate, without any headlight or other proper signal, ran over deceased, and if there had been a proper light on the engine, or the bell had been ringing, he would have had notice of the approaching train in time to escape the danger, and would have escaped, and if he did not have such notice or warning, and by reason thereof was injured, then such failure to have the headlight or other proper signal was continuing negligence and the proximate cause of the injury, was proper.

Appeal from Superior Court, Cabarrus County; Bryan, Judge.

Action by John E. Heavener, administrator, against the North Carolina Railroad Company. Verdict and judgment for plaintiff, and defendant excepts and appeals. No error.

Action for personal injury caused by alleged negligence of employé and agents of Southern Railway Company, operating defendant's road under lease from defendant. There was evidence tending to show that on the night of March 6, 1904, intestate of plaintiff, while walking along the track of defendant in the town of Concord, was run over and killed by the train of defendant's lessee; that the place of the occurrence was between the Buffalo and Cannon Mills, a thickly settled portion of the town of Concord, and the track there was used as a common walk way by the mill hands and others. One witness testified: "The mill people use the railroad track as a common walk way. It is very thickly settled along there and the track is used as a path and walk way, I suppose, as much as any street in Concord." Another witness testified that the plaintiff's intestate "and everybody else in that section used the railroad track in coming and going from the mill and in coming and going from the depot, and nobody ever objected to it." That it was a dark and rainy night, and the intestate was going along the track to his boarding house "like we always go," and he was run over and killed by the train going north and that said train had no headlight and gave no signal or warning of any kind. Intestate's ante mortem statement received without objection was as follows: "I was coming up the track from the depot to my boarding place like we always go. It was raining hard, and I turned my collar up round my neck to keep from getting wet. The first thing I knew the train struck me. I never heard the train. I did not see any light and it didn't have any light and it did not give any signal. The first thing I knew, it had struck me." There was other testimony as to the absence of light and the failure to give any signal. At the request of plaintiff, the court below gave special in-

struction to the jury as follows: "If the jury should find from the evidence, the burden being upon the plaintiff to establish it by the greater weight of the evidence, that the defendant was running its train through the corporate limits of the town of Concord along its track, and that this track whereon the train was running was much used by the public, both in crossing the track, and in walking on the track, and if the jury should further find from the evidence that on the night alleged by the plaintiff, it was running its train at the place above stated, at a rapid rate without any headlight or other proper signal, and while so running ran over and killed the intestate; and if the jury should further find from the evidence that if there had been a proper light upon the engine, or if the bell had been ringing, the intestate would have had notice of the approaching train in time to escape the danger, and would have escaped, and that the plaintiff did not have such notice or warning, and by reason thereof was injured, then such failure to have the headlight or other proper signal was what the law calls 'continuing negligence,' and would be the proximate cause of the injury and the jury should answer the first issue 'Yes,' and the second issue 'No.'" There was verdict and judgment for plaintiff, and defendant excepted and appealed.

W. B. Bodman and Geo. F. Bason, for appellant. Jas. A. Lockhart and Montgomery & Crowell, for appellee.

PER CURIAM. The principle embodied in the special prayer for instructions is in accord with the decision of this court in *Stanley v. Railroad*, 120 N. C. 514, 27 S. E. 27, and others of like import. These cases are decisive in favor of plaintiff's right to recover on the facts presented in the record, and the court holds there is no error.

In this charge the intestate was not relieved of all obligation to look and listen by reason of the defendant's breach of duty, as in *Cooper's Case*, 140 N. C. 209, 52 S. E. 982, cited and relied upon by the defendant. On the contrary, the prayer for instructions assumes that the plaintiff was required to do both and rests the right to recover on the fact that the intestate was prevented from noting the approach of the train, by reason of the defendant's failure to have a light or give any warning of its approach—this fact to be determined by the jury.

No error.

(141 N. C. 249)

BROWN v. CITY OF DURHAM.

(Supreme Court of North Carolina. May 1,
1906.)

1. MUNICIPAL CORPORATIONS — DEFECTS IN STREETS—FAILURE TO REPAIR OR GUARD— NEGLIGENCE.

For a city to permit a washout a foot or more wide and eight inches or more deep, extending half way or more across the path of

one of the most populous sidewalks of a much-used street and adjacent to a large hole just outside the sidewalk, to remain for ten days without being repaired, and without rails or barriers and light to guard the hole, was negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1615, 1747.]

2. NEGLIGENCE—QUESTION OF LAW.

Negligence may be defined by the judge as a question of law, when the facts make out such a clear case that there could be no two opinions among men of fair minds.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 277-289.]

3. MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTS IN STREET—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where the evidence was conflicting as to whether there was sufficient light to have enabled plaintiff to note the conditions of the sidewalk, the question of contributory negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1756.]

Appeal from Superior Court, Durham County; Shaw, Judge.

Action by R. J. Brown against the city of Durham. Verdict and judgment for plaintiff, and defendant excepts and appeals. Affirmed.

Civil action to recover damages for personal injuries caused by the alleged negligence of defendant corporation. The usual issues in actions of this character were submitted: (1) As to defendant's negligence. (2) Contributory negligence on the part of the plaintiff. (3) Damages. There was evidence tending to show that on Saturday night, July 30, 1904, the plaintiff was seriously injured by falling into a hole adjacent to the south sidewalk of Peabody street. The street was much used by the public. It extended from the residence of J. S. Carr to Union Station, ran parallel with Main street, and was the only street between Main street and the North Carolina Railroad. The plaintiff was going from Durham to his home in East Durham. He stepped into a washout extending across the sidewalk and fell into the hole. It was five feet or more in depth, six to ten feet wide at the top, and adjacent to the sidewalk. At the bottom of the hole were a stump, roots, and rocks. It had been there nine years or more, and was made more dangerous by the city when it raised, graded, and macadamized Peabody street, two years or more before the date of the plaintiff's injury. The edge of it next to the sidewalk was perpendicular, the sidewalk having been built up with masonry at that point. There were no rails, guards, or other barriers to prevent those using the street from falling into this dangerous hole, and none had ever been there. There was no light placed at the hole to warn travelers, and the nearest street light (the only one giving any light at that point) was located 110 yards away on Main street on the "off" side from the hole and upgrade. For some

time before the date of the injury, from ten days to two weeks, a washout, caused by the overflow of water across the sidewalk at that point, had been widening and deepening, being about 1 inch deep next to the curbstone and 12 inches or more at the edge of the deep hole. The plaintiff's own testimony as to the occurrence and condition is as follows: "I have lived at Durham for nearly 15 years; was injured Saturday, July 30, 1904, between 8 and 9 o'clock p. m.; was injured near the old freight depot on the south side of Peabody street, opposite to where Queen street enters the same; was on the side next to the depot, going from the city of Durham to my home. There was a sidewalk on the south side of the street. I stepped into the washout across the sidewalk and fell down, and it threw me into a deep hole to the right or south of the sidewalk. The deep hole was close to the sidewalk; did not see the washout before I stepped into it; did not know it was there; was walking on the sidewalk in the usual way; the washout seemed to be about 1 or 1½ feet deep; do not know which foot I stepped with into the hole. Stepping into the hole, not expecting it, it threw me on my right side on the ground and gave me a kind of a whirl, and I went into the deep hole, which had thrash, stumps, roots, and some water and rocks in it. It was six or seven feet deep. I think I fell to the bottom of it; fell in the hole in doubled-up condition. No one was with me at the time. There was nothing there to protect me from the hole. It was four or five feet wide; had never noticed it before. There were some weeds or bushes growing in it when I fell. There was no light there; could not see any light, except when I went up at the street car line on Main street. This would not light the hole." There was evidence on the part of the defendant tending to show that the defendant had no actual notice of the washout across the sidewalk, and that there was light enough at the time, noticed and spoken of by the witnesses, from the electric lights supplied by the defendant for the streets, to enable one to see and observe the conditions at the place of the injury. Verdict and judgment for the plaintiff. The defendant excepted and appealed.

Manning & Foushee and R. B. Boone, for appellant. Winston & Bryant, for appellee.

HOKE, J. (after stating the case). The right of the plaintiff to recover on the facts set out in the case on appeal is fully sustained by the principles announced in *Bunch v. Edenton*, 90 N. C. 431, and *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; and there is no error in the record, certainly none which gives the defendant any just ground of complaint.

Among other things, the judge below charged the jury that it would be a breach of duty on the part of the city for it to per-

mit a hole or washout one or more feet wide and eight inches or more deep, and extending two feet or more across the sidewalk, adjacent to an opening into a large hole five feet or more deep and four feet in diameter just out of the sidewalk, to remain without light and without railing or barriers to protect the same for an unreasonable length of time. And his honor further charged: "If you find from the greater weight of the evidence that the defendant permitted a washout one foot or more wide and eight inches or more deep, extending half way or more across the path of one of the most populous sidewalks of a much-used street in the city of Durham and adjacent to a large hole, such as above described, just outside the sidewalk, to remain without being repaired and without rails or barriers and light to guard such a hole for the space of ten days, this would be an unreasonable length of time." The second portion of the charge is especially urged for error in that the judge held ten days to be an unreasonable length of time as a matter of law. We think the charge was clearly correct. There was evidence tending to prove the facts suggested, and, if proved, they are not only sufficient to fix the defendant with notice, but they make out such a clear case of negligence that there could be no two opinions on the question among men of fair minds; and this is the test established by the decisions on trials of this character, determining when negligence may be defined by the judge as a question of law. *Russell v. Railroad*, 118 N. C. 1098, 24 S. E. 512; *Ramsbottom v. Railroad*, 138 N. C. 38, 50 S. E. 448.

There was evidence on the part of the defendant that the street lights provided by the town, while some distance away, at times noticed by the witnesses, and generally, gave light enough to have enabled the plaintiff to note the conditions of the sidewalk. The plaintiff himself testified, however, that there was nothing to protect him from the hole, that he had never noticed it before, and that there was no light there. He could not see any light, except when he got up to Main street on the street car line. In this conflict of testimony, the question as to the effect of the plaintiff's conduct was properly left to the jury under a correct charge on the issue as to contributory negligence.

There is no error, and the judgment below is affirmed.

(141 N. C. 780)

STATE v. POWELL.

(Supreme Court of North Carolina. April 3, 1906.)

INTOXICATING LIQUORS—ILLEGAL SALE—KNOWLEDGE OF INTOXICATING QUALITY.

Though the statute declaring sales of intoxicating liquors an offense does not provide that the sale must be "willfully and unlawfully" made, it is in fact qualified by such words, so

that the defense of ignorance of the fact, the ignorance not being due to negligence, is available; and for such purpose defendant may show that the liquor he sold was bought by him as a "soft drink" under the name of "phosphate" with a guaranty of the manufacturer that it was nonalcoholic and nonintoxicating, the manufacturer's agent furnishing what purported to be a statement from the Internal Revenue Commissioner that it was nontaxable; that he bought and sold it, believing that it contained no alcohol; and that he sold it only the day after he received it, when hearing that it was charged to be intoxicating he immediately closed it up, and returned it to the manufacturer.

Appeal from Superior Court, Robeson County; Justice, Judge.

Sylvester Powell was convicted of selling intoxicating liquor, and appeals. Reversed.

Defendant was indicted for retailing intoxicating and spirituous liquor contrary to the statute, etc. The state introduced Jim Ezzell, who testified that on Tuesday, February 6, 1906, at the store of the defendant, in Lumberton, he purchased at two or three times, a certain drink called "phosphate," or something of the kind; that it would take about a quart of this drink to intoxicate; that he paid 25 cents a quart for the liquid so purchased by him. On cross-examination he further testifies that he returned to defendant's Wednesday morning and offered to purchase more, but defendant declined to sell him any, telling him that he had understood that it was alleged that the "phosphate" drink was intoxicating, and if so, he would sell no more of it, but would return it immediately to the maker, and he asked defendant two or three times on Wednesday morning to let him have more, but he refused. There was no evidence that defendant had ever sold any of this liquid except on the Tuesday named. The state rested its case, and the defendant offered himself and other witnesses to show that the drink so called by him was purchased as a "soft drink" under a guaranty from the manufacturer that it was nonalcoholic and nonintoxicating, and that at the time of the purchase the agent of the manufacturer furnished him with what purported to be a statement from the Commissioner of Internal Revenue, that it was nontaxable; that he purchased it in the full belief that it contained no alcohol, and sold it so believing; that he received from the manufacturer the only purchase made by him on Monday, February 5th, and the only sales made by him were on Tuesday, February 6th; and, having heard Tuesday night that it was charged that this "phosphate," the name being given to it by the manufacturer, Burmanco, was intoxicating, he immediately closed it up and shipped it back to the manufacturer, having had it in his possession only one day, and refusing to make any sales after he was informed of the charge that it was intoxicating. His honor declined to admit this evidence, and the defendant excepted. Under the charge of his honor the jury returned a

verdict of guilty. From a judgment upon the verdict, the defendant appealed.

McLean, McLean & McCormick, for appellant. The Attorney General, for the State.

CONNOR, J. (after stating the case). It will be observed that the bill of indictment charges the sale of the intoxicating liquor to have been made "willfully and unlawfully." This language is not to be found in the statute, but this court has several times held that these words, or words of equivalent import, should be used in indictments for violating statutes prohibiting, or making criminal the doing or omitting to do the acts described. In *State v. Simpson*, 73 N. C. 269, the indictment was drawn under a statute declaring it a misdemeanor to kill or abuse live stock in any inclosure not surrounded by a lawful fence. Neither the words "with intent" or "willfully, or unlawfully" nor any words qualifying or giving character to the mental attitude of the party are to be found in the statute. Because the words "unlawfully and willfully" were not in the indictment, judgment was arrested. Pearson, C. J., said, "The statute by its necessary construction must be qualified by the addition of the words 'willfully and unlawfully.'" Common sense forbids the idea that it was the intention of the General Assembly to send to jail every person who by accident kills or injures stock in an inclosure not surrounded by a lawful fence. In *State v. Parker*, 81 N. C. 548, it was held that an indictment under the same statute, charging the act to have been "unlawfully" done was defective and judgment was arrested because of the failure to charge that it was "willfully" done. These rulings do not conflict with those which hold that when a person intentionally does the act forbidden by the statute, the criminal intent attaches to the act as in *State v. King*, 86 N. C. 603, and many other cases in our reports. The distinction is said to be, if the criminal character of the act is made to depend upon the intent, as in disposing of mortgaged property with intent to defraud the mortgagee, the intent must be charged and proven; whereas, if the act is made criminal, the intent need not be proven or charged, as in indictments for removing crops. But, as we have seen, it must be charged that the act was willfully — that is, intentionally — done; the criminality attaching. See discussion of Smith, C. J., in King's Case, *supra*. The proposed testimony was not offered to show that the defendant knowingly sold intoxicating liquor but had no criminal intent; for such purpose it was clearly incompetent. The purpose of the testimony was to show that he did not knowingly sell intoxicating liquor; that in doing so he was acting under a mistake of fact.

The principle is well illustrated in *State*

v. Nash, 88 N. C. 618, in which the defendant hearing unusual noises at night near his dwelling, ringing of bells, blowing of horns, discharge of pistols and guns, etc., his child who was sleeping near a window in the house through which the noise was heard and the flashes of the discharge of the guns seen, ran to defendant with blood on her face, whereupon he took his gun, went to the door and fired into the crowd, wounding several. It turned out that the crowd consisted of boys who were, in that peculiar manner, serenading defendant. Ashe, J., said: "Did the defendant have reasonable ground to believe that his daughter had been shot and the assault upon him and his house was continuing? If he had, then he ought to have been acquitted." The decision is based upon the ruling in *Selfridge's Case*. It is said that the defendant did the act prohibited by the statute, sold an article containing intoxicating liquor, and that it is immaterial with what intent he did it. So Nash did an act prohibited by law. He fired a pistol into a crowd who were engaged in harmless amusement. Selfridge fired upon and killed a man approaching him with an empty pistol pointed at him. In both cases the defense was sustained upon the well-settled principle that they acted under a mistake of fact. In neither case were the defendants in any danger from the conduct of the persons assaulted, but the jury were instructed to acquit if in their opinion they acted under a reasonable apprehension and belief that the fact was as they supposed. The principle is essential in the administration of the criminal law. Without it the law would become an engine of wrong and oppression. In almost every case involving the plea of self-defense it is announced from the bench and applied by juries. Mr. Bishop states the law so clearly and so strongly vindicates the principle that we prefer to adopt his language. "Of course to make such defense available, the defendant must have acted in good faith and with due care and caution. And when this good faith and this due care do exist, and there is no fault or carelessness of any kind, and what is done is such as would be proper and just were the fact what it is thus honestly believed to be, there is no principle known to our criminal jurisprudence by which this morally innocent person can be condemned because of the existence of a fact which he did not know and could not ascertain. On the other hand, to condemn him would be to violate those principles which constitute the very foundation of our criminal jurisprudence. Honest error of fact is as universal an excuse for what would otherwise be a criminal act as insanity. And it is a universal rule in the interpretation of criminal statutes that when an expression is general in terms, it must be taken with such limitations and exceptions as the principles of the unwritten law have established; to justify a

different interpretation the statute must be specific and name the particular thing in respect of which there is to be a departure from this fundamental rule. Thus a statute forbidding or making penal a thing in general terms does not justify the punishing an insane person who commits the act or a child under seven years of age or a sane person of full years who does the forbidden thing under a compulsion which he cannot resist; or, as we have just seen, who does it from a pure mind under a mistake of facts which he cannot overcome. These exceptions are grafted upon the statute by the common law; and, if the courts did not recognize this effect of the common law to modify the general terms, courts and statutes would alike be abated; and they ought to be as public nuisances, by the uprising of the popular instinct." We find no direct authority in our Reports.

The cases relied upon to sustain his honor's ruling arose out of efforts to avoid criminal liability either by claiming that there was no intent to violate the law, as in indictments for carrying concealed weapons (*State v. McManus*, 89 N. C. 555), removing crop (*State v. Williams*, 106 N. C. 646, 10 S. E. 901), or by showing that the defendant did not know that the act was prohibited by statute. *State v. Downs*, 116 N. C. 1064, 21 S. E. 689. In none of these cases is the question here presented involved or decided. We have examined with care the cases cited by the Attorney General, who with his usual industry has gathered all of the cases decided by this court bearing upon the subject. In *McBrayer's Case*, 98 N. C. 619, 2 S. E. 755, *Merrimon, J.*, says: "That the defendant in good faith thought that he had the right to sell the minor the spirituous liquor, did not excuse him from criminal liability," showing clearly the principle upon which the decision went. He concludes the discussion with the maxim, "*Ignorantia legis neminem excusat.*" *State v. Scoggins*, 107 N. C. 959, 12 S. E. 59, 10 L. R. A. 542 and *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698, the question is not raised.

Counsel for defendant cite a decision made by the Supreme Court of Ohio, which is directly in point. *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614. Defendant was indicted for sale of intoxicating liquors. He set up as a defense that if the bitters sold contained such liquors he was wholly ignorant thereof, that he brought them upon information and in the belief that the bitters were free from alcoholic properties. *Ashburn, J.*, said: "Testimony tending to prove the accused was ignorant of that fact or condition which constitutes the criminal element of the criminal charge is competent. In such case the maxim of the criminal law, '*Ignorantia facti excusat.*' applies to his case. Ignorance or mistake in fact, guarded by an honest purpose will afford, at common law, a sufficient excuse for a supposed criminal

act." Blackstone thus states the principle: "Ignorance or mistake is another defect of the will, when a man intending to do a lawful act does that which is unlawful. For, when the will and the deed act separately, there is not that conjunction between them which is necessary to form a criminal act. But it must be an ignorance of fact and not an error in point of law." 4 Com. 25. The distinction between right and liability growing out of mistake of law and of fact is recognized both in civil and criminal jurisprudence. In point of natural justice there is no very sound distinction but of necessity and to prevent confusion and anarchy the maxim, "*Ignorantia legis neminem excusat.*" is adopted. To omit the word "*legis*" and insert "*facti*" would be shocking to our sense of justice and right. It would destroy one of the most essential elements of the first law of nature and make a felon of every man who, under an honest, well-grounded mistake of fact, took human life. As said by Mr. Bishop: "It would be more just to send to prison, or impoverish by a fine, a person admitted to be insane, because an insane person could not so keenly feel the wrong or be so indignant at the injustice inflicted, or do so much damage to the state if his instincts should impel him to appeal to the moral sentiment of mankind. And to deal thus with an insane person would be no wider departure from the established principles of the criminal law than it is to deal thus with a sane man or woman whose honest act is prompted by a mistake of facts of a sort not to be guarded against. Indeed the violence done to the law is precisely the same in one instance as in the other." "According to all of our books, mistake of fact is quite different in its consequences, both civil and criminal, from ignorance of law. There is no necessity, or technical rule of any sort, requiring it to be dealt with in any other way than is demanded by pure and abstract justice. * * * To punish a man who has acted from a pure mind, in accordance with the best lights he possessed, because misled, while he was cautious, he honestly supposed the facts to be the reverse of what they were, would restrain neither him nor any other man from doing a wrong in the future, it would inflict on him a grievous injustice, would shock the moral sense of the community, would harden men's hearts and promote vice instead of virtue." Bishop, *Crim. Law*, 302. The proposition is thus stated: "A mistake of fact neither induced nor accompanied by any fault or omission of duty, excuses the otherwise criminal act which it prompts." Baron Parke says: "The guilt of the accused must depend on the circumstances as they appear to him." *Turpin's Case*, 77 N. C. 473, 24 Am. Rep. 455. For an interesting and enlightening discussion of this subject, see 1 Bish. *Crim. Law*, 330, note 4. In *Myers v. State*, 1 Conn. 502, the defendant was indicted for a violation of a Sunday

law. Gould, J., said: "Now that the defendant would not have been within the spirit or reason of the statute, upon the supposition that he actually believed a case of necessity or charity to exist, from that fundamental principle, as well of criminal law as of natural justice, that to render any act criminal the intention with which it is done must be so; or, in other words, the will must concur with the act. 4 Black. 20-24. Upon this principle it is that idiots, lunatics, and infants under a certain age are, in judgment of law, incapable of any offense whatever. Hence, also, ignorance or mistake in point of fact (for ignorance of law, I admit, cannot be averred) is, in all cases of supposed offense, a sufficient excuse." In *Com. v. Presby*, 14 Gray (Mass.) 65, it appeared that a statute made it the duty of a police officer to arrest any person found in the highway in an intoxicated condition. The defendant, having made such an arrest, was indicted for an assault. To the suggestion that, in fact, the prosecutor was not intoxicated, the officer alleged that he honestly, and upon a well-grounded belief, thought that he was in such condition. The court, by Hoar, J., said: "It is argued on behalf of the commonwealth, that if Harford was not intoxicated, this statute affords no justification for his arrest, because the fact, and not a suspicion on belief, however reasonable of intoxication, is requisite to such justification." After a review of the standard authorities on Criminal Law, the court held that if the defendant "acted in good faith and upon reasonable and probable cause of belief, without rashness or negligence, he is not to be regarded as a criminal because he is found to be mistaken."

The recognition of the principle, "ignorantia facti," is essential to the safety of all peace officers who are required to make arrests for offenses committed in their presence. As said in *Neal v. Joyner*, 89 N. C. 287: "A peace officer may now justify his arrest, without proof of the actual commission of the crime, when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party. * * * Although the arrested party may prove to be innocent, they (the officers) can defend against actions for false imprisonment, when the arrest is shown to have been made upon information reasonably sufficient to warrant the belief that crime has been committed and that it was committed by the person arrested." *State v. McNinch*, 90 N. C. 695.

It would seem, if not seriously controverted, that a principle so consonant with elementary principles of natural justice and right, would require for its vindication neither argument nor authority. Some confusion has arisen because of a failure to note the distinction between intentionally doing the prohibited act and doing an act entirely lawful, but for the existence of some element, condition or fact unknown to the person which brings the act within the description

of the offense. We have recently held that when a person hunting supposed that a noise near by was made by a wild turkey, acting in good faith and free from negligence, shot and killed a man, was not guilty of any crime. *State v. Horton*, 139 N. C. 588, 51 S. E. 945.

We have so far discussed the question upon the theory that the proposed testimony would, if believed by the jury, justify the conclusion that the defendant was in fact ignorant of the presence of intoxicating liquor in the "phosphate" which he sold and that he was not negligent in that respect. It may be that his honor excluded the evidence because of the opinion that if true, it did not show that defendant was free from negligence. It is clear that when the statute does not make knowledge or intent an essential element the state may, upon proof of the commission of the act, rest and rely upon the presumption that knowledge is in accord with the fact. The duty then devolves upon the defendant to show the exculpatory facts. It would seem that if the testimony offered by defendant was found by the jury to be true, the conclusion that his conduct measured up to the standard of the ideal prudent man, would reasonably follow. He proposed to show that the article purchased by him was known as "phosphate" and came within the category known as a "soft drink," that he had a guaranty from the manufacturer that it was nonalcoholic and nonintoxicating, that the agent of the manufacturer furnished him with what purported to be a statement from the Commissioner of Internal Revenue that it was not taxable, that he purchased it in good faith and in the full belief that it contained no alcohol; that he received it on the 5th day of the month, sold only one day, hearing that it was charged to be intoxicating he immediately closed it, and shipped it to the manufacturer. It was in his possession only one day and he refused to make any sales after hearing that it was charged to be intoxicating. What more could he have done? It may be suggested that he should have analyzed the phosphate. We take notice of the fact that to do this required not only learning and skill in chemistry, but instruments and appliances not in common use. It is doubtful whether such an analysis could be made in the town or county in which defendant resided. In *Byars v. City*, 77 Ill. 467, the principle involved in this appeal is in no wise questioned. The testimony was admitted. The difficulty was that as said by the court, "He was the manufacturer and was bound to know what it contained." The case does not weaken the authority of the one from Ohio. The common law is "the perfection of human reason"—to be applied in a reasonable way, to reasonable conditions, resulting in reasonable conclusions. The standard of duty in respect to obedience is that of a sane, honest, intelligent, prudent man presumed to know the law. When the conduct of the citizen measures up to this

standard there can be no sound public policy, no matter how desirable the end to be accomplished, which will make him a criminal.

It was said on the argument that to permit the defense of "ignorantia facti" to prevail would "open the door" to violations of the many wise and beneficent statutes designed to suppress the liquor traffic. It behooves the courts to give to statutes such a reasonable construction as will advance the remedy and suppress the evil, but they may not do violence to those well-established principles of the common law bulwarked upon the wisdom of the ages, the custom of the people, and the experience of centuries. To them, in times of strife and struggle with passion and power, the people must, as they have ever done, look for safety and security. The same objection was made to the construction of the statute in *Myers v. State*, supra. To it Gould, J., wisely said: "The objection that this construction will facilitate evasions of the statute is not, I think, very well founded, even in point of fact. The danger of collusion will always be known to the triers; and the probability of it, in any supposable instance, will be open to discussion. But, at any rate, considerations of this kind ought never to influence a court when, as in the present case, a construction, dictated by them, would manifestly contravene the spirit of the law as well as the universal immutable principles of justice."

The testimony should have been received, and, under proper instructions, submitted to the consideration of the jury. For the error in that respect, the defendant is entitled to a new trial.

(141 N. C. 11)

DAVIS v. KERR et al.

(Supreme Court of North Carolina. April 3, 1908.)

1. TRUSTS—EVIDENCE.

A parol trust in lands, a deed to which on sale thereof under mortgage by K. to B., president of a bank, to secure a debt of \$500 to the bank, was made to B., may be found on evidence consisting, not only of the testimony of K. that prior to the sale it was agreed between him and B. that he should attend the sale, bid in the lands, and have deed made to B., who should hold title for K. till the debt and interest was paid, when he would convey to K., but also by the facts that K. made the purchase at the sale, B. or any other representative of the bank not being present, and had the deed made to B.; that K. remained in possession and made the trade for a sale of part of the land, B. making the deed under his direction; and that K. alone paid the taxes till the bank failed, after which the taxes were not only paid by him, but by the receiver to whom B. conveyed the property.

2. TRIAL—REMARKS OF COUNSEL.

Counsel has no greater right, in commenting on evidence in argument, to denounce a witness who is not a party, than he has where the witness is a party.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Trial, § 300.]

Appeal from Superior Court, Bladen County; Moore, Judge.

Action by Junius Davis, receiver, against J. D. Kerr and others. From an adverse judgment, plaintiff appeals. Affirmed.

This was an action for the recovery of the possession of several tracts of land, the title to which plaintiff alleged to be in him as receiver of the Bank of New Hanover. Defendant J. D. Kerr admitted that the legal title was in plaintiff. By way of equitable counterclaim he averred that being the owner of said lands, on the 18th day of January, 1885, he conveyed them by way of mortgage to Isaac Bates, president of said bank, to secure the payment of a note of \$500. That thereafter, during the year 1890, an action was brought and prosecuted to final judgment for the purpose of foreclosing said mortgage, and that a commissioner was duly appointed to sell said lands, etc. That, prior to the day appointed for the sale, he entered into a parol agreement with said Bates, by the terms of which he, said Kerr, was to attend the sale, bid in the lands and have deed executed to said Bates, who would hold the title for said Kerr until the debt and interest was paid, when he would convey to said J. D. Kerr. That pursuant thereto said Kerr did bid off the lands and directed the commissioner to execute the deed therefor to said Bates, which was done on April 11, 1890. That he remained in possession, sold off a portion of the lands to R. W. Gibson, which were conveyed by said Bates by his (Kerr's) direction; made other payments thereon, leaving due upon a settlement had with said Bates a balance of \$62.50. The lands were thereafter conveyed by Bates to Bank of New Hanover and afterwards vested in plaintiff, who became receiver in June, 1893. The following issues were submitted to the jury: "(1) Did I. Bates purchase the lands sold by C. C. Lyon, commissioner, in trust for the defendant, J. D. Kerr, and agree to convey said lands to J. D. Kerr on the payment of \$500 and interest? (2) Did the defendant J. D. Kerr pay the said \$500, except the sum of \$62.50? (3) Is the plaintiff seized in fee of the lands in controversy? (4) Does the defendant J. D. Kerr wrongfully withhold said lands from plaintiff?"

Defendant John D. Kerr testified in his own behalf, as follows: "Prior to the day of the sale I had agreed with Bates to attend sale and buy land for him, he to hold it for me until I should repay the full amount of the bid with interest on it from the day of the sale. The bid was \$500. I made the only bid. I directed commissioner to report the bid in the name of Isaac Bates, at the sum of \$500. The sale was confirmed and deed made accordingly. Several persons were present at the sale. Bates was not present, I represented him, and no one else did. Deed by commissioner to Bates was made pursuant to this agreement. Some time after the sale Mr. Gibson applied to me to buy a part of the land. I reported the bid to Bates. Told him I wanted him to sell to

Gibson for me for \$250, and take the money as a credit on this debt of \$500 and interest. He agreed to do so. Thought I ought to have gotten more for it. This was one of the tracts in the mortgage. Bates made the deed to Gibson. I directed him to do so. He told me that Gibson paid him the \$250 and I saw the deed immediately after its execution. Gibson was present during part of the conversation: I paid Bates at one time \$150. I can't give the date of these other payments further than in last talk I had with Bates just prior to the failure of the bank. He stated that he would like for me to pay up the balance of the debt, that he wanted to close the matter up. I asked him how much the balance of the debt was. He went back in the bank, brought out a memorandum of some sort, and said, 'Pay the debt down to \$50.' I gave him as much of the money as I could spare. He told me that there was \$62.50, balance due after I gave him the money. This was in June or July, 1893, just before failure of the bank. I have been in possession of the land all the time. After the sale to Bates, and before the bank failed, I was in possession, paid the taxes during those years, or had it done. I paid other amounts besides the \$150 and the amount Gibson paid, but I cannot give the amounts or the dates. The amounts were small. If I ever had receipts I lost them. Since the receiver was appointed he has paid some taxes on this land. I don't remember how much he has paid, except that he paid two or three or possibly four years' taxes. I have paid the taxes all the time. The land was worth probably \$1,000. It was reported by commissioner that \$500 was a fair valuation—he was my attorney all through that suit. I did not know as a fact that the Bank of New Hanover claimed this land. Saw deed to Gibson. The deed is made by the Bank of New Hanover, signed by Bates as president and others as directors. Deed from Bates to Bank of New Hanover for this land March 14, 1891. Saw plaintiff in regard to the land in his office in Wilmington and told him that I owed balance due on this debt and had been informed that Bates made a conveyance of it to him, that he was claiming it as receiver, that I wanted to avoid a law suit if possible and would like for him to carry out the agreement which I had with Bates. He replied that he did not recognize any such agreement and would decline to do so. I said I wanted to avoid law suit; wanted to pay up what I owed. He asked me what I would give for it. I made him an offer for \$250, and said 'If you feel like accepting that, I do not know whether it amounts to more or not, but would be willing to pay it rather than have a lawsuit.' He said that he had been offered \$500. I asked him to let me know what he would take for it. Said he would take \$800 and I told him that I would have to hold off, did not have the cash then. Substantially the matter dropped there. I

believe that I wrote him again." Letter shown witness from plaintiff, receiver, March 31, 1902, in which it was said: "When we last talked about it you offered me \$800 for all of the Bladen lands held by me as receiver, or \$500, or \$550, I think, for the 640 acre tract which lies partly in Colley Swamp. I write now to ask if I understood you correctly and if it holds good now, and if so, how soon you could wind it up and pay the money. Of course I made it clear to you that this is a cash transaction. Please let me hear from you at once, as I have other offers for the land. I must have an answer from you this week, by Friday, if possible." Witness answered on April 4th, "I will be down on 10th April, next, when I hope to arrange satisfactorily our business. Hope you can be in the city that day." Witness continued, "I do not think I agreed to pay him \$800, that was not my understanding. Some conversation with Mr. Thomas Davis, told him I thought the land was not worth \$800, but would rather pay that amount than have a law suit, that I could not raise the \$800 as it was a cash transaction, but thought I could raise the money. Did not try to get it." R. W. Gibson testified for defendant: "I made bargain for land described in deed to me with defendant Kerr first. Agreed on \$250 as the price several days before I got the deed. Kerr and I then went to the bank and saw Bates. Kerr did the talking, cannot remember what he said. I paid the money for the land to the Bank of New Hanover, took a deed from the bank. Kerr and I agreed to meet in Wilmington to get Bates to make the deed. Kerr told me that bank was the owner of the land." Plaintiff introduced deposition of Isaac Bates and other testimony tending to contradict the defendant's version of the transaction. At the close of the evidence plaintiff demurred and moved for judgment. Motion denied. Plaintiff excepted.

Plaintiff, among other prayers, requested the court to charge the jury: "The declaration of Kerr, the defendant, as to agreement between Bates and himself that Bates would reconvey to him upon payment of \$500, are not of themselves sufficient to change the deed from C. C. Lyon, commissioner, to Isaac Bates, from an absolute to a conditional one, or to engraft a trust on it in favor of Kerr." The court refused the instruction. Defendant excepted. The jury having answered the issues in favor of the defendant, judgment was rendered accordingly, to all of which plaintiff excepted. The plaintiff further excepted to the form of the judgment for that it provided for the sale of the lands by a commissioner and the application of the proceeds of the sale to the payment of the debt, and further that the costs of the action were taxed against the plaintiff, it having neither been alleged nor proven that the defendant J. D. Kerr, was able, willing, nor ready to pay the debt found by the jury to be due.

McLean, McLean & McCormick, for appellant. E. W. Kerr, Homer Lyon, C. C. Lyon, and Shepherd & Shepherd, for appellees.

CONNOR, J. (after stating the case). We have not noted plaintiff's several exceptions to his honor's ruling in regard to the admissibility of evidence, because the questions raised by them are presented upon the demurrer to the entire evidence and motion for judgment of nonsuit. The question pressed and argued in this court upon the demurrer, is whether the entire evidence, if true, was of that character required to engraft a trust upon the legal title to land. The plaintiff contends that proof of declarations of the holder of the title, made antecedent to, or at the time of, the delivery of the deed, is insufficient to establish a parol trust, unless evidenced by facts and circumstances dehors the deed; that, in this record the only evidence of the alleged trust is the unsupported testimony of defendant Kerr that Bates promised to take the title and hold for his benefit, conveying to him when he paid the amount of the bid with interest; that this testimony is denied by Bates; that, in this condition of the case the question is not one of intensity, which it is conceded would be for the jury, but of character which must be decided by the court as matter of law. It must be conceded that expressions have been used by this court which, but for later decisions would seem to sustain the proposition of the plaintiff. In *Cobb v. Edwards*, 117 N. C. 247, 23 S. E. 243, it is said: "The court may declare that there is not evidence of the kind required by law to entitle the plaintiff to the relief sought." It is difficult to conceive of a case in which there would be an absence of some act, or conduct of the parties connected with the language used, throwing light upon and either sustaining or contradicting the allegation of the declaration of a parol trust. The question has recently undergone so thorough an investigation, involving a review of our own and cases from other courts, that we do not deem it necessary to review our conclusions or the reasons upon which they are based in the opinions of Mr. Justice Walker in *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776 and in *Sykes v. Boone*, 132 N. C. 199, 43 S. E. 645, 95 Am. St. Rep. 619. Quoting the language of Mr. Bispham, he says: "When a party acquires property by conveyance, or devise, secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another, a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that, by means of such promise he had induced the transfer of the property to himself." Bispham, Eq. § 218. The principle is illustrated and enforced in a

large number of cases in our Reports, many of which are cited and commented upon in the opinions in the cases named. It must be conceded that language is sometimes used by the court when discussing the cases, both questions of law and fact, which are difficult to reconcile, in regard to the kind and intensity of proof required. In regard to the first question, it is not necessary to discuss the law in this appeal, because following the principles laid down in *Avery v. Stewart*, supra, we are of the opinion that there is found in the testimony in this record evidence of such facts and circumstances as were sufficient to take the case to the jury. The relation of the parties, that of mortgagor and mortgagee, the purchase by defendant Kerr at the sale, Bates not being present and Kerr making the only bid, the fact that Kerr remained in possession, that when Mr. Gibson wished to buy a portion of the land Kerr made the trade, fixed the price, and that Bates made the deed under Kerr's directions, etc., much of which is uncontradicted and some of which is supported by Mr. Gibson. These facts are consistent with the existence of some arrangement between Bates and Kerr. It would, without some such explanation, have been a remarkable and inexcusable breach of duty on the part of Bates, representing the bank, to have permitted the land to be sold in his absence and without any representative, to see that it brought the amount of the debt, or, at least, a fair price. It is equally difficult to understand why he permitted the defendant to remain in possession from April, 1890, until the failure of the bank June, 1893, unless some agreement existed between Kerr and himself. Again, except upon the same theory, how is Kerr's interest in and conduct in regard to the sale to Gibson explained? Defendant, it seems, without question, alone paid the taxes until the plaintiff came in as receiver and continued to do so, although the receiver also paid them. It is true that there is evidence, much of which is uncontradicted, of language and conduct on the part of defendant inconsistent with the allegation that he had paid for the land. The only purpose for which we are at liberty to discuss the testimony is to ascertain whether, admitting the proposition of plaintiff in regard to the kind of evidence required, such is found. Having passed that point and seen that the defendant was entitled to go to the jury, we may not trespass upon their domain. What weight the jury will give to the evidence, how it will be affected in their opinion by the testimony introduced by plaintiff and by defendants' conduct, are questions solely for them. This court has held in *Lehew v. Hewitt*, 130 N. C. 23, 40 S. E. 769, that in those cases where the evidence is required to be clear, cogent and convincing, the court may not decide whether it is so, but must submit the evidence to the jury. In that respect

we refer to the opinion in *Avery v. Stewart*, supra, as containing our views. We are therefore of the opinion that his honor correctly submitted the evidence to the jury and, in the absence of any exceptions, we assume that he explained to them the law and the rules by which they were to be guided in arriving at a verdict. The question of payment was one of fact, and we find no exception to his honor's ruling in that regard. The original debt was due to the bank. Bates was, in the entire transaction, acting for the corporation.

Plaintiff excepts to the language of defendants' counsel in regard to the plaintiff's witness Bates and his honor's course in that respect. Certainly the language is not to be commended in a judicial investigation. It was not calculated to aid the jury or enlighten the court. Denunciation is not argument, either in the court house or elsewhere. There may be a wide divergence of opinion as to the proposition that "This is a sentimental age" and whether we use "mild expressions" instead of "plain strong language." Certainly the counsel could not have supposed that he was under the ban of sentimentalism, in describing his estimate of the witness. It is exceedingly difficult, as this court has often said, to draw the line between proper comment and abuse of the privilege conferred upon counsel. This privilege is conferred upon counsel as a sacred trust, to be used only in defense of truth and right. It does not pertain to his personal, but to his official relation as an officer of the court. Any use of it for other than the high purpose for which it is conferred is an abuse. As we have said in *Horner's Case*, 139 N. C. 607, 52 S. E. 138, adopting the language of a judge of this court, "It is difficult to lay down the line, further than to say that it must, ordinarily, be left to the discretion of the judge who tries the cause," etc. While we do not sustain the plaintiff's exception, because we are not persuaded that any substantial injustice was done, we do not concur in the suggestion made in defendants' brief, "that a witness does not come under the same rule that applies to plaintiff or defendant." If there be any difference, which is not conceded, a witness should be more carefully guarded by the court from assaults of counsel. The parties come voluntarily, while a witness is brought in by the process of the court. Both are entitled, as are the court and jury, to have the testimony discussed. It is the office of counsel to comment upon, analyze, and discuss their testimony, and in a proper, respectful manner call attention to their demeanor, relation to the parties and the cause. In discharging this duty it is due the court, the jury, the witness, and to counsel himself, but above all to the cause of truth and justice, whose minister he is, to speak temperately and with a due regard to the sacred trust

reposed in, and the responsibility imposed upon, him.

Upon an examination of the entire record, we find no reversible error of the law. In view of the pleadings and testimony we think that the cost should be equally divided. It is so ordered.

Affirmed.

WALKER, J., did not sit on the hearing of this appeal.

(141 N. C. 791)

STATE v. THOMAS.

(Supreme Court of North Carolina. April 3, 1906.)

1. MUNICIPAL CORPORATIONS—MAYOR PRO TEM.—APPOINTMENT—COLLATERAL ATTACK.

The regularity of the appointment of a mayor pro tem. under Revisal 1905, § 2933, providing that, in the event of the absence or sickness of a mayor, the board of commissioners may appoint one of their number pro tempore to exercise his duties, cannot be questioned collaterally in a criminal proceeding wherein defendant claims that the warrant under which he was arrested was void for lack of authority in the mayor pro tem. to issue the same.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 810.]

2. SAME—POWERS—DUTIES—STATUTORY CONSTRUCTION.

Revisal 1905, § 2933, provides that the mayor shall preside at the meeting of the commissioners and that in his absence or sickness, the board of commissioners may appoint one of their number pro tempore to exercise his duties. Section 2934 prescribes among his duties that of being a conservator of the peace, and that he shall have within the city limits the jurisdiction of a justice of the peace in all criminal matters. Section 2935 makes it his duty to exercise the ordinances, laws, and rules of the government and regulations of his town or city; and sections 3156-3162 include "mayors or other chief officers of incorporated towns" in naming those by whom warrants in criminal actions may be issued. *Held*, that a mayor pro tem., appointed by the board of county commissioners, is not limited in his powers to presiding at the meeting of the board, but is authorized to exercise the duties of the mayor during the latter's absence as fully as he could do if present.

3. CRIMINAL LAW—WARRANTS—POWER TO ISSUE—MAYOR PRO TEM.

Under such statutes a mayor pro tempore is authorized to issue warrants in criminal actions.

Walker, J., dissenting.

Appeal from Superior Court, Union County; Moore, Judge.

Henry Thomas was acquitted of a charge of resisting an officer in the discharge of his official duty, and the state appeals. Reversed.

The Attorney General, for the State. A. M. Stack, for defendant.

CLARK, C. J. The defendant was arrested upon a warrant for violation of a town ordinance in being "drunk and disorderly and using profane language upon the streets." He is indicted for resisting the officer in the discharge of that duty. *Hi-de*

fense is that the warrant was void because signed by "Davis Armfield, Mayor pro tem." The special verdict finds that Davis Armfield, an alderman of the town of Monroe, had been duly chosen mayor pro tem. by the board of aldermen on 16th March, 1905, and was still exercising the duties of that office on 19th November, 1905, when he issued this warrant.

Revisal 1905, § 2933, provides: "The mayor or shall preside at the meetings of the commissioners, but shall have no vote except in cases of a tie; and in the event of his absence or sickness, the board of commissioners may appoint one of their number pro tempore to exercise his duties." The defendant contends that the election only authorized the mayor pro tem. to preside at the meeting. If so, the words used would have been "appoint one of their number pro tempore to preside at such meeting." But the Legislature prescribed that the purpose of the appointment of a pro tempore occupant of the office of mayor should be "to exercise his duties." The only question then is what are "the duties" of the mayor? The very next section (2934) prescribes among his duties that of being a conservator of the peace and that he shall have within the city limits "the jurisdiction of a justice of the peace in all criminal matters," and the next section (2935) makes it his duty to execute the ordinances, laws, and rules of the government and regulations of his town or city, and sections 3156-3162, in naming those by whom warrants in criminal actions may be issued, include "mayors or other chief officers of incorporated towns." "The duties of a mayor are to cause the laws of the city to be enforced and to superintend inferior officers." 2 Bouvier, Law Dict. "Mayor." A pro tem. officer is a substitute who shall discharge the functions of the office during the absence of the officer.

The mayor pro tem. here was chosen in March, and was still in office in November. It does not appear why the mayor was so long disabled. The election of the mayor pro tem. must be taken as regular. This is not questioned in this case and could not be questioned collaterally in this mode. The only point is, taking the election of mayor pro tem. as properly made, does the power conferred by the statute "to exercise the duties" of mayor include that of issuing warrants when the mayor could have done so? There is nothing to indicate that he is not like all other pro tem. officers vested with all the duties of the principal whose place he temporarily occupies. In this very case, it would be singular if from 16th March to 19th November, more than eight months, all the duties of mayor of the town should go undischarged, save the least important one, probably, that of presiding at the meetings of the board of aldermen or town commissioners. The language used by the Legislature was intended, we think, to pro-

vide that in case of the absence of the mayor, from sickness or other cause, the board of town commissioners should appoint one of their number "to exercise the duties" of such mayor till his return, as fully as he could do if present, in order that the public might suffer no inconvenience or detriment by reason of his absence.

The word "mayor" first occurs in English history in 1189 when Richard I substituted a mayor for the two balliffs of London. The Romans styled such officer "prefectus urbi," and originally the English title for such officer was either "balliff" or portreeve, just as the sheriff (who had, however, far greater functions than our officer of that title) was "shirereeve"; i. e., sheriff. In 5 Words & Phrases, 4450, it is said that the word "mayor" comes from the old English word "maier," which means "power," "authority," and not from the Latin "major," greater. He represents the power and authority of the town, and the duty of presiding at meetings of the town commissioners is only one of the duties he exercises. While the power and duties of mayor may vary according to the charter of the town or the laws of the state, it is probably without any exception his duty to execute the laws and local regulations of his city and to supervise the discharge of their duties by the subordinate officers of the city government. Such an office could not be left vacant, without public inconvenience, during the illness or absence of the incumbent, and hence our statute provides a mode of selecting a substitute, a pro tem. mayor, who shall "exercise his duties"; meaning all his duties (for there is no restriction), and as fully as he could have done. Ingersoll, Pub. Corp. 221, says that when the mayor is absent "his office may be supplied by a pro tem. election from among the members of the board, and the person thus chosen mayor pro tem. has the powers and may perform the functions of the mayor, for the time being." Where a statute required for the validity of an ordinance "approval by the mayor" it was held that "approval by the mayor pro tem." was sufficient. *Saleno v. Neosho*, 127 Mo. 636, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653. The same was held, if the mayor by reason of his absence was unable to perform his duties. *Detroit v. Moran*, 46 Mich. 213, 9 N. W. 252. In *Bank v. Dubuque*, 19 Iowa, 467, it was held that where the law authorized the appointment of a mayor pro tem., a deed executed by such officer, if otherwise regularly executed, is sufficient, as if executed by the mayor.

An officer pro tem. is one who pro tempore—for the time being—is such officer, fully, completely, and he is, as Revisal 1905, § 2933, provides, authorized "to execute the duties" of such office. This is true of a speaker pro tem. of a legislative body (the most usual instance), who, as we know, can swear in members, issue subpoenas, or discharge

any other function of the speaker, "unless otherwise provided by law or the rules of the body." Cushing, Leg. Assem. 313. And so of any other officer appointed pro tem. Upon the special verdict the jury should have been instructed to return a verdict of guilty.

Reversed.

WALKER, J. (dissenting). It cannot be questioned that there should be some way of filling a temporary vacancy in the office of mayor, as the prompt and efficient administration of the criminal law would thereby be promoted. But while I recognize the necessity for such a provision of law, and regret my inability to agree with the court that it now exists, the language of Revisal 1905, § 2933, quoted in the court's opinion, is to my mind so free from ambiguity and points so clearly to the absence from sickness or other cause of the mayor, as presiding officer, and to his ministerial duties pertaining to that office, that my assent to the conclusion of the court must be withheld. It is impossible for me to read that section and not see that the Legislature is referring to the mayor as the presiding officer at the meeting of the commissioners, and that the power given in that section to appoint one of their number to perform pro tempore his duties has reference solely to the duties therein mentioned and imposed on him as presiding officer and not to his judicial duties. This section relates to the legislative proceedings of the commissioners and has no apparent connection with the following section which relates to the mayor's judicial functions. Why require the commissioners to select one of their number to act pro tempore with judicial functions, when by section 2931 they are given the power to fill a vacancy in the office without this restriction? As the mayor has the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the state or the ordinances of the city, it was thought that, when he is absent or under a temporary disability, a justice could perform his judicial duties for him (Revisal 1905, § 2934), and this, it seems, has been the practice in such cases. If this be not so, and there is a casus omissus, the Legislature, and not this court, must provide for it. We must administer the law as we find it and cannot supply the omission by interpretation. The language of section 2933 of the Revisal of 1905 is susceptible of but one construction which excludes the idea of a mayor pro tempore exercising any judicial function. He is not even a judicial officer de facto, as there must be some semblance of judicial authority before a person assuming to act as a judicial officer can be so regarded. The commissioners had no right to appoint one of their number as mayor and thereby clothe him with judicial powers than they had to appoint a judge. Their act in that respect

was utterly void and without any legal efficacy whatever.

Entertaining the view that the person alleged to have been resisted was not, for the reason stated, a lawful officer, and that the defendant cannot therefore be convicted of the offense charged against him, I must dissent from the opinion and judgment of the court.

(141 N. C. 143)

SMITH et al. v. BOARD OF TRUSTEES OF ROBERSONVILLE GRADED SCHOOL

(Supreme Court of North Carolina. April 17, 1906.)

1. SCHOOLS AND SCHOOL DISTRICTS—CREATION OF DISTRICT—ELECTION.

An election held pursuant to chapter 204, p. 581, Priv. Acts 1905, which creates a graded school district which includes portions only of two white and of two colored districts as established by the county board of education, and which includes portions of the territory of two voting precincts, is not invalid because no new registration was ordered for the entire electorate of the new district, where the act directs that the election be held under the laws governing elections for cities and towns (chapter 514, p. 692, Laws 1899, and chapter 750, p. 972, Laws 1901).

2. SAME—TAXATION—BOND ISSUE.

Chapter 204, p. 581, Priv. Acts 1905, creating a graded school district and authorizing its trustees to levy a tax and issue bonds, when the act is approved by a majority of the qualified voters, is a valid exercise of legislative authority.

3. SAME—POWERS OF DISTRICT.

The Legislature can create a specific school district within the precincts of a county, incorporate its controlling authorities, confer upon them certain governmental powers, and, when accepted and sanctioned by a vote of the qualified electors within the prescribed territory, as required by Const. art. 7, § 7, may delegate to such authorities power to levy a tax and issue bonds in furtherance of the corporate purpose.

4. SAME.

School districts are public quasi corporations included in the term "municipal corporations," as used in Const. art. 7, § 7, of our Constitution, and so come within the express provisions of section 7, that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit," etc., "nor shall any tax be levied unless by a vote of the qualified voters." And the principle of uniformity is established and required by section 9 of this article.

5. SAME—DISPOSITION OF SCHOOL FUND.

Section 12, c. 204, p. 584, Priv. Acts 1905, which provides that the trustee shall dispose of the school fund to be realized under the act as to them may seem just, does not confer an arbitrary discretion, but the same must be used as directed and required by the Constitution and in the light of the decision of Lowery v. School Trustees, 52 S. E. 287, 140 N. C. 33.

Appeal from Superior Court, Martin County; Cooke, Judge.

Action by A. B. Smith and another against the board of trustees of Robersonville graded school. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Civil action to restrain the authorities of a public school district, known as "Robersonville Graded School District," from issuing

bonds and levying a tax under and by virtue of an act of the General Assembly (Priv. Acts 1905, p. 581, c. 204) and an election held pursuant to said act. By consent duly entered, a jury trial was waived and the cause was tried and determined by the judge presiding. The act creates a graded school district of defined boundaries so as to include the town of Robersonville and certain adjacent territory, establishes a board of trustees to hold office for a definite period, fills same by appointment for the first term, and provides that the successors of these officers shall be elected by a vote of the qualified voters within the district as their respective terms expire, etc., and confers power on said board as follows:

"Sec. 3. That the board of trustees hereby created and their successors in office, shall be a body politic and corporate by the name and style of the Board of Trustees of the Robersonville Graded School, and by that name shall be capable of receiving gifts and grants, purchasing and holding personal and real estate, selling and mortgaging and holding personal and real estate, selling and mortgaging and transferring the same for school purposes, and of prosecuting and defending suits for or against the corporation hereby created. Conveyances to said trustees shall be to them and their successors in office.

"Sec. 4. That said board of trustees shall have entire and exclusive control of the graded schools and all public school property in said Robersonville school district, and shall prescribe rules and regulations for their own government not inconsistent with the provisions of this act; shall employ and fix compensation of officers and teachers annually, subject to removal by said board; shall make an accurate census of the school population of the district as required by the general law of the state, and do all other lawful acts proper to the management of said school, provided that all children resident in said district between the ages of six and twenty-one years shall be admitted into said school free of tuition charges, and those desiring to be admitted as pay students may be admitted upon such terms as the board may direct.
* * *

"Sec. 6. That for the purposes of this act, the board of trustees of said district shall, and they are hereby authorized and empowered, beginning with the fiscal year, June 1, 1905, and annually thereafter, to levy and cause to be collected a particular tax on all taxable property and polls in said district, provided said particular tax shall not exceed thirty-three and one third cents on the one hundred dollars valuation of all taxable property in said district and one dollar on each taxable poll in said district, provided that the valuation of all property in said district shall be the same as that at which it is assessed for county and state purposes, provided that the taxes levied under this act shall be due, payable and collectible in like time and man-

ner as are the taxes for county and State purposes."

Section 7 confers power to appoint a tax collector, etc.

"Sec. 8. That the board of trustees herein provided shall be and are hereby authorized and empowered to issue bonds of said graded school to an amount not exceeding three thousand dollars of such denomination and of such proportion as said board of trustees shall deem advisable, bearing interest from date thereof at a rate not exceeding six per cent. per annum, with interest coupons attached, payable annually, such bonds to be of such form and tenor, and transferable in such way, and the principal thereof payable or redeemable at such time or times not exceeding twenty years from date thereof, as said board of trustees may determine, provided that the said board of trustees shall issue bonds at such time or times and in such amounts as may be required to meet the expenditures hereinafter provided for in section 9 of this act."

The act further provides that the taxes collected pursuant to the act shall be applied to payment of said bonds and interest thereon and the necessary expenses of the schools within the district, and that proper schools shall be established, etc. The act then directs that an election be held by the qualified voters of the district under the law governing the election in cities and towns, and, if a majority of such qualified voters shall vote for schools, then the provisions of the act shall be in full force and effect. In addition to the terms and provisions of the act referred to, the court finds the following additional facts as pertinent to the inquiry: "(1) That the defendants had the district surveyed and laid off according to the description in said private act, and within its boundaries are included portions only of white school districts Nos. 23 and 34 and portions of colored districts Nos. 14 and 23, as established by the board of education of the county. The whole town of Robersonville is in the district. (2) That the board of trustees ordered an election, appointed a registrar and the judges of election, but did not order a new registration. That the district included portions of the territory of Robersonville voting precinct and of Gold Point voting precinct. That the registrar gave the proper notice of the time for registering the votes. That he referred to the registration books in Robersonville precinct and Gold Point precinct, and copied from these books into his registration books the names of all the registered voters who were then residing within the boundaries of said school district, and registered anew those persons entitled to register residing in the said district whose names did not appear on the old registration books of said voting precincts. There were 14 new registrations. That at the election 136 votes were cast, of which 96 were for schools and 40 were against schools. I further find that 96 was more

than a majority of the registered voters, as they were registered, for I find that the number of names registered was 181. (3) I further find that the said trustees have levied a tax of 33½ cents on the \$100 worth of property and \$1 on the poll, and that they are proceeding to have the same collected, and that the plaintiffs are residents and property owners and taxpayers in said district. (4) I further find that the trustees are arranging to issue \$3,000 of bonds, and that they propose to use \$2,500 of the proceeds from the sale of said bonds to pay for a building for a graded school for the white race." Upon said facts judgment was entered as follows: "Upon the foregoing * * * I find as conclusions of law (1) that the defendants, or such trustees, had the right to authorize the election, but there should have been a new registration, makes the election void. (2) That the said trustees could not levy a tax, because it is against the Constitution of the state, and that the said act of the General Assembly authorizing them to levy a tax is unconstitutional and void. It is therefore ordered and adjudged that the said trustees be enjoined from issuing the said bonds and from collecting any tax on the poll or property, because of the said levy made by them."

Thereupon defendants excepted and appealed.

H. W. Stubbs and Winston & Everett, for appellants. Gilliam & Gilliam, for appellees.

HOKE, J. (after stating the case). It is not urged against this legislation that its acceptance was made to depend upon the vote of the people within the new school district. Such legislation has so often been sustained in this state that it is no longer an open question. *Cain v. Com'rs*, 86 N. C. 8. Nor is it suggested that any but those who were qualified voters of the territory took part in the election, nor that any who were such electors in the territory were denied registration.

Plaintiffs rest their right to a stay of further proceedings under the act on two grounds: (1) That the election was invalid because no new registration was ordered for the entire electorate of the new district. (2) That the act is unconstitutional, in that it delegates legislative power to defendant board. The court is of opinion that both positions should be resolved in favor of defendant. As to the first, the legislation bearing on the question is, we think, decisive against the plaintiffs. Section 15 of the act directs that the election be conducted under the laws governing the elections for cities and towns. The laws (by chapter 514, p. 692, Laws 1899, and chapter 750, p. 972, Laws 1901) provide that a new registration may be ordered by the city or town authorities, but that unless this is required the registrars appointed for the purpose shall be furnished with registration books, and after taking an oath for faithful

performance of duty shall revise the registration books of their wards or precincts, so that such books shall show an accurate list of the electors previously registered and still residing therein, without requiring such electors to be registered anew, and then keep open the books at stated periods, in order that any new electors, not before registered, may be properly registered thereon. Here no new registration was required. The registrar and judges were duly appointed and the registrar revised the registration books of the precincts included in the designated territory, transcribed from these books the names of all registered voters who were still residing within the boundaries of the school district, and registered anew those persons entitled to register and whose names did not appear on the old books. The clear intent of the statute is that unless a new registration is ordered no electors within the territories should be required to re-register, and there has been a substantial compliance with the law. *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

In support of the second position, the plaintiffs contend that the power of taxation is a legislative power, which cannot be delegated except to municipal corporations, quoting a clause from *Cooley on Taxation* as follows: "There is one clearly defined exception to this rule which is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent which is conclusive. This exception relates to the case of municipal corporations. Immemorial custom which tacitly or expressly has been incorporated in the several state Constitutions has made these organizations necessary parts of the general machinery of government." The court is further referred to several decisions of this state construing acts which conferred this power on municipal corporations, and it is urged that thus far this has only been done in North Carolina in the cases of cities, towns, and counties, the usual or ordinary political subdivisions of the state. It is true that the power of taxation is an inherent and essential attribute of sovereignty, which under our system of government is placed in the legislative department, and that Mr. Cooley and other writers on the subject, in referring to it, say that it cannot be delegated except to municipal corporations. But in using the term "municipal corporations," in this connection, these writers do not use the word in its restricted sense of municipal corporations proper, confining it to cities and towns, but in a more enlarged and generally received acceptation, which includes municipal corporations technically so termed, and also public corporations created by the state for the purpose of exercising defined and limited governmental functions in certain designated portions of the state's territory. These last are termed by authors of approved excellence and decisions of authority to be "public quasi corporations," and are said to

include counties, townships, school districts, and the like. Thus a recent writer, Abbott on Municipal Corporations, § 8, says: "Public quasi corporations are defined as 'subdivisions of the state's territory, such as counties, townships, school districts, and the like, which are created by the Legislature for public purposes and without regard to the wishes of the inhabitants, are to be included in the class known as 'public quasi corporations.'" They are, in essence, local branches of the state government, though clothed in a corporate form in order that they may the better perform the duties imposed upon them." Smith's Modern Law Municipal Corporations, §§ 8, 9; Beach on Public Corporations, § 3; Dillon, Mun. Corp. §§ 23, 24, 25—give definitions substantially similar, and also classify school districts with counties, townships, and other corporations of like kind. Some of these authors say that such corporations are usually formed or created by general laws, but this is not said to be universal or necessary, and on the question here discussed, the capacity to receive and exercise delegated powers of taxation, the essential feature is that they are, as stated, agencies of the state, incorporated to enable them to exercise certain governmental functions in designated portions of the state's territory. In accord with these text-writers Rhotrock, J., delivering the opinion of the court in *Currier v. District Township*, 62 Iowa, 102, 17 N. W. 191, says: "The word 'municipal,' as originally used in its strictness, applied to cities only, but the word now has a much more extended meaning, and when applied to corporations the words 'political,' 'municipal,' and 'public' are used interchangeably." This decision is an apposite authority on the case now being considered, and holds that under a statute authorizing municipal corporations to issue bonds a school district is properly called a municipal corporation according to the modern use of the term, and as such may obligate itself by bonds issued under such a statute. Our own Constitution evidently uses this term in the same sense, for in article 7, being that headed "Municipal Corporations," are included counties, cities, townships, and in section 7 of the same article, restrictive of incurring debts, it is provided "that no county, city, town or other municipal corporation shall contract a debt," clearly showing that, as used in that instrument, the broader definition is intended. That Mr. Cooley, in the clause cited by plaintiff, clearly intended the term in its more generally received acceptation is, we think, made clear by the context; for on page 103 of same work this author says: "Neither can the Legislature confer upon private corporations the power to tax, though it may doubtless create municipal corporations for that especial purpose when not forbidden by the state Constitution to do so." And in another work (*Cooley on Constitutional Limitations*, p. 264) the author says: "It is already been seen that the

Legislature cannot delegate its power to make laws; but fundamental as this maxim is it is so qualified by the customs of our race and by other maxims which regard local government, that the right of the Legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations and to confer upon them the powers of local government, and especially of local taxation, and police regulation usual with such corporations, would always pass unchallenged."

This being the correct definition of "municipal corporations" as used in the connection stated, and school districts being properly included in the term, in the absence of some restraint in the organic law, the great weight of authority is to the effect that the Legislature, as it has done in this instance, can create a specific school district within the precincts of a county, incorporate its controlling authorities, confer upon them certain governmental powers, and when accepted and sanctioned by a vote of the qualified electors within the prescribed territory, as required by our Constitution, art. 7, § 7, may delegate to such authorities power to levy a tax and issue bonds in furtherance of the corporate purpose. Thus, in *Am. & Eng. Enc. of Law*, vol. 27, p. 906, it is said: "Districts for school, highway, levee, irrigation, drainage, and other similar purposes may be, and often are, invested by the state with a corporate character and endowed with a taxing power. These are quasi corporations, mere subdivisions of the state for political purposes. * * * And further: "As has already been shown, the establishment and maintenance of public schools is deemed to be a legitimate purpose of taxation, and since the state has power to levy school taxes it can delegate such power to its subordinate political divisions. Usually the power is expressly conferred by the state on existing political divisions, or on districts constituted as corporations for school purposes." In *Desty on Taxation*, vol. 1, p. 226, it is said: "As distinct from its power of local assessment, the Legislature may create special taxing districts which may include one or more subdivisions of the state or parts of subdivisions. It is not essential that such districts shall correspond with the territorial limits of such subdivisions. So it may create levee districts, school districts, swamp lands, road and highway, and other special taxing districts." And the weight of decided cases bear out these statements of the doctrine. *McCormac v. Commissioners*, 90 N. C. 441; *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269; *State v. Sharp*, 125 N. C. 628, 34 S. E. 264, 74 Am. St. Rep. 663; *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352; *Gilkeson v. Frederick Justices* (Va.) 13 Grat. 577; *Kuhn v. Board of Education*, 4 W. Va. 499; *Smith v. Bohler*, 72 Ga. 546; *Landis v. Ashworth*, 57 N. J. Law, 510, 31 Atl. 1017; *Carson v. St. Francis Levee District*, 50 Ark. 513, 27 S. W.

590; *State v. Leffingwell*, 54 Mo. 458. In *McCormac v. Commissioners*, supra, *Merrimon, J.*, for the court, said: "That it is within the power and is the province of the Legislature to subdivide the territory of the state and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purposes of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be only by the organic law. The Constitution of the state was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them, when they apply. It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation. Hence the Legislature may, from time to time, in its discretion, abolish them, or enlarge or diminish their boundaries, or in crease, modify, or abrogate their powers. It may provide that the agents and officers in them shall be elected by the electors, or it may appoint them directly, or empower some agency to appoint them, unless in cases where the Constitution provides otherwise, and charge them with duties specific and mandatory, or general and discretionary in their character. Such power in the Legislature is general and comprehensive, and may be exercised in a great variety of ways to accomplish the ends of the government." In *Kuhn v. Board of Education*, it is held that "the Legislature has the exclusive power to create independent school districts without the assent of the citizens residing therein, and authorize by law the election of a board of education for such district by the qualified voters resident therein, and to give such board power to make the annual levies for buildings, and a board of schools therein." And in *State v. Leffingwell*, supra, on the suggestion that these districts should be created by general laws, *Wagner, J.*, for the court, says: "It may be urged that such subdivisions should be created by general laws without resort to special legislation. As a general rule this is true, but cases might arise where special acts might become absolutely necessary, such as the establishment of a new

county or a new school district in some particular locality," etc.

It cannot be maintained for a moment that the corporate purpose and authority given to the board under the act in question are not governmental in their nature. The duty of providing for a system of education is enjoined upon the Legislature, in most impressive terms by our Constitution, and is considered of such supreme importance as to require an independent and separate article in that instrument. As said by Chief Justice Jackson in *Smith v. Bohler*, supra: "We think it one of the most important of all the authorities of the county. Education is the corner stone of a political fabric, especially when that fabric rests on the basis of popular suffrage. Neither roads, court-houses, nor district subdivisions, or other arrangements for good government are more vital to society. To regulate the instruction of the children who are soon to become the fathers and mothers of the land is a great public trust, second to none confided to the people's agents, and those clothed with power to perform such a work in a county constitute a great county authority, the very head of the list of the fiduciary agents of that county which confides such a trust to them." And in this connection we deem it well to quote, also, from the opinion of *Dixon, J.*, in *Landis v. Ashworth*, supra: "That the generality of a statute is not to be tested by the uniformity of the results flowing from the exercise of the powers which it confers, provided the same powers are bestowed upon all political bodies of the same class, was distinctly decided in *Petition of Cleveland*, 52 N. J. Law, 188, 19 Atl. 17, 7 L. R. A. 431. The school laws under which this tax was levied come within the range of this decision. Nor can I think that the Constitution requires the Legislature to provide the same means of instruction for every child in the state. A scheme to accomplish that result would compel either the abandonment of all public schools designed for the higher education of youth or the establishment of such schools in every section of the state within reach of daily attendance by all the children there residing. Neither of these consequences was contemplated by the amendment of 1875. Its purpose was to impose on the Legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship, and such provision our school laws would make, if properly executed, with the view of securing the common rights of all before tendering peculiar advantages to any. But, beyond this constitutional obligation, there still exists the power of the Legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though

not essential, are yet conducive to the public service. On this power I think rests the laws under which special opportunities for education at public expense are enjoyed."

There are decisions in other jurisdictions which appear to conflict, and some which do conflict with the position here maintained; but on examination they will, as a rule, be found to rest on a different principle from that involved by the facts of the case, or to be based on reasons or some special constitutional feature which do not exist with us. Thus in New Jersey (*Morgan v. Comptroller of City of Elizabeth*, 44 N. J. Law, 573) it is said: "The power of the Legislature itself to erect a taxing district of lesser area than the district of which it is a part has been denied in a series of cases in this court." This statement of the doctrine, while sufficient, perhaps, for the purpose then made, on examination of the authorities cited to sustain it, will be found too broad, and these authorities will require the qualification that such a district cannot be formed within an existing political division of the state in which taxes may be imposed, without regard to special benefits, unless such district is itself made a political division with appropriate powers of self-government. Accordingly we find that the New Jersey courts, as seen in *Landis v. Ashworth*, supra, uphold the taxing power of school districts, specially created for the reason, no doubt, that there, as here, the tax is laid on a principle of uniformity, and for the benefit of all the inhabitants within the designated territory. It is imposed only by a vote of the people themselves, and the authorities are given entire control over all matters pertaining to education within the specified district. The Supreme Court of Alabama has also held that the power of taxation cannot be conferred on a school district (*Schultes v. Eberly*, 82 Ala. 242, 2 South. 345), and that such districts are not included in the term "municipal corporations" as used in their Constitution. This decision is rested in part on certain special features of the Alabama Constitution, but is made to depend chiefly on the ground that under the act creating these districts the "cardinal principle of self-taxation" was ignored; and if these districts were allowed the power to tax the limitations fixed by their Constitution on municipal taxation could be avoided.

No such objection can be raised to the act now before us. The tax, as stated, can only be imposed, as required by our Constitution, by a vote of the people within the district, and there is no reason which occurs to us why the limitations on municipal taxation provided in our Constitution do not apply. As we have shown, these school districts are public quasi corporations included in the term "municipal corporations" as used in article 7, § 7, of our Constitution, and so come within the express provisions of section 7,

that "no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or bond its credit, etc., nor shall any tax be levied but by a vote of the qualified voters." And the principle of uniformity is established and required by section 9 of this article. Only counties, cities, towns, and townships are mentioned in section 9 in terms, but the section is intended to, and does, regulate the method of taxation, and requires that all municipal taxation shall be uniform and ad valorem. The agencies are of secondary importance, and, if the General Assembly under the power conferred by section 14 of the article, change the agencies for levying these taxes the substituted authority would at once come within the regulation as to the method, and we so hold. Again the Supreme Court of Tennessee in *Waterhouse v. Board of School Trustees*, 55 Tenn. 857, has held that the taxing power can only be delegated to counties and incorporated towns, and not to school districts. This decision is put on the ground that the Constitution of Tennessee in terms gives the General Assembly the power to authorize "counties and incorporated towns to impose" taxes without more, and that the express delegation of this power in the cases specified excludes its exercise in other cases. But no such limitation exists with us. Article 7 of our Constitution, which relates to the matter of municipal government, after providing for the officers, agents, and boards which shall be ordinarily required as sufficient for the purpose, contains this provision, being section 14: "The General Assembly shall have full power by statute to modify, change or abrogate any and all of the provisions of this article and substitute others in their place, except sections 7, 9 and 13." Section 7, as stated, establishes a limitation on the power to contract debts, impose taxes, etc. Section 9 provides that taxation shall be imposed ad valorem. Section 13 prohibits the payment of debts contracted in aid of the Confederate government. The language of section 14 is very broad in its scope and terms, and the Supreme Court in construing the section has decided that it is not necessary to effect changes in municipal government that an act for the purpose should be general in its operation, or that it should, in terms, abrogate one article and substitute another in its stead, but that an act of the General Assembly making such change, and local in its operations, must be given effect under this amendment if otherwise valid. After declaring this as a principle of construction, the court, in *Harriss v. Wright*, 121 N. C. 179, 28 S. E. 269, further holds as follows: "In 1875 a constitutional convention amended article 7 in these words: 'The General Assembly shall have full power by statute to modify, change or abrogate any and all the provisions of this article and substitute others in their place except sections 7, 9 and 13.'

Thus was placed at the will and discretion of the Assembly the political branch of the state government, the election of court officers, the duty of county commissioners, the division of counties into districts, the corporate power of districts and townships, the election of township officers, the assessment of taxable property, the drawing of money from the county or township treasury, the entry of officers on duty, the appointment of justices, of the peace and all charters, ordinances, and provisions relating to municipal corporations." Our Constitution, therefore, so far from restricting the power of the General Assembly on the matter now before us, has conferred upon that body full and ample power to establish any form of municipal government which the public interests and special needs of a given community may require. It is further urged that to establish such a district and confer powers of taxation within another political division which is also exercising powers of local self-government will tend to enhance expense, produce confusion, and disorder, and at times, perhaps, a conflict of authority. It does not appear what were the reasons which induced the inhabitants of this community to procure and adopt the scheme of education established by the act in question, but whether they were well considered or otherwise is of no moment. The question here is simply one of constitutional power. As said by Nash, O. J., in *Taylor v. Commissioners*, 55 N. C. 144, 64 Am. Dec. 566: "Whether the Legislature acted wrong or not is a question with which we have nothing to do. The power being admitted, its abuse cannot affect it. That is a matter for Legislative consideration. It is sufficient that the judiciary claim to sit in judgment upon the constitutional power of the Legislature to act in a given case. It would be rank usurpation for us to inquire into the wisdom or propriety of the act." We are of the opinion that on reason and authority the act in question is a valid exercise of legislative power, and on the facts found by the court below there was error in the judgment pronounced by his honor, and the same must be reversed.

While this disposes of the case and determines all questions in which the plaintiffs have shown or claimed any interest, inasmuch as the judge declared that the defendants intend to disburse \$2,500 of the \$3,000 raised by the sale of bonds for the erection of a school building for the white race, we deem it not amiss to call the attention of the defendants to the decision of this court made at the last term in *Lowery v. School Trustees*, and reported in 140 N. C. 33, 52 S. E. 267, as affecting section 12 of the act. This section provides that the trustees shall dispose of the school funds to be realized under the act as to them may seem just. According to this well-sustained opinion of Mr. Jus-

tice Connor it is held to be the law that: "(a) The two essential principles underlying the establishment and maintenance of the public school system of this state are, first, the two races must be taught in separate schools; and, second, there must be no discrimination for nor against either race. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for the purpose. (b) In executing the law the defendant shall not discriminate against either race, but shall afford to each equal facilities. It is not intended by this that the taxes are to be apportioned between the races per capita, but that the school term shall be of the same length during the school year, and that a sufficient number of competent teachers shall be employed at such prices as the board may deem proper. Dictum in *Hooker v. Greenville*, 130 N. C. 478, 42 S. E. 141, disapproved. (c) The act establishing a graded school for the town of Kernersville is construed to contain a positive direction to establish one school in which the children of each race are to be taught in separate buildings and by separate teachers, as the Constitution commands. (d) The school district prescribed by the act of 1905 (Priv. Laws, p. 30, c. 11) must include both races, and the taxes levied and collected upon the property and polls of both races in the district must be applied to the support and maintenance of a graded school for the children of both races, and in carrying out the provisions of the act the imperative mandate of the Constitution that there shall be no discrimination in favor of, or to the prejudice of either race, must be observed." And from this it follows that the discretion conferred upon the defendants by the terms of section 12 is by no means an arbitrary one, but the same must be used as directed and required by the Constitution and in the light of the above decision. There are no facts or data given by which the court may determine whether the contemplated expenditure is or is not an unequal and unlawful disbursement of the school funds. The defendants in their sworn answer aver that they have no desire or intent but to administer their trust in accordance with the law of the land, and it is right that we should act upon this statement till the contrary is made to appear by proceedings duly entered. This section as stated only relates to the disposition of the fund which is in no way involved in this suit. If defendants, contrary to their avowed purpose, shall endeavor to exercise the authority conferred upon them with an "evil eye and unequal hand," so as to practically make unjust discrimination between the races in the school facilities afforded, it is open to the parties who may be interested in the question by proper action to correct the abuse and enforce compliance with the law.

Judgment reversed.

(141 N. C. 128)

CITY OF DURHAM v. RIGSBEE et al.

(Supreme Court of North Carolina. April 17, 1906.)

1. EMINENT DOMAIN—CONDEMNING LAND FOR STREET—INABILITY TO AGREE WITH OWNER—PETITION—SUFFICIENCY.

The charter of a city authorized it to condemn land for municipal purposes by the method prescribed for railroad companies condemning land, which required the petition to show that the petitioner had not been able to acquire title to the land sought and the reason of such inability. *Held* that, in a petition by a city to condemn land for widening a street, it was essential to allege that it had not been able to acquire title and the reason of such inability.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 514.]

2. SAME.

A petition by a city to condemn land for widening a street, alleging that its officers had made reasonable efforts to agree with the owners, but that an agreement was rendered impossible owing to the extravagant value which they placed on the property, as well as by their conduct in declining to meet a committee of aldermen, and in sending them a threatening message, sufficiently showed an effort on the part of the city to come to an agreement and the reason of its inability to do so, especially in view of the answer of the owners alleging that they were not willing that the street should be widened, or that their property should be condemned, because they did not believe that it was necessary for the public interest, but that they were willing to sell the property to the city for an adequate price.

3. SAME—DISCRETION OF MUNICIPAL AUTHORITIES.

The question of widening a street is a matter within the sound discretion of the municipal authorities, with the exercise of which neither an owner whose land is sought to be taken nor the courts can interfere.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 168-170.]

4. SAME—PROCEDURE—LEGISLATIVE DISCRETION.

The method of condemning land for a public use is within the exclusive control of the Legislature, limited by the Constitution, and courts cannot aid a landowner whose land is sought to be taken, where the statute has been strictly followed, until the question of compensation is reached.

5. SAME—AWARD OF DAMAGES—JURY TRIAL—EFFECT.

Where, in proceedings by a city to condemn land for widening a street, the sole exception filed by the owner related to the amount of damages, and he demanded a jury trial, as authorized by Revisal 1905, § 2588, providing that, in condemnation proceedings by a city to acquire rights of way for streets, a person interested in the land shall be entitled to have, on demand, the damages assessed by commissioners determined on appeal by a jury of the superior court in court time, he must abide by the verdict of the jury, and he cannot complain that the clerk reduced the compensation awarded by the commissioners.

Appeal from Superior Court, Durham County; Ferguson, Judge.

Proceedings by the city of Durham against R. H. Riggsbee and another, executors and trustees of A. M. Riggsbee, deceased, to condemn land for widening a street. From a judgment awarding damages, defendants appeal. Affirmed.

Proceeding under sections 1943 et seq. of the Code, now section 2580, 2588, of the Revisal of 1905, commenced by the city of Durham for the purpose of condemning land to widen a street in the city. The defendants demurred to the petition. The demurrer was sustained by the clerk, and an amended petition filed. The defendants demurred to the petition as amended. The demurrer was overruled, and the clerk required the defendants to answer. Upon the filing of the answer, the clerk appointed three disinterested freeholders as commissioners to appraise the land described in the petition and plat attached. Upon the coming in of the report, the defendants excepted thereto upon the ground that the valuation, placed upon the property condemned, was inadequate. The petitioner also excepted upon the ground that the appraisement was excessive. Upon the hearing the clerk reduced the sum at which the commissioners had appraised the property from \$2,500 to \$1,750. Whereupon the defendants entered of record the following exception: "In open court the defendants excepted to the foregoing order and decree and every part thereof, and appealed to the superior court in term and demand a jury trial upon the hearing of the appeal." Upon the trial in the superior court, Judge Ferguson affirming the order of the clerk overruling the demurrer of the defendants. Whereupon the defendants tendered certain issues which the court declined to submit, and thereupon submitted to the jury the following issue: "What damages have the defendants sustained by reason of taking the land condemned in these proceedings for the purpose of widening Church street? Ans. \$2,000." From the judgment rendered the defendants appealed.

Fuller & Fuller and Pou & Fuller, for appellants. Manning & Foushee and R. B. Boone, for appellee.

BROWN, J. (after stating the facts). 1. We agree with the clerk and his honor that the demurrer to the amended petition should be overruled, and further that the answer sets up no valid defense to a condemnation of the land by the petitioner for the purpose of widening Church street. It seems to be conceded, although not so stated in the record, that the method of procedure for condemning land prescribed for railroad companies by the Revisal is the method authorized by the petitioner's charter for condemning land for municipal purposes. That being so, a necessary allegation of the petition is that the plaintiff has not been able to acquire title to the land and the reason of such inability. *Hill v. Mining Co.*, 113 N. C. 259, 18 S. E. 171; *Allen v. Railroad*, 102 N. C. 381, 9 S. E. 4. It is not essential that the particular language of the statute should be used. If the facts alleged plainly show that the petitioner has been unable to acquire title and

the reason why, that is a compliance with the statute. While this is a necessary allegation of this petition, it is not an issuable fact for the jury to determine. The judge was right in refusing to submit it to the jury. The statute requires such a statement so that the court may see whether the condemnor has made a reasonable effort to acquire title without resorting to the expense of condemnation proceedings and bringing a citizen into court. This statement is the allegation of a preliminary jurisdictional fact, not triable by the jury, a question of fact for the decision of the clerk in the first instance, and perhaps subject to review by the judge on appeal. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123; *Railroad v. Parker*, 105 N. C. 246, 11 S. E. 328; Code § 1945, Revisal 1905, § 2584. The purpose of this requirement in the statute is thus stated in *Hill v. Mining Co.*, supra: "The statute requires the railroad company when it becomes the actor in such a proceeding, as it may, to state that fact as its justification for summoning to court a citizen whose land it wishes to take by condemnation." The allegation is not required when the landowner is petitioner. We think the amended petition states facts which plainly indicate not only that the petitioner's officers made every reasonable effort to agree with the defendants, but that an agreement was rendered impossible owing to the extravagant value of \$30,000 which the petition alleges was placed upon the property by the defendants, as well as by their conduct in declining to meet the committee of aldermen and in sending them a threatening message "to look out or they would get themselves put in jail." These alleged facts are tantamount to a specific allegation in the words of the statute, and plainly show an effort upon the part of the petitioners' officers to come to an agreement and the reason of their inability to do so. If the amended petition was deficient in this respect, it is greatly aided by the admissions of the answer, for that shows clearly that the petitioner made initial efforts to negotiate and that the defendants declined to do so. The answer gives the real reason why all negotiations proved abortive, viz., "that said R. H. Rigsbee is not willing that Church street should be widened or that this property should be condemned, because he does not believe that it is necessary or to be desired for the public interest that it should be, but that these defendants are willing to sell said property to said petitioner for an adequate price." It is apparent from a perusal of the answer that the defendants would entertain no proposition except a sale to the city of the entire property, which the city doubtless had no use for. The advisability of widening Church street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither these defendants nor the courts can interfere. It is a political and admin-

istrative measure of which the defendants are not even entitled to notice or to be heard. 2 *Lewis, Eminent Dom.* § 66; *State v. Jones*, 189 N. C. 616, 52 S. E. 240. The method of taking the land for the public use is within the exclusive control of the Legislature limited by organic law. The exercise of this power being a political and not a judicial act, the courts cannot help the injured landowner, in a case like this, where the statute has been strictly followed, until the question of compensation is reached. *People v. Railway Co.*, 160 N. Y. 225, 54 N. E. 689; *Zimmerman v. Canfield*, 42 Ohio St. 463; *People v. Smith*, 21 N. Y. 595. We therefore think there are no issues to be determined except that of compensation, and that his honor properly declined to submit any others.

2. Upon the coming in of the report of the commissioners, both the petitioner and the defendants filed exceptions thereto, the plaintiff, because the compensation was excessive; the defendants, because it was inadequate. Upon the hearing of the exceptions the clerk modified the report, reduced the compensation to \$1,750 and adjudged the same to be a fair valuation of the property and authorized the plaintiff to enter upon and take possession of the land described in the petition to be used for school purposes on the payment by it of the \$1,750. The defendant excepted to the order, appealed to the superior court and demanded a jury trial. It is contended by the defendants that the clerk had no power to fix the compensation himself, and that when he set aside the appraisement he should have appointed other commissioners. The case of *Hanes v. Railroad*, 109 N. C. 490, 13 S. E. 896, is cited as authority for this position. Since that case was decided, however, the act of 1893 has been enacted, by which the rights of all parties to the proceeding are fully protected by prescribing a jury trial in term time at the instance of either. It is contended by the petitioner that since the passage of that act there is no reason for appointing new commissioners, and that the clerk, being authorized by the statute to modify the report, may do so even as to matter of compensation without jeopardizing the rights of either party to the proceeding. There is undeniable force in this reasoning. It is not necessary, however, that we should decide it now, inasmuch as the defendants did not move for the appointment of other commissioners. They preferred to exercise their undeniable right to demand a jury trial before the judge in term. Since the act of 1893, Revisal 1905, § 2588, the defendants had a right to demand a jury trial upon the matter of compensation. That act provides in express terms that in condemnation proceedings by any city or town to acquire rights of way for streets, any person interested in the land, or the condemnor, shall be entitled to have upon demand the damages assessed by commissioners heard and deter-

mined upon appeal by a jury of the superior court in term time. The sole exception filed by the defendants to the report of the commissioners related to the amount of damages assessed. They entered no exception to the order appointing commissioners, and they appear to have waived whatever rights they may have had, except to have the amount of compensation they are entitled to receive determined by a jury in term. Having appealed to a jury of their country, they must abide the verdict rendered.

No error.

CONNOR, J., concurs in result.

(141 N. C. 123)

DUNN et al. v. CURRIE.

(Supreme Court of North Carolina. April 17, 1906.)

1. WITNESSES—TRANSACTION WITH DECEASED PERSON—WORK AND LABOR.

In an action against an administrator on an implied contract for services rendered by decedent, plaintiff was incompetent to testify that he worked on deceased's land and as to the reasonable value of his services, as such evidence indirectly showed a transaction or communication with deceased as to which plaintiff was prohibited from testifying by Revisal 1905, § 1631.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 664.]

2. APPEAL—EFFECT OF ERROR.

Where plaintiff sued an administrator on an implied contract for services rendered by himself and his wife and children to deceased, and a verdict recovered by plaintiff was indivisible, an error committed in permitting plaintiff to testify as to the services rendered by him and as to the reasonable value thereof vitiated the entire verdict.

3. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST DECEDENT—IMPLIED CONTRACT—RELATIONSHIP OF PARTIES.

Where plaintiff, his wife, and children rendered services for decedent in his lifetime at his request, the fact that plaintiff's wife was his daughter was insufficient to rebut an implied contract on deceased's part to pay for such services.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 733.]

Appeal from Superior Court, Montgomery County; Peebles, Judge.

Action by B. T. Dunn and others against J. C. Currie, as administrator of the estate of Thomas Bunnell, deceased. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

The plaintiff sued to recover to his own use the sum of \$243.80 for work done, labor performed, and services rendered by himself and family for Thomas Bunnell, the intestate of the defendant. He testified as follows: "Q. Did you ever do any work on the land of Thomas Bunnell? A. I worked on the land in cultivating it. I worked on the building; cannot tell the date. It was worth 75 cents per day." He further testified that he did other work, such as cutting

and binding wheat and oats, plowing, and mauling; that his family also worked on the farm; that his wife did the cooking, and he took care of the intestate's house and his stock, and he and his wife nursed him in his last illness. The plaintiff's wife is a daughter of the intestate. He then testified as to the reasonable value of the work and labor done by him and his family. All of this testimony was objected to by the defendant in apt time and admitted. The defendant excepted. There was other evidence introduced by the respective parties which is not set out in the case because, as is stated, there was no exception thereto. At the close of the testimony, the defendant requested the court to charge the jury "that, if they believed the testimony in the case, the presumption of a promise to pay for the services rendered is rebutted by the relation of the parties, and the plaintiff is not entitled to recover." This instruction was refused, and defendant excepted. There was a verdict for \$232.15, and judgment thereon for the plaintiff. The defendant appealed.

Adams, Jerome & Armfield and W. A. Cochran, for appellant.

WALKER, J. (after stating the case). The testimony of the plaintiff, which was admitted by the court over the objection of the defendant, was incompetent, and should have been excluded. If it did not clearly show a transaction or communication between the plaintiff and the intestate, from which the law would imply a promise by the latter to pay for the services alleged to have been rendered, then it was wholly irrelevant, and did not tend to establish the plaintiff's cause of action for work done and labor performed for the intestate. From the fact that labor is performed and services are rendered which benefit another, who avails himself of the benefit thus derived, the law implies both a prior request for the labor and services and a promise on the part of the beneficiary to pay for them what they are reasonably worth. Any dealing or course of conduct on the part of the plaintiff with respect to the deceased which tends to imply this request, and the consequent promise to pay the reasonable worth of the benefit received, must, of necessity, though indirectly, show a transaction or communication with the deceased within the evident meaning and intention of the statute. Revisal 1905, § 1631. In this case the plaintiff substantially testified to a transaction or communication with the deceased; otherwise, where is there the slightest foundation for the claim that the defendant, as his administrator, is indebted to him. If he did not work for the intestate, nor render him any service, there was no implied promise to pay, and he does not allege or rely on an express one. The case, therefore, is governed by the principle, an-

nounced in *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779, that the plaintiff is competent to testify as to independent facts, but not as to those which tend to show a personal transaction or communication with the deceased, whereby a liability to him by the latter, either express or implied, would arise. The plaintiff cannot, it is further said in that case, by his own testimony prove an express contract by showing a communication, or an implied contract by showing a personal transaction, as, for example, the rendition of services which were accepted by the intestate or received without objection. To the same general effect is *Kirk v. Barnhart*, 74 N. C. 653. But the case of *Stocks v. Cannon*, 139 N. C. 60, 51 S. E. 802, is more directly in point. There the testimony as to services rendered was very similar to that we have here. We find that the same decision has been made by another court upon a like state of facts, it being there held that such testimony is, in substance and effect, a statement that services had been rendered under a contract, or upon request, implying a promise to pay for them, and therefore related to a transaction or communication within the meaning of the statute excluding such evidence. *Boyd v. Cauthen*, 28 S. C. 72, 5 S. E. 170. Whether it was competent for the plaintiff to testify as to the services rendered by his wife and children, for the value of which he sues in his own right, we need not inquire, as the verdict is indivisible, and the error we have already pointed out vitiates it as a whole. It cannot be ascertained to what extent the incompetent evidence influenced the jury, all of the items being indistinguishably blended in one amount. *Rowe v. Lumber Co.*, 133 N. C. 444, 45 S. E. 830; *Beam v. Jennings*, 96 N. C. 82, 2 S. E. 245; *Holmes v. Godwin*, 71 N. C. 306.

The instruction requested by the defendant was properly refused. All of the evidence, as the case shows, is not before us. We cannot, therefore, decide whether, "if the jury believe the testimony," the implication of a promise which the law ordinarily raises has been rebutted, because we are not informed as to what the testimony was. Upon the evidence which appears in the record we do not think that, if it had all been competent and a promise could be implied, there was anything in the relation of the parties, so far as we are now advised, which rebuts the implication of the law. As now presented, the case does not fall within any of the adjudged cases upon this subject. *Hussey v. Roundtree*, 44 N. C. 110; *Hudson v. Lutz*, 50 N. C. 217; *Dodson v. McAdams*, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408; *Young v. Herman*, 97 N. C. 280, 1 S. E. 792; *Callahan v. Wood*, 118 N. C. 753, 24 S. E. 542; *Avitt v. Smith*, 120 N. C. 392, 27 S. E. 91; *Hicks v. Barnes*, 132 N. C. 146, 43 S. E. 604; *Stallings v. Ellis*, 136 N. C. 69, 48

S. E. 548. These cases establish the principle that certain relations existing between the parties raises a presumption that no payment was expected for services rendered, or support furnished by the one to the other. The presumption standing by itself repels what the law would otherwise imply—that is, a promise to pay for them; but this presumption is not conclusive, and may in its turn be overcome by proof of an agreement to pay, or of facts and circumstances from which the jury may infer that payment was intended by one of the parties and expected by the other. There is no fixed rule governing all cases alike, but each case as it arises must be determined upon a consideration of all the facts and circumstances, subject, however, to the legal bearing on the liability of the particular relation existing at the time between the parties, as shown in the cases cited and in others of a similar kind decided by this court. *Young v. Herman*, 97 N. C. 280, 1 S. E. 792; 21 Am. & Eng. Enc. Law (2d Ed.) 1061, 1063; *Williams v. Barnes*, 14 N. C. 348.

There is nothing, though, in the facts of this case as we view them, to prevent a recovery, if the plaintiff had, by competent evidence, proved that he had performed the services as alleged, and that the intestate received the benefit of them.

New trial.

(73 S. C. 306)

FOWLES v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Feb. 26, 1906.)

1. RAILROADS—KILLING DOG ON TRACK.

There is no presumption of negligence of a railroad from the fact of the killing of a dog on the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1578.]

2. SAME—SIGNALS AT CROSSING.

An engineer is not required to give statutory signals at crossings to warn a dog hunting near the track, but must take precautions to avoid injuring the dog, if seen on the track, and not in the possession of its faculties.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1476-1478.]

Appeal from Common Pleas Circuit Court of Richland County; Gary, Judge.

Action by J. J. Fowles against the Seaboard Air Line Railway. From a judgment affirming a judgment of magistrate, defendant appeals. Reversed.

Lyles & McMahan, for appellant. Jas. H. Fowles, Jr., for respondent.

WOODS, J. The plaintiff recovered judgment in the court of Magistrate Robert Moorman for \$75, the alleged value of a Red Bone fox hound killed by the defendant's train of cars. The judgment of the circuit court affirming the judgment of the magistrate must be reversed on the ground that there was no evidence of negligence. The

proof was that the dog was killed by the train while trailing around the track near the public crossing. The act of the defendant alleged to be negligent and on which, as stated by the magistrate, the judgment was based, was that the defendant's train "gave no warning such as is usually given when animals are on the track, and that this was negligence inasmuch as the engineman had ample time to see the dog ahead of him." No witness saw the dog when he was killed, and there is nothing to indicate whether he was on the track long enough for the engineman to see him and sound the whistle, or ran on the track the instant he was killed. The person who had him in charge, and who knew of the approach of the train had no right to rely upon the statutory signals required at a crossing, as the dog was not in the attitude of one intending to cross, but merely happened to be hunting near by. *Neely v. Railroad Co.*, 33 S. C. 136, 11 S. E. 636; *Kinard v. Railroad Co.*, 39 S. C. 514, 18 S. E. 119; *Sims v. Railway Co.*, 59 S. C. 246, 37 S. E. 836. The rule in *Danner's Case*, 4 Rich. Law, 329, 55 Am. Dec. 678, does not apply to the killing of a dog by a railroad train and there is no presumption of negligence from the fact of killing. *Wilson v. Railroad Co.*, 10 Rich. Law, 52; *Richardson v. Railroad Co.*, 55 S. C. 334, 33 S. E. 466. The dog's intelligence, the rapidity and agility with which he moves, warrant those in charge of a train in acting upon the supposition that he will observe its approach, and get out of its way. In this respect it is reasonable to place him on somewhat the same footing as a human being when in the possession of all his faculties and capable of seeing the danger and escaping from it. If the dog had been observed by the engineman to be on the track in a condition of helplessness or even impaired capacity to take care of itself, it would have been the duty of the engineman to take some precaution for its safety; but there is no proof that the dog was not in possession of his faculties, or that the engineman had any opportunity to see him on the track before he was killed.

The judgment of this court is that the judgment of the circuit court be reversed.

(73 S. C. 325)

Ex parte MILEY.

WARNEKE v. KEARSE et ux.

(Supreme Court of South Carolina. Feb. 26, 1906.)

1. HOMESTEAD—EXEMPTIONS.

Where neither a wife nor a husband owned lands in the state, other than a house and lot of the value of \$750, the wife had a right of homestead in such house and lot, which, being of less value than \$1,000, was not subject to any lien by her creditors.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 93-97.]

2. APPEAL—EXCEPTIONS—SUFFICIENCY.

Where an exception points out no specific error, it will not be considered.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1620-1630.]

Appeal from Common Pleas Circuit Court of Alken County; Klugh, Judge.

Action by H. F. Warneke against D. H. Kearse and Susan Badger Kearse. Petition of Salley Miley to enjoin levy on certain real estate under a judgment for plaintiff in such action. From an order granting said petition, H. F. Warneke appeals. Affirmed.

T. R. Morgan, for appellant. Croft & Salley, for respondent.

POPE, C. J. This is an appeal from an order of his honor, Judge Klugh, enjoining Mrs. H. F. Warneke, the appellant, and the sheriff of Alken county, from selling certain real estate, levied upon under the judgment in the case of H. F. Warneke, plaintiff, against D. H. Kearse and Susan Badger Kearse, defendants. The following facts were admitted by the parties to this controversy: (1) That D. H. Kearse and Susan Badger Kearse became husband and wife on the 25th of September, 1890. That, as husband and wife, they resided in a house and lot in the city of Alken, in this state, from the date of their marriage until the 26th of December, 1901. (2) That this small lot of land was all the real estate which the said D. H. Kearse and Susan Badger Kearse owned, or now own, and this lot of land was owned in her own right by the said Susan Badger Kearse. (3) That on the 26th of December, 1901, for the sum of \$750, the said Susan Badger Kearse, under her deed, conveyed the said small lot of land to the petitioner, Salley Miley, which said deed was duly recorded in the office of register of mesne conveyances of Alken county in title book 11, p. 30. (4) That the plaintiff, Mrs. H. F. Warneke, obtained a judgment in court of common pleas for Alken county in said state, against the defendants, D. H. Kearse and Susan Badger Kearse, for the sum of \$14.19, on the 22d of November, 1897, on a note held by the plaintiff against the defendants, dated the 20th of June, 1895. (5) That the said judgment was levied upon the small tract of land, formerly owned by Susan Badger Kearse and at present owned by the petitioner, Salley Miley, by the sheriff, Owen Alderman, who has advertised the same for sale on the 7th of November, 1904, for the purpose of satisfying said judgment. (6) That the said Susan Badger Kearse occupied the same as her homestead; that the same is admitted to be worth the sum of \$750, and no more.

Upon the pleadings and the foregoing facts, the contention between the parties came on for trial before Judge Klugh, who, upon the 31st of October, 1904, rendered the

following order: "This is a motion made before me at chambers this day upon notice and upon a petition and affidavits on the part of Salley Miley, for an order enjoining the plaintiff, Mrs. H. F. Warneke, and the sheriff of Aiken county, from proceeding further with the sale of a house and lot located in the city of Aiken, on an execution issued in the above-entitled action, on the ground that the said property is exempt from the judgment lien on which said execution was issued by reason of the homestead laws of this state. The facts of the case are these: The defendants, Susan Badger Kearse and D. H. Kearse, it appears, were married on the 25th of September, 1890, and have ever since occupied the relation of husband and wife, and have ever since been residents of the state of South Carolina. It also appears that the judgment on which the said execution was issued in the above-entitled action was recovered on the 22d day of November, 1897. I also find that from the date said judgment was recovered up to and including the 26th of December, 1901, the date on which said property was sold to Salley Miley, that the defendant, D. H. Kearse, owned no real estate in this state, nor did his wife, Susan Badger Kearse, during said period of time own any real estate, except that herein advertised for sale, and that they occupied the same as their home until they removed to the County of Spartanburg, in 1896. That the said Susan Badger Kearse conveyed the same to Salley Miley on the 26th of December, 1901, for the consideration of \$750, which was a reasonable price for the same. On these facts I hold as a matter of law that said property not being worth more than \$1,000 and the defendants owning no other property during said period, the same was exempt from the judgment lien herein as their homestead. "Ordered, that plaintiff, Mrs. H. F. Warneke, and Owen Alderman, sheriff of Aiken county, and all persons claiming under, by or through them, be enjoined, and they are hereby enjoined and restrained, from proceeding further with the sale until the further order of the court, and the plaintiff, Mrs. H. F. Warneke, pay the cost of this proceeding."

To which order the appellant filed the following exceptions: "(1) Because his honor erred in holding as a matter of law that the property, sought to be sold, not being worth more than \$1,000 and the defendant owning no other real property during the period mentioned in the petition, was exempt from the judgment lien herein as their homestead; whereas, he should have held as a matter of law that the defendant, Susan B. Kearse, waived any right to homestead that she may have had in said real estate by her deed of conveyance of the said real estate to said Salley Miley. (2) Because his honor erred in not holding as a matter of law, as contended by the plaintiff, that inasmuch as the real

estate had never been assigned or set off to the defendant, Susan Badger Kearse, as a homestead, the lien of judgment remained upon said real estate, and the same was conveyed to the petitioner, Salley Miley, subject to said lien. (3) Because his honor erred in not holding as a matter of law, as contended for by the plaintiff, that the debt upon which the judgment referred to in the petition was rendered, evidenced by the note mentioned in the first paragraph of the third defense of the answer of the plaintiff to the petition herein was a contract entered into prior to the adoption of the Constitution of South Carolina of 1895, and, therefore the said Constitution not being retroactive, section 23, of article 3 of said Constitution, and the acts passed pursuant thereto, were not applicable to this case, but the Constitution of 1868, as subsequently amended in the year 1890, governed, and that said Constitution did not prohibit the waiver of the homestead. (4) Because his honor erred in enjoining and restraining the plaintiff, Mrs. H. F. Warneke, and the sheriff of Aiken county, from proceeding further with the sale herein."

The appellant has abandoned exception 3. We will now dispose of the other three exceptions in their order.

1. The circuit judge is sustained in the matter embraced in this exception. The true value of the house and lot in Aiken, being the sum of \$750, and it appearing that neither said Susan Badger Kearse nor her husband, D. H. Kearse, owned other lands in this state on the 26th day of December, 1901, she had a right of homestead in said house and lot, which being of less value than \$1,000, was not subject to any lien by attachment or otherwise by her creditors. *Elliott v. Mackorell*, 19 S. C. 243; *Cantrell v. Fowler*, 24 S. C. 428; *Wood v. Timmerman*, 29 S. C. 173, 7 S. E. 74; *Ketchin v. McCarley*, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674. It made no difference that such right of homestead was not assigned. *Ketchin v. McCarley*, supra, in which it was held: "It is clear, therefore, that the land in controversy in this case, was not only exempt from levy or sale under the execution issued to enforce McCarley's judgment, but was not subject to the lien of such judgment. If, then, the land was not subject to the lien of the judgment when it was conveyed to the plaintiff (to petitioner in the case at bar), it must necessarily have passed to her free from any such lien or incumbrance, and cannot now be subjected to the satisfaction of a judgment against her grantor."

2. The decisions cited above are conclusive of the question raised by the second exception.

3. The fourth exception is too general. It points out no specific error. These exceptions are all overruled.

It is our judgment that the judgment of the circuit court is affirmed.

(73 S. C. 351)

WATSON v. HOKE.

(Supreme Court of South Carolina. Feb. 27, 1906.)

EASEMENTS—RIGHT OF WAY—FARM LANDS—GATES.

Where the owner of the servient estate in farm lands took a right to use his land for agricultural purposes subject to a private right of way, and consented and assisted others in laying out the way across open lands, he could inclose them, if necessary, by using gates for that purpose, if they were not so constructed as to constitute an unreasonable burden on the right of way.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 124–126.]

Appeal from Common Pleas Circuit Court of York County; Gage, Judge.

Action by D. A. A. Watson against Henry L. Hoke. Decree for defendant, and plaintiff appeals. Affirmed.

The following is the circuit decree: "This is an action to abate a nuisance and to further enjoin its commission. The wrong complained of is the erection by defendant of gates across a way owned by plaintiff over defendant's lands. The referee found against the plaintiff, and the case comes on to be heard upon two exceptions by the plaintiff. The exceptions raise practically one issue, of mixed law and fact, and that is: Did the defendant have the legal right to at all obstruct plaintiff's way across defendant's land? The land over which the way lies was conveyed by plaintiff to defendant on 8th December, 1892, and it lies between plaintiff's two tracts of land. When the deed was made, this clause was written into it: 'With the reservation of the right of way over said tract of land which I am to have on both sides of Allison's creek down to my land which adjoins said tract of land.' Thereafter the parties made definite that which the deed did not. They located the way upon the ground, worked it and erected bridges along it. All the parties ever expressly agreed to about the way was written into the deed, and has been recited. There was no fence across the way when the deed was made, and none when the location was made; and therefore there were no bars or gates there. The way is a private one, and there is no pretense it is aught else. The case would not be altered if plaintiff had never owned the servient estate, and defendant had granted to him an easement across the defendant's land. In that event, would the law forever prohibit defendant to fence his land; for a gate implies a fence? For there was no agreement between the parties, and the law must determine that which they have left uncertain. In my judgment, section 1338 of the Civil Code of 1902, has no reference to a case like this. It embodies the act of 1855. The object of that act was to confer on the owner of the servient estate, by direct grant of the Legislature, a right the courts had held he might acquire by pre-

scription. It had reference to neighborhood roads, because the penalty was by indictment. *State v. Pettis*, 7 Rich. Law, 390; *State v. Jefcoat*, 11 Rich. Law, 529. A 'right of way' means what those words imply. It does not mean a way always open. It does not mean a way without any obstruction. Words have not been used to express that idea. The right reserved is to pass and repass; and, in the absence of express language, that means to pass and repass in a reasonable manner. The testimony does not show that the gates constitute an unreasonable obstruction. It should do so to establish the plaintiff's case. The testimony, leads me to believe this controversy arose out of a controversy about bridges on the way. Unfortunately for themselves, and for society, these neighbors got wrong with one another, so that acts which might have been regarded as lawful came to be regarded as trespasses. I can put my hand on no controlling authority in this state to sustain my view of defendant's right to erect the gates. Mr. Washburn states the law thus: 'As a general proposition the owner of a servient estate, over which there is a private way, may maintain gates or bars across the way, provided it do not materially interfere with the use of it; or the way, by the terms of the grant, is to be kept open.' 2 Wash. Real Prop. (4th Ed.) 337. An Indiana case thus lays down the rule: 'It is the rule established by the authorities, that where one grants a right of way across his land, he may shut the termini of the same by gates, unless an open way is expressly granted.' *Boyd v. Bloom* (Ind. Sup.) 52 N. E. 751. When the parties laid out the way over an unobstructed field, the inference is not conclusive that they impliedly agreed that it should always remain an uninclosed field. The defendant had just purchased the land, and the inference might well be drawn that he intended to use it in the same way land owners do use their own lands, consistent also with the rights of others upon and over it. Each party ought to have the reasonable use of his own, in the absence of a plain agreement to the contrary. In my judgment, the report of the referee should be affirmed; and it is so ordered."

Geo. W. S. Hart, for appellant. Finley & Jennings, for respondent.

WOODS, J. The sole question in this case is whether the defendant should be required to remove gates erected across plaintiff's right of way over defendant's pasture land and be enjoined from again erecting them. The facts are set out in the decree of the circuit judge, and this court is fully satisfied with his reasoning and the conclusion that the erection of the gates was necessary for the reasonable enjoyment by defendant of his land over which the way passes, and that they do not constitute an unreasonable interference with plaintiff's right of way. Wheth-

er the owner of land over which a right of way runs has a right to erect gates across it depends upon the circumstances. The owner of the servient estate in farm land does not lose the right to inclose his land for agricultural purposes by reason of taking it subject to a private right of way, nor is it his duty to run a fence on both sides for the entire length of the way as laid out. He may inclose his land, using gates, provided they are necessary for the enjoyment of his property, and are not so numerous and of such size and construction as to constitute an unreasonable burden on the right of way. This is not only manifestly the reasonable view, but it is supported by many authorities, among which we may mention the following in addition to those cited in the circuit decree: *Whaley v. Jarrett* (Wis.) 34 N. W. 727, 2 Am. St. Rep. 764; *Short v. Devine* (Mass.) 15 N. E. 148; *Green v. Goff* (Ill.) 39 N. E. 975; *Bakeman v. Talbot* (N. Y.) 38 Am. Dec. 279, and note at page 281; *Jones on Easements*, § 409. While the precise question was not involved or decided, very strong language to the same effect is used by Judge Nott, in *Capers v. Wilson*, 3 McCord, 170. To require the defendant to throw his pasture lands open would deprive him of their use, and to require him to fence the right of way on either side would entail a most unreasonable burden upon him. On the other hand, the erection of two gates, which are well constructed, does not materially affect plaintiff's enjoyment of his right of way.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 435)

STATE v. ADAMS.

(Supreme Court of South Carolina. March 8, 1906.)

1. CRIMINAL LAW — APPEAL — AFFIRMANCE — NEW TRIAL.

Where a judgment of conviction of the circuit court has been affirmed in the Supreme Court, and the case remanded, with instructions to assign a new day for the execution of the sentence, the circuit court has no jurisdiction, without leave of the Supreme Court, to entertain a motion for new trial on after-discovered evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3236.]

2. SAME — APPEAL — JURISDICTION.

On appeal from an order granting a new trial after conviction of murder has been affirmed and the case remanded, the question of jurisdiction can be raised for the first time in the Supreme Court.

Appeal from Common Pleas Circuit Court of Colleton County; Townsend, Judge.

R. A. Adams was convicted of murder, and moves for a new trial on after-discovered evidence. From an order granting the motion, the state appeals. Reversed.

James E. Davis and W. St. Julian Jervey, Sols. for the State. Howell & Gruber, for respondent.

JONES, J. The defendant, R. A. Adams, indicted for the murder of Henry Jaques, was convicted and sentenced to death. A motion for a new trial was made in the circuit court and refused. On his appeal to the Supreme Court said judgment was affirmed, and the case remanded to the circuit court, "for the purpose of having a new day assigned for the execution of the sentence heretofore imposed." *State v. Adams*, 68 S. C. 421, 429, 47 S. E. 676, 679. Upon the call of the case at the March term, 1905, of the court of general sessions for Colleton county, the solicitor moved for judgment in accordance with said judgment of the Supreme Court. In the meantime, the defendant's counsel had served the solicitor with notice of a motion before Judge Townsend, presiding judge, for a new trial on after-discovered evidence, upon the record in the case and upon annexed affidavits. The solicitor resisted the motion upon other grounds, but raised no question as to the power of the court to hear and determine said motion. The circuit court granted the motion for a new trial and the state now appeals.

The exceptions raise two questions: (1) Whether the circuit court had jurisdiction to grant a new trial on after-discovered evidence after judgment of the Supreme Court affirming the judgment of the circuit court and remanding the case for the assignment of a new day for execution. (2) Whether the showing made furnished a proper case for new trial.

The first question is conclusively settled in favor of appellant by the cases of *State v. Turner*, 39 S. C. 420, 17 S. E. 885; *State v. Way*, 40 S. C. 204, 18 S. E. 676; and *State v. Ezzard*, 41 S. C. 525, 19 S. E. 854—the two first named of which held that, after judgment of conviction in the circuit court and affirmance thereof by the Supreme Court, with instructions to assign a new day for execution of the sentence, the circuit court has no jurisdiction to entertain such motion without previous leave of the Supreme Court. The jurisdiction required by the circuit court when the remittitur is sent down is only for the purpose of carrying out the final judgment of the Supreme Court. It is contended, however, that inasmuch as no such objection was raised by the solicitor when the motion for new trial was made on circuit, that such objection cannot be urged now. This, however, is not one of those questions of procedure, or jurisdiction of the person, which might be waived by failure to raise timely objection, but is a question of jurisdiction of the subject-matter, which cannot be waived and may be urged for the first time in this court, as consent cannot confer such jurisdiction. *Ware v. Henderson*, 25 S. C. 385; *Bell v. Fludd*, 28 S. C. 313, 5 S. E. 810; *Kirven v. Scarborough*, 70 S. C. 294, 49 S. E. 860.

The circuit court being without jurisdiction, it is wholly unnecessary to consider whether that court otherwise committed error

in attempting to exercise jurisdiction. The defendant has not asked this court to suspend the appeal herein, with leave to apply anew to the circuit court to grant a new trial on after-discovered evidence, as was recently done in the case of *State v. Palmer Cresswell* (per curiam order filed February 2, 1906), and this court will not upon the record sua sponte make such order.

The order of the circuit court is reversed for want of jurisdiction, and the case is remanded to the circuit court for the purpose of having a new day assigned for the execution of the sentence in conformity with the former judgment.

(73 S. C. 430)

**CARTER v. WESTERN UNION
TELEGRAPH CO.**

(Supreme Court of South Carolina. Feb. 15, 1906. On Rehearing, March 7, 1906.)

1. TELEGRAPHS—DELAY IN TELEGRAM—COMPLAINT.

A complaint for delay in delivering a telegram: "We bring mother on 10 o'clock train. Have conveyance ready"—alleging that the telegram was sent that the receiver might make preparations for the funeral, sufficiently shows that it might have been expected that the failure to deliver the telegram would cause the body to remain at the station until a conveyance was procured.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 32, 33, 54.]

2. TRIAL—NONSUIT.

In an action for negligence, if there is evidence tending to show negligence, a nonsuit is properly denied.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 279-287; vol. 46, Cent. Dig. Trial, §§ 338-340.]

3. APPEAL—REVIEW—REASON FOR DECISION.

Where a nonsuit was properly denied, the reasons given by the court for so doing are immaterial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3408-3419.]

4. SAME—RECORD.

To procure a review of an order refusing a new trial, the grounds of motion must be set out in the record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2944, 2945.]

Appeal from Common Pleas Circuit Court of Florence County; Dantzler, Judge.

Action by John Carter against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. H. Fearons and Willcox & Willcox, for appellant. W. F. Clayton, for respondent.

GARY, A. J. The exceptions assign error on the part of his honor, the circuit judge, in overruling the demurrer to the complaint, and in refusing the motions for a nonsuit and new trial.

The complaint contains the following allegations: "That on the 19th day of Sep-

tember, 1902, between the hours of 7 and 8 in the morning, the plaintiff delivered to the defendant's agent at Lynchburg, S. C., in regard to the death of plaintiff's mother, the following message: Lynchburg, S. C., Sept. 18, 1902. To Millard Carter, Effingham, S. C. Will bring mother on ten o'clock train, have conveyance ready. John Carter.' That the said message was not received in Effingham until after the plaintiff arrived with the dead body of his mother, and that no preparations for the funeral had been made in consequence of the nonarrival of the message. That upon the arrival of plaintiff, which was coextensive with the arrival of the train from Florence to Charleston, and if on time should have arrived at Effingham about half past 10, plaintiff inquired of the telegraph agent at Effingham if he had received said telegram, he replied that he had not, but would make inquiries in regard to it, which he did by telegraphing to Charleston, S. C., when he received from Charleston said telegram as sent from Lynchburg by plaintiff, and this he received some time between 10 and 11 o'clock a. m., after the train upon which plaintiff brought the corpse of his mother had departed from Effingham. That the defendant at Lynchburg, at the time above mentioned, received said message, and promised promptly to transmit the same, and received therefor the usual charge in advance. That although the address of the said Millard Carter was well known to defendant, and was within their regular delivery limits of Effingham, the said defendant willfully, wantonly, and grossly negligently withheld said message from him in the city of Charleston, S. C., one of their offices, and failed to deliver said message until after the arrival of the train with plaintiff and the corpse of his mother, which was somewhere between 10 and 11 o'clock a. m., and no preparations had been made, as was intended by sending said message. That by reason of defendant's wanton, willful and grossly negligent failure to deliver to Millard Carter said message as aforesaid, no preparations were made for the funeral, and the corpse of plaintiff's mother was compelled to remain upon the depot platform for several hours, until conveyance could be procured, to the great mental anguish and suffering of the plaintiff, and to the damage of plaintiff \$500."

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action for the following reasons: "(1) In that on the face of the complaint it appears that the defendant did not willfully, wantonly and grossly negligently withhold said message in the city of Charleston, S. C., and did not willfully, wantonly, and grossly negligently fail to deliver said message. (2) In that on the face of the complaint it does not appear that any of the consequences set up in the

complaint, such as the resting of the corpse of plaintiff's mother upon the depot platform at Effingham, S. C., were proximately caused by any delay in the delivery of the telegram. (3) In that it appears on the face of the complaint that plaintiff was not in any sense damaged by any act of the defendant, or in consequence of any act of defendant. (4) In that it appears on the face of the complaint that plaintiff could not have had any mental anguish or suffering that could be measured by damages, or cognizable under the law, as a result of any act of the defendant alleged in the complaint as a proximate cause. (5) In that it does not appear on the face of the complaint that the message was withheld, or its delivery delayed negligently, wantonly, willfully, or grossly negligently."

1. The complaint in effect alleges that the plaintiff sent a telegram in regard to the death of his mother, from Lynchburg to Millard Carter at Effingham, notifying him that he would bring his mother on the 10 o'clock train and to have conveyance ready; that the telegram was sent for the purpose of having preparations made for the funeral; that the defendant willfully, wantonly, and negligently withheld and failed to deliver the message, in consequence of which no preparations had been made and no conveyance was ready. The corpse of his mother was compelled to remain upon the platform of the depot several hours, to the great mental anguish and suffering of the plaintiff. The face of the telegram and the allegations of the complaint show that such results might naturally and reasonably have been expected from the failure to deliver the message. The demurrer was, therefore, properly overruled.

2 The defendant made a motion for nonsuit on the grounds that there was no testimony tending to sustain the allegations of willfulness and wantonness, or mere negligence. The defendant did not make a motion for nonsuit upon the cause of action based upon willfulness and wantonness, and upon the cause of action founded upon mere negligence, but upon the whole case. The failure to deliver the message, under the circumstances of the case, afforded some evidence of an unreasonable delay. The nonsuit could not properly have been granted on the ground that there was no evidence of negligence. In the case of *Machen v. Telegraph Co.*, 72 S. C. 256, 260, 51 S. E. 697, the rule as to nonsuits is thus stated: "The cases are numerous to the point, that where the complaint alleges damages as the result of negligence, and as the result of willful misconduct, a nonsuit cannot be granted as to the whole case, if there be any testimony tending to show damages as the result of either negligence or willfulness. * * * In all the cases cited above, the motion for nonsuit was directed to the whole

case, and the point decided was that nonsuit was improper, if there be any evidence tending to support a verdict for damages either for negligence or willful misconduct." Under this authority we are constrained to rule that the motion for nonsuit was properly refused.

3. The defendant also appealed from the order of nonsuit on the ground that the reasons assigned by the presiding judge were erroneous. We have shown that it would have been error of law to have granted the nonsuit; and, as the motion was properly refused, the reasons assigned are immaterial.

4. The defendant likewise appealed from the order refusing a new trial, but the exceptions cannot be considered, as the grounds upon which the motion was made are not set out in the record.

It is the judgment of this court that the judgment of the circuit court be affirmed.

On Rehearing.

PER CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question, either of law or fact, has been disregarded or overlooked. It is therefore ordered that the petition be dismissed, and the order heretofore granted staying the remittitur be revoked.

(73 S. C. 407)

LAMAR et al. v. CROFT et al., County Com'rs.
(Supreme Court of South Carolina. March 6, 1906.)

1. APPEAL—TEMPORARY INJUNCTION.

Under Code Civ. Proc. 1902, § 11, providing that Supreme Court shall have appellate jurisdiction for correction of errors at law, and shall review on appeal an interlocutory order granting, or continuing, or refusing an injunction, an appeal lies from an interlocutory order granting a temporary injunction.

2. INJUNCTION—PARTIES IN INTEREST.

Citizens of a county may sue to enjoin commissioners appointed by the Governor to have surveys made for proposed new county from acting under such appointment.

3. PARTIES—NECESSARY PARTIES—PLAINTIFF.

Under Code Civ. Proc. 1902, § 138, providing that all persons having an interest in the subject-matter may be joined as plaintiffs, an action may be maintained without joining all parties having an interest.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 18.]

4. CONSTITUTIONAL LAW—EXECUTIVE POWERS—JUDICIAL REVIEW.

Const. art. 7, § 1, imposes exclusively on the Governor the duty to determine whether there has been a compliance with the Constitution preparatory to the ordering of an election for the formation of a new county, and courts have no power to interfere with him in the exercise of his discretion.

Appeal from Common Pleas Circuit Court of Alken County; Aldrich, Judge.

Action by B. D. Lamar and others against T. G. Croft and others, county commissioners.

From an order granting a temporary injunction. Defendants H. M. Cassels and Luther W. Reese appeal. Reversed.

George T. Jackson, for appellants. Hendersons, Davis, Gunter & Gyles, Sawyer & Owens, T. R. Morgan, Rice & Johnson, for respondents.

GARY, A. J. This is an appeal from an interlocutory order of injunction. The complaint alleges that during the year 1903, the Governor, upon petition filed in his office, ordered an election to be held in portions of the counties of Aiken, Edgefield, and Barnwell for the formation of a proposed new county, which was denominated to be the county of Hammond. That said election was held on the 15th of December, 1903, and resulted in the defeat of the proposed new county. That in 1905, and within four years from the date of said election, the same promoters of the proposed county of Hammond, filed in the office of the Governor, a petition for the formation of a new county from portions of Aiken and Edgefield counties, with the proposed name of Heyward. That the territory in the proposed counties of Hammond and Heyward is substantially and practically the same. That the Governor has appointed the defendants as commissioners who are about to engage upon the discharge of their duties in making contracts with surveyors, which will result in the unlawful expenditure of the funds of the counties. His honor, the circuit judge, issued a rule against the defendants to show cause why a temporary injunction should not be granted. The defendants made return to the rule to show cause, based upon the pleadings and affidavits.

The defendants Cassels and Reese interposed a demurrer to the complaint on grounds that will be hereinafter stated. The circuit judge overruled the demurrer, and in his order thus states his reasons for granting the temporary injunction: "I have no hesitation in holding that the complaint states facts sufficient to constitute a cause of action, on the equity side of the court. * * * The contention of the plaintiffs is, that the county now proposed to be formed by the name of Heyward is substantially, essentially and practically the same county as was the proposed county of Hammond, which was defeated by an election before the people in December, 1903, and that the effort on the part of the promoters of the said proposed county of Heyward, is inimical to the second section of the 7th article of the Constitution of South Carolina of 1895, which contains the express provision that 'an election upon the question of forming the proposed new county shall not be held oftener than once in four years.' The contention on the part of the defendants Cassels and Reese in their answer, is that the proposed county of Heyward is not the same as the formerly pro-

posed county of Hammond. In the case of *Riley v. Union Station Co.*, 67 S. C. 93, 45 S. E. 149, our Supreme Court, following the case of *Cudd v. Calvert*, 54 S. C. 457, 32 S. E. 503, decides that where the action is brought solely for the purpose of obtaining an injunction, and where, if the facts alleged in the complaint are found to be true, the proper case for injunction would be presented, it would be error to dissolve a temporary injunction upon a mere motion heard upon affidavits, as that would deprive the plaintiff of his right to have the facts determined in the mode prescribed by law, instead of by affidavits, a most unsatisfactory mode of eliciting proof. The prayer in the complaint of these plaintiffs is simply for injunction, and the allegations of the complaint as sustained by the exhibits and affidavit connected therewith show that they are entitled to the relief which they ask, nor in my judgment does the denial in the answer and the affidavit presented with it, effect sufficiently the case made by the plaintiff to authorize me in denying the preservation by this court of the status quo of this controversy until the matter can be finally determined by the court in the proper way, as it may seem to the presiding judge who shall finally hear the cause. If the defendants under the act of 1905, the constitutionality of which is not questioned, are proceeding to take steps looking towards the establishment of a new county, which in all essentials is the same new county in which an election was held not more than four years ago, then they are proceeding in an unconstitutional and unlawful manner, and they should be restrained by a court of equity."

1. When the case was called for hearing in this court, the respondents raised the objection that the order was not appealable. Section 11 of the Code of Civil Procedure of 1902 provides that "the Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal an interlocutory order or decree in the court of common pleas granting, or continuing, or modifying, or refusing an injunction." The objection must, therefore, be overruled.

2. The first ground of demurrer was "that it appears upon the face of the complaint that the plaintiffs have no legal capacity to bring this action, they having no sufficient interest in the cause, and the action, if maintainable at all, being only maintainable by the counties to be affected, to wit, the counties of Aiken and Edgefield, acting through their duly constituted and authorized officers and agents." The circuit judge properly overruled this ground of demurrer, citing *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291, and *High on Injunctions*, § 802, to which might be added *Butler v. Ellerbe*, 44 S. C. 276, 22 S. E. 425, and the authorities therein mentioned. The second ground of demurrer was "that it appears upon the face of the complaint, that there is a non-joinder of parties plaintiff, for that even if

the plaintiffs are proper parties, the action cannot be maintained by them alone, but the counties interested, to wit, Alken and Edgefield, should be joined as parties plaintiff." Section 138 of the Code of Civil Procedure of 1902, is as follows: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title." This section was construed in *McCorkle v. Williams*, 43 S. C. 66, 20 S. E. 744, wherein it was ruled that the action may be maintained without joining all parties having an interest. This ground of demurrer was likewise properly overruled.

3. The third, fourth, and fifth grounds of demurrer were: "(3) That the complaint does not state facts sufficient to constitute a cause of action. (4) That there is no equity in the complaint, and the plaintiffs are not entitled to the relief prayed, or to any equitable relief. (5) That it appears upon the face of the complaint that the plaintiffs have a complete and adequate remedy at law." The circuit judge, in his order, states that the constitutionality of Acts 1905, p. 915, is not questioned. If the question whether there has been a compliance with the requirements of the Constitution preparatory to the ordering of an election by the Governor, is to be determined by the courts, then the complaint states facts sufficient to entitle the plaintiffs to equitable relief; while, on the other hand, if, under the provisions of the Constitution, such question is addressed to the discretion of the Governor, the courts have not the power to interfere with the exercise of his discretion. Section 1, art. 7, of the Constitution, provides that "the General Assembly may establish new counties in the following manner: Whenever one-third of the qualified electors within the area of each section of an old county proposed to be cut off to form a new county, shall petition the Governor for the creation of a new county, setting forth the boundaries and showing compliance with the requirements of this article, the Governor shall order an election, within a reasonable time thereafter, by the qualified electors within the proposed area." One of the requirements of that article is that "an election upon the question of forming the same proposed new county, shall not be held oftener than once in four years." Our construction of section 1, art. 7, of the Constitution, is that it imposes exclusively upon the Governor the duty of determining whether there has been a compliance with the requirements of the Constitution preparatory to the ordering of an election, and that the courts have not the power to interfere with him in the exercise of his discretion. Therefore, the complaint presents no grounds for equitable relief. This case differs from the cases of *Riley v. Union Station Co.*, 67 S. C. 93, 45 S. E. 149, and *Cudd v. Calvert*, 54 S. C. 457, 32 S. E. 503, cited by the circuit judge, in that the complaint in those

cases set forth grounds entitling the plaintiff to equitable relief, while in this case there are no such grounds. It was, therefore, error to grant the temporary order of injunction.

It is the judgment of this court that the order of the circuit court be reversed.

(73 S. C. 364)

PAGAN v. DRAKE FURNITURE CO.

(Supreme Court of South Carolina. Feb. 23, 1906.)

1. DAMAGES—PUNITIVE DAMAGES.

In an action for trespass committed by defendant's agents and servants, an instruction as to punitive damages, that the object is to punish a wrong, and in deciding whether punitive damages should be awarded the jury should determine whether there has been a wrong committed on plaintiff in taking certain property belonging to plaintiff, the contention of plaintiff being that it was done in a wanton, reckless manner, against her wishes, and the contention of defendant being that she agreed to their taking of the property, is not erroneous as authorizing punitive damages for any wrong, though unaccompanied by wantonness, willfulness, or high-handed conduct.

2. TRESPASS—DAMAGES—INSTRUCTIONS.

In an action for trespass committed by defendants' agents, an instruction that there was no evidence that plaintiff was intimidated, frightened, or subjected to nervous shock, was properly refused where there was testimony that in plaintiff's own home one of defendants drew a pistol and cursed her, and threatened to kick her, and used considerable violence in seizing certain property belonging to plaintiff.

Appeal from Common Pleas Circuit Court of Richland County; Gary, Judge.

Action by Louisa Pagan against the Drake Furniture Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Clark & Clark and D. W. Robinson, for appellant.

WOODS, J. The complaint in this case alleges in substance that the defendant, by his agents and servants, entered the premises of plaintiff, demanded payment of money due by her to him, and upon her failure to pay, recklessly, willfully and maliciously seized a tablecloth of the value of \$1.51 belonging to her, and forcibly and against her will carried it away; and that in making this seizure, defendant's agents, for the purpose of frightening her into compliance with their demands and humiliating her, used language calculated to frighten and intimidate, and which did frighten plaintiff and subject her to nervous shock. Damages were alleged and demanded in the sum of \$1,000. The defendant in his answer alleges that the tablecloth was his property, hired to plaintiff, and that it was taken under the right given by a written contract with her, and denies that he acted recklessly, willfully or maliciously. Under the issue thus made the plaintiff recovered a verdict of \$100.

The defendant's appeal depends mainly upon whether the circuit judge committed the

error of charging that punitive damages could be inflicted for "a wrong" which would mean any wrong, though unaccompanied by recklessness, wantonness, willfulness, malice, or high-handed conduct. We do not think the jury could have received that impression. It is true, that the circuit judge did say: "Now, as to the question of punitive damages: the object of punitive damages is to punish a wrong. In deciding as to whether or not you should award punitive damages, you will determine whether there has been a wrong committed on the plaintiff by the defendant; and that brings up the question of the taking of the tablecloth." But he immediately followed this with the following statement, which indicated that the issue was whether the seizure was a wanton and high-handed wrong: "There is no issue that the defendants took possession of the tablecloth, but there is where the difference on the question of fact comes in; the contention of the plaintiff being that they did it in a reckless, high-handed, wanton spirit, against her wishes; the contention of the defendant that she agreed to them taking the property, and they did nothing more than actually go there and take the property." That the impression conveyed to the jury was that the wrong for which they might give punitive damages should be reckless and high-handed is further evident from this language of the charge: "So if nothing was due for the purchase of the tablecloth, then they would have no right to take it. If condition had been broken, then they would have the right to take it peaceably and quietly; if that was the manner in which the taking was done, past due, condition broken, and they took it peaceably and quietly, they would have the right to do that. If not, and they took it in a reckless, high-handed manner, and in the taking she was injured, in addition to that injury you might award, as I say, punitive damages, in order to punish a wrong, if they committed a wrong. If there is no wrong, there is no right of action. If they have committed a wrong, in addition to actual damages sustained, you can award punitive damages. If you think it is a case for punishment, you can award punishment by your verdict. That is the theory of punitive damages." The exceptions on this point cannot be sustained.

Manifestly, it would have been an error to charge, as defendant contends the circuit judge should have done, that there was no evidence "that plaintiff was intimidated, frightened or subjected to nervous shock," in the face of the testimony on the part of the plaintiff that in her own home one of the defendant's agents drew a pistol and cursed her and threatened to kick her, and used considerable violence in seizing the tablecloth, causing the plaintiff to cry. It is also clear from the evidence above recited, that it would have been error for the circuit judge to charge, as he was in effect requested by

the defendant to do, that the plaintiff could only recover the value of the tablecloth without punitive damages, even if nothing was due by plaintiff under the contract which defendant claimed conferred on him the right to seize.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 438)

MOODY v. McKINNEY et al.

MORTON v. SAME.

(Supreme Court of South Carolina. March 9, 1906.)

INTOXICATING LIQUORS—ILLEGAL TRANSPORTATION—CONFISCATION OF CONVEYANCE.

Where plaintiffs did not consent to or have knowledge of or voluntarily permit their property to be in the custody of another under circumstances which should have lead them to believe that it would be used in transporting liquor in the nighttime, the property is not subject to seizure and confiscation under Cr. Code, § 594, providing that any conveyance transporting liquors at night shall be liable to seizure and confiscation.

Appeal from General Sessions Circuit Court of Oconee County; Gary, Judge.

Actions by John M. Moody and by John A. Morton against J. T. McKinney and P. P. McDaniel. Judgments for plaintiffs, and defendants appeal. Affirmed.

Jaynes & Shelor, for appellants. Stribling & Herndon, for respondent.

JONES, J. The above-entitled actions were commenced before A. P. Crisp, magistrate, on the 24th day of December, 1904, for claim and delivery of personal property. As both cases grew out of the same transaction and involve the same state of facts, they were tried together. The plaintiff John M. Moody sued for the recovery of the possession of one black mare of the value of \$75, and the plaintiff John A. Morton sued for the recovery of one top buggy, one set of buggy harness, and one lap robe, of the value of \$64.30. The cases were tried together before A. P. Crisp, magistrate, and a jury, on the 23d day of January, 1905. The jury found a verdict in favor of the plaintiff John M. Moody for the possession of the property sued for, or \$75, the value thereof, and in favor of the plaintiff John A. Morton for the possession of the property sued for, or \$64.30, the value thereof. Motion for new trial was made in each case, and the same refused by the magistrate. The defendants appealed, in each case, to the circuit court.

The appeal came on to be heard before his honor, Ernest Gary, presiding judge, at the March, 1905, term of the court of common pleas. The appeals were dismissed, and the judgments of the magistrate's court affirmed by the following order of the circuit court: "Upon hearing the appeal in each of the above-entitled actions, I find that during the night of the 23d of December, 1904, the black

mare described in the complaint of the plaintiff John M. Moody, and the buggy, harness, and lap robe, described in the complaint of John A. Morton, were seized from George Morton and A. L. Rowland, who were violating the dispensary law by transporting contraband liquors at night. I am satisfied from the testimony, and so find, that the liquors being transported by said parties were contraband liquors at the time of seizure by J. T. McKinney and P. P. McDaniel as state constables, and that said property was used by them in transporting said liquors. The plaintiffs in the above entitled actions, however, are not George Morton and A. L. Rowland, but are John M. Moody, who claims to be the owner of the mare, and John A. Morton, who claims to be the owner of the buggy, harness, and lap robe. The testimony fails to show that either John M. Moody or John A. Morton participated in any way in transporting said contraband liquors, or had any knowledge that their property was being used by George Morton and A. L. Rowland for any such purpose. I do not think plaintiffs could be deprived of their property unless they participated in such unlawful use of their property or gave consent for such use, and for this reason alone do I refuse to sustain the appeal. It is, therefore, ordered that the judgment of the magistrate's court, in each of the above entitled actions, be affirmed."

The appellants question this ruling, and contend that property used in transporting contraband liquors at night is liable to seizure and confiscation without regard to whether the owner participated in, consented to, or had knowledge of such unlawful use. The defendants justify their seizure of said property and right to possession thereof under section 594 of the Criminal Code, which is as follows: "Any wagon, cart, boat, or any other conveyance, together with horses, mules, or other animal or animals and harness, accompanying the same, transporting liquors at night, other than regular passenger or freight steamers and railway cars, shall be liable to seizure and confiscation, and to that end the officer shall cause the same to be duly advertised and sold and the proceeds sent to the State Treasurer." We do not regard that the constitutionality of this statute is involved in this appeal, as it does not appear that such question was submitted to or considered by the circuit court. The real question is whether the case made falls within the intention of the statute. The rule of construction which should govern in this case is thus aptly stated in *United States v. Kirby*, 7 Wall. 482, 486, 19 S. E. 278: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid re-

sults of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted 'that who ever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person who fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden, that the statute of Edward I which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make that the act of Congress which punishes the obstruction or retarding the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." See, also, *Riggs v. Palmer*, 5 L. R. A. 340, and note.

A like rule of construction was early applied in this state in a case (*Ham v. McClaws*, 1 Bay, 93) in which a forfeiture was sought under the act of 1788, prohibiting the importation of slaves by land or water before January 1, 1793, under penalty of forfeiture of such slaves. The letter of the act embraced the case made, but the court held that it was not within the intention of the Legislature to make a forfeiture of slaves brought into this state under the peculiar circumstances detailed in that case, as such construction would be against common right and reason. Applying this rule to the case in hand, we hold that, notwithstanding the generality of language used, the Legislature did not intend to declare a forfeiture of property belonging to one who did not participate in, consent to, or have knowledge of the unlawful use made of his property by the party violating the statute, or has not negligently or voluntarily permitted his property to be in the custody and control of the person transporting contraband liquor in the nighttime under circumstances which would reasonably lead him to apprehend that such unlawful use would be made of his property. It appears in this case, from the undisputed testimony, that the horse was taken from the premises of John M. Moody, claimant, when he was not at home and had no knowledge of what the parties wanted the horse for. It seems perfectly clear that the statute could not be held to cover a case in which the owner's property was stolen from him or obtained through fraud or trespass and then used by another in such unlawful manner, and yet the statute makes no such exception in express language. So, also, it should be held that the Legislature did not intend to declare a forfeiture of property in a case where the owner is not chargeable with any fault or negligence with reference to the custody and use of this property.

Otherwise, the owner, without the slightest knowledge on his part, might have his carriage and horses confiscated by the casual and secret act of his driver in transporting therein contraband liquor, or the farmer who places his stock or team in custody of a laborer for farm uses might have his property subject to forfeiture by the act of another, which he could not anticipate or control.

We are aware that some cases in the federal courts, with reference to forfeitures declared in maritime and revenue laws, regard the property as the offending party, and forfeitures are sustained without regard to the innocence of the owner and from the necessity of the case, but we will not push this doctrine to the extent of holding that property is the offender, even though its owner is in no wise connected with its unlawful use by knowledge, acquiescence, fault, or power of control. This view we do not regard as really in conflict with the points decided in the cases of *Peisch v. Ware*, 4 Cranch, 347, 2 L. Ed. 643, and *Dobbins' Distillery v. United States*, 96 U. S. 395, 24 L. Ed. 637. In the first-named case it was held that, under a statute of Congress providing for a forfeiture under the revenue laws for goods improperly imported, the owner of goods cannot forfeit them by an act done without his consent or connivance, or that of some person employed and trusted by him. In the case of *Dobbins' Distillery v. United States*, supra, the court held that the owner of real estate and other property leased for the purposes of a distillery and with knowledge of the lessee, intended to use the premises to carry on that business, and that he did use the same for that purpose, is liable, under the revenue laws of Congress, to a forfeiture of said property for the unlawful and fraudulent acts and omissions of the distiller, even if he was ignorant of such fraudulent acts and omissions. In the last-mentioned case the owner of the property voluntarily leased it for the purpose of a business, when he knew, or ought to have known, that forfeiture would follow if the business was not conducted as required by law.

The judgment of the Circuit Court is affirmed.

(59 W. Va. 315)

STATE v. LEGG.

(Supreme Court of Appeals of West Virginia.
April 10, 1906.)

1. CRIMINAL LAW—APPEAL—RECORD—EVIDENCE—BILL OF EXCEPTIONS.

Where evidence is certified by the trial judge, and a separate bill of exceptions is used to make it a part of the record, a reference in the bill to the certificate of evidence, stating that it is made a part of the record and a part of the bill of exceptions, is sufficient to make the evidence a part of the record.

2. WITNESSES—REFRESHING MEMORY—USE OF MEMORANDUM.

The testimony of a witness, upon the preliminary examination of one accused of crime,

may be used by the witness upon the trial of such accused person for the purpose of refreshing his present recollection, but when so used it is not admissible in evidence, and should not be read to the witness in the presence of the jury.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 885, 892.]

3. CRIMINAL LAW—EVIDENCE—SWORN STATEMENT OF ACCUSED.

Where a justice, for the purpose of determining whether or not he will hold an inquest, takes the sworn statement of a person who is not, at the time, accused of killing the deceased, but against whom an indictment is afterwards preferred, such statement is admissible upon the trial of the accused; not having been made by the person as a witness upon a legal examination, it is not protected under section 20, c. 152, Code 1899. A justice, in taking such statement, is without warrant of law.

4. HOMICIDE—EVIDENCE.

Upon the trial of a wife for the murder of her husband, testimony tending to show the existence, prior to the alleged killing, of adulterous relations between the prisoner and a third person, is admissible, for the purpose of showing motive for the commission of the offense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 326.]

5. SAME—INSTRUCTIONS.

Where, upon a trial for murder, the killing is shown to have been done with a deadly weapon, and the defendant relies upon accidental killing as an excuse, it is a question for the determination of the jury as to whether the killing was intentional or the result of an accident. And when the evidence tends, in an appreciable degree, to establish both theories, it is the duty of the court to instruct the jury presenting both, if asked to do so.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 563.]

6. CRIMINAL LAW—INSTRUCTIONS—REPETITION.

The purpose of giving instructions is to aid the jury in arriving at a proper verdict, and the practice of repeating them is discountenanced.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1991.]

7. SAME—CREDIBILITY OF WITNESSES.

It is not error, where an instruction is asked telling the jury that they are the sole judges of the credibility of the witnesses, and that they have the right to believe or not to believe any witness who has testified in the case, to modify the instruction so as to tell them that they cannot arbitrarily disregard the testimony of a witness, unless they believe it untrue.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1889-1893.]

8. HOMICIDE—INSTRUCTIONS.

An instruction which tells the jury that before they can find the defendant guilty of murder, they must believe from the evidence beyond all reasonable doubt that the defendant willfully, maliciously, deliberately, feloniously, and unlawfully killed the deceased, is erroneous in this, that it is not necessary that these elements should coexist in order to find the defendant guilty of murder in the second degree.

9. SAME.

An instruction saying that before the jury could find the defendant guilty of murder, they must believe from the evidence beyond all reasonable doubt that the defendant maliciously, feloniously, and unlawfully killed the deceased, is erroneous in not limiting the instruction to murder in the second degree.

10. SAME.

Where one, upon an indictment for murder, relies upon accidental killing as a defense, and there is evidence tending in an appreciable degree to establish such defense, it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident they should find the defendant not guilty.

11. SAME.

On a trial for murder, where the defense is that the killing was accidental, it is error to instruct the jury that they shall find the defendant not guilty if they believe the killing was the result of an accident, unless they further find that the defendant was guilty of criminal carelessness, without instructing as to what constitutes criminal carelessness, and without further qualifying the instruction so as to enable the jury, if they should find the defendant guilty of that offense, to properly fix the degree of crime.

12. SAME—EVIDENCE TO SUPPORT INSTRUCTIONS.

Where, upon a trial for murder, the defendant relies upon accidental killing as a defense, it is error for the court, when asked to instruct the jury that if they believe from the evidence that the killing was accidental, and not intentional, they should find the defendant not guilty, to refuse to do so; and it is also error for the court to modify such instruction so offered so as to present a theory of the case to them, when there is no evidence, or, if any, when it does not tend in an appreciable degree to support such theory.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 636.]

(Syllabus by the Court.)

Error to Circuit Court, Clay County.

Sarah Ann Legg was convicted of murder, and brings error. Reversed, and new trial granted.

Horan & Horan and W. E. R. Byrne, for plaintiff in error. C. W. May, Atty. Gen., Frank Lively and J. E. Springston, for the State.

SANDERS, J. This writ of error is to a judgment of the circuit court of Clay county, convicting the defendant, Sarah Ann Legg, of the murder of her husband, Jay Legg, and sentencing her to be hanged.

The Attorney General asserts that the evidence is not made a part of the record by proper bill of exceptions, and relies upon *Tracy's Adm'x v. Carver Coal Co.*, 57 W. Va. 587, 50 S. E. 825, *Dudley v. Barrett* (W. Va.) 52 S. E. 100, *Railway Co. v. Joyce* (W. Va.) 52 S. E. 498, and *Parr v. Currence* (W. Va.) 52 S. E. 496, to support this contention. The rule announced in these cases has no bearing upon the case under consideration. There it was held that the evidence had not been made a part of the record. In *Tracy's Adm'x v. Coal Co.* a skeleton bill of exceptions was used for the purpose of certifying the evidence and making it a part of the record, with parenthetical instructions to the clerk to insert stenographer's transcript of the evidence. It did not even appear that the evidence had been transcribed by the stenographer, and, if not, it could not have been certified by the judge, as required. By

section 9, c. 131, Code 1899, it is provided that a party may except to any action or opinion of the court, and tender a bill of exceptions, and, if the action or opinion of the court be upon any question involving the evidence or any part thereof, the court shall certify all the evidence touching such question, and the judge shall sign any such bill of exceptions, and it shall be made a part of the record. The judge cannot certify evidence which is not written out and before him at the time, so as to comply with the requirement of the statute. Also, in that case, the stenographer's transcript of the evidence bore no mark or memorandum, to which reference was made, by which it could be safely identified as the evidence adduced upon the trial. It is not necessary to review the other cases referred to and relied upon, because by consulting them it will be found that they differ widely from the case in hand. The evidence here was certified by the judge, and by a separate bill of exceptions made a part of the record by referring to it as the "certificate of evidence." It is insisted, however, that the bill, in attempting to make the evidence a part of it, says: "Here insert certificate of evidence, which is made a part of the record in said case, and a part of this bill of exceptions," and that the bill only attempts to make the certificate a part thereof. The bill calls for and makes a part of it the certificate of evidence. What certificate of evidence? The certificate of evidence in the case, to which the bill of exceptions related. The evidence had been certified by the judge, as required by statute; the certificate of evidence showed the style of the case, and that the evidence contained in it was the evidence, and all the evidence, introduced upon the trial, and was signed by the presiding judge. The certificate was self-identifying, as much so as the bill of exceptions itself. Then we have the judge certifying all the evidence, which is, by a separate bill of exceptions, made a part of the record by unmistakable reference thereto.

There are many errors assigned as reasons for reversing the judgment of the circuit court, and awarding the prisoner a new trial, which will be considered in the following order:

1. Complaint is made that the trial judge examined and cross-examined certain witnesses in such manner as operated prejudicially to the prisoner. The record shows that the judge did examine some of the witnesses at considerable length. Whether such examination was proper or not, and ground for reversal, we are not called upon to determine. In order to demand a review of the action of the trial court in this respect, there should have been an objection to the examination, and, if overruled, proper exceptions taken. There was no objection made to the examination by the judge, except to one question, and we cannot say that

the asking of this single question was prejudicial to the prisoner. Nor does it appear that the court was asked to set aside the verdict upon this ground. Where the action of the trial court is sought to be reviewed upon the ground that improper questions were asked witnesses, or that the judge, in examining such witnesses, did so in an improper manner, there should be an objection and exception to such course.

2. It is insisted that certain evidence was improperly admitted, over the objection of the defendant. Pat Butler, who had been a witness upon the preliminary examination of the accused, and whose evidence had, upon such examination, been reduced to writing, also testified upon the trial. It appears that this witness was at the home of the defendant immediately after the shooting, and after having stated, upon his examination as a witness upon the trial of this case, that while there he had overheard a conversation between the defendant and Willis Ashley, in which the defendant stated that the shooting was an accident, he was asked what else, if anything, was said in the conversation, to which he replied, "I can't recall the language." He was then asked if he could recall any of the conversation, and his response was, "I don't believe I can." Then it was inquired of him if he had not given evidence upon the preliminary examination of the accused, and, after having stated that he had, he was asked if he remembered a question propounded to him on cross-examination, and the answer he had given. The answer which it was claimed he had made to such question was read to him, in the presence of the jury, which is as follows: "She said that he come in and told her to get the gun for him and she went and got it, and I don't remember which one asked whether it was loaded. Anyway, she said it was loaded, and he said it was not, and they repeated it two or three times, and he told her to snap it, and she snapped it, and it went off." He replied, "Yes, sir; I remember that." And then he was asked if he heard the defendant there, at that time, tell how the killing occurred, to which he answered, "Yes, sir." Then he was interrogated as to how she said it occurred, and he replied, "Well, she said that he came in and called for the gun, and she got the gun and one of them said it was loaded—I don't remember which one—and the other said it was not, and they repeated that two or three times, and then he told her to snap the gun, and she snapped it, and it went off." The question we have to determine is whether or not it was proper to read to the witness his answer given upon the preliminary examination, for the purpose of stimulating and reviving his recollection. "It is to-day generally understood that there are two sorts of recollection which are properly available for a witness—past recollection and present recollection. In the latter and

usual sort, the witness either has a sufficiently clear recollection, or can summon it and make it distinct and actual, if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it—in particular, of using written or printed notes, memoranda, or other things as refreshing it. In the former sort, the witness is totally lacking in present recollection and cannot revive it by stimulation, but there was a time when he did have a sufficient recollection and when it was recorded, so that he can adopt this record of his then existing recollection and use it as sufficiently representing the tenor of his knowledge on the subject. This use of a past recollection depends, of course, on certain conditions, while the stimulation of an actual present recollection need be subject to no fixed rules; and it is through the improper application of the limitations of the one case to the other that some confusion of decisions has arisen." 1 Greenleaf on Ev. (15th Ed.) § 439a; 1 Wigmore on Ev. §§ 734, 738.

It will be necessary to know whether or not the answer read to the witness, and which was given upon the preliminary examination, was used to revive a present recollection, or whether it was employed as the past recollection of the witness, because there are certain fixed rules regulating the use of a past recollection which do not apply to the use of a writing for the purpose of refreshing a present recollection. We will not here attempt, however, to discuss the rules applicable to the use of a past recollection, except in so far as is necessary in dealing with the question under consideration. The situation as to past recollection is where a witness is devoid of a present recollection, and desires to use a past recollection. The witness, upon a perusal of the record or memorandum of a fact or transaction, may not be able to call to mind and testify to an existing knowledge of the fact, independent of the memorandum or writing. The writing fails to refresh and revive the recollection, and thus constitute a present knowledge. So, if the witness testifies that at or about the time the memorandum was made he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. "If, by verifying and adopting the record of past recollection, the witness makes it usable testimony, and if by this verification alone can it become so usable, it follows that the record thus adopted becomes to that extent the embodiment of the witness' testimony. Thus the record, verified and adopted, becomes a present evidentiary statement of the witness, and as such it may be handed or shown to the jury by the party offering it. * * * A few decisions declare that the writing is not 'independent evidence' or 'in itself evidence,' but this is to be construed as meaning merely—that no one could deny—that without being verified

and adopted it is without standing. A few others expressly refuse to allow it to be 'read in evidence' or 'given in evidence.' But these must be regarded as being unsound in principle." 1 Wigmore on Ev. § 754.

In *Moots v. State*, 21 Ohio St. 653, it is said: "The entry in the book and the oath of the witness supplement each other. The book was really a part of the oath, and therefore admissible with it in evidence." Also, in *Howard v. McDonough*, 77 N. Y. 592, it was held that after the witness has testified, the memorandum which he has used may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to by the witness." Judge Cooley, in *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 837, said: "After she had testified that she knew it to be correct, she might have read the entries or repeated them as her evidence. Showing the book was no more than this." It is held in *Bryan v. Moring*, 94 N. C. 687: "The memorandum thus supported and identified becomes part of the testimony of the witness, just as if without it the witness had orally repeated the words from memory." 1 Greenleaf on Ev. (16th Ed.) § 439b. The witness, in proceeding to testify from a present or existing recollection, may be unable to do so by unaided mental effort, but by resort to some memorandum or writing, his memory may be so stimulated and refreshed as to enable him to recollect the fact, and where this is so, it is not proper to introduce the writing in evidence, or read it in the presence of the jury, because it forms no part of the testimony, being used only for the purpose of aiding the mental effort of the witness to recollect the particular transaction. "But since, in Lord Ellenborough's words, 'it is not the memorandum that is the evidence, but the recollection of the witness,' the party whose witness uses it has no right to have it read or handed to the jury; it is only the opponent who wishes to do this in case he wishes to cast doubt on the reality of the refreshment of memory." 1 Greenleaf on Ev. (16th Ed.) § 439c. Wigmore on Evidence, § 763, in speaking of a writing used to revive a present recollection of a witness, says: "It follows from the nature and purpose for which the paper is used that it is in no sense testimony. In this respect it differs from a record of past recollection, which is adopted by the witness as the embodiment of his testimony, and, as thus adopted, becomes his present evidence, and is presentable to the jury. Nevertheless, though the witness' party may not present it as evidence, the same reason of precaution which allows the opponent to examine it allows him to call the jury's attention to its features, and also allows the jurymen, if they please, to examine it for the same end. In short, the opponent, but not the offering party, has a right to have the jury see it." It is held in *Gregory v. Taverner*, 6 C. & P. 281: "The memorandum itself is not evidence, and particular entries

only are used by the witness to refresh his memory. * * * The defendant's counsel may cross-examine on the entries already referred to, and the jury may also see those entries if they wish to do so." In *Com. v. Jeffs*, 132 Mass. 5: "The opposite party is entitled to cross-examine the witness in regard to it; and it may be shown to the jury, not for the purpose of establishing the facts therein contained, but for the purpose of showing that it could not properly refresh the memory of the witness."

This doctrine gives to the defendant the right to cross-examine as to such paper, and also, if he desires, to introduce it to the jury, to show that the memory of the witness could not thereby be revived, but does not give to the party who uses it for the purpose of refreshing the memory of the witness, the right to introduce it in evidence. Having shown that a writing or memorandum used to refresh a present recollection cannot be read to the witness nor introduced to the jury, we have only to inquire: Was the answer of the witness given upon the preliminary examination used to revive a present recollection, or was it the use of a past recollection? The witness shows clearly that, when the answer was read to him, he remembered the conversation. This he expressly states, and further on in his testimony, in answer to a question as to how the defendant said it occurred, he states, substantially, the facts embodied in the answer read to him. Therefore it is perfectly apparent that the use of the answer was for the purpose of refreshing the present recollection of the witness, and this being so, and it being read to him in the presence of the jury, we must conclude that it was error to do so.

3. Were the statements of the defendant that are claimed to have been made to R. A. Hamrick, a justice of the peace, admissible? It is claimed that these statements were made upon a legal examination, and for that reason were inadmissible. Section 20, c. 152, Code 1899, provides: "In a criminal prosecution, other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." In *Hall's Case*, 31 W. Va. 505, 7 S. E. 422, it was held error to permit the state, upon the trial of the prisoner, to prove a statement made by him when he was before the justice on his preliminary examination, and in *Kirby's Case*, 77 Va. 681, 46 Am. Rep. 747, evidence was admitted to show that the accused had, upon a previous trial, made statements different from his evidence on his second trial, which was held to be error. These cases do not measure up to, and are not decisive of, the question here presented. In those cases there was no question as to the examination being a legal one, but here, while the statements were made, it is true, at the solicitation of the justice, and after the defendant had been sworn by

him, still the question arises: Was this a legal examination, such as is contemplated by the statute? Just after the killing, the justice, for the purpose of determining whether or not an inquest should be held, requested the defendant to make a statement, to which she willingly acceded, saying that she had no objection to doing so. This cannot be regarded as a legal examination. The law makes no provision for it, and does not recognize it as such. No coroner's jury had been summoned, and there was no inquest being held. An investigation was simply being made for the purpose of determining the propriety or impropriety of holding an inquisition. And again, the statement was not made upon the preliminary examination of the defendant, because at that time no accusation had been preferred against her. No warrant had been issued. No examination was being held. We must not so construe the statute as to give to it a meaning which its clear language does not import. It only extends protection as to any statement made by a "witness upon a legal examination." The defendant, at the time she made this statement, was neither a witness, nor was it made upon a legal examination.

4. It is claimed that the court erred in admitting the testimony of the witnesses Eagle and Hays as to what occurred at the home of the Leggs on the night preceding the killing. This evidence was introduced for the purpose of showing the existence of improper relations between the defendant and these witnesses, or one of them, and is excepted to on the ground that it had a tendency to prejudice the minds of the jurors against the defendant. The court instructed the jury that even if they should find that any improper relations existed between these witnesses and the defendant, they should not consider that upon the question of her guilt or innocence of the crime charged against her, unless they should find from the evidence that such conduct and relationship between the parties was a motive for the commission of the crime. With the qualification annexed by the court, the evidence was competent. If admitted only for the purpose of showing motive, the objection urged against its admission—that it was not shown that the deceased knew anything of the visit of these witnesses to his house—falls, for, if the relations existing between these witnesses and the defendant furnished a motive for the commission of the offense, it is immaterial whether the deceased knew of such relations or not. Wharton's Criminal Evidence, § 785, says: "Among the circumstances from which malice, in a killing by a husband of his wife, may be inferred, are adultery by either husband or wife, illustrating a desire to get rid of the marital relation." See, also, *State v. Watkins*, 9 Conn. 49, 21 Am. Dec. 712; *Shaw v. State*, 102 Ga. 660, 29 S. E. 477; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157. It is said that the admission of this testi-

mony merely afforded the jury full and free rein for conjecture. But if testimony be competent and relevant, it must be admitted, and confidence placed in the jury that they will legally apply it. It is the duty of the court, if asked to do so, to instruct the jury as to the applicability of the evidence, as was done in this case, and it is the duty of the jury to observe the direction of the court as to the law governing such evidence. That they exercised their judgment soundly is a presumption of law.

5. Another reason advanced for reversal is that the court, at the instance of the state, and over the objection of the prisoner, gave to the jury certain instructions:

Instruction No. 1: "The court instructs the jury that a man (or a woman, as in this case) is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and if the prisoner, with a deadly weapon in her possession, without any or upon very slight provocation, gives to another a mortal wound, the prisoner is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity rests upon her of showing excusing or extenuating circumstances, and unless she proves such excusing or extenuating circumstances, or the circumstances appear from the case made by the state, she is guilty of murder in the first degree." The objection urged to this instruction is that the defense interposed was that the killing was accidental, and this being so, the jury should not have been told if the defendant relies upon excusing or extenuating circumstances, the burden is upon her to establish the same. Where there is any evidence tending in an appreciable degree to support a particular theory of a case, the court may give to the jury instructions presenting it to them. This instruction proceeds upon the theory that the killing was intentional, and, if there is evidence tending to show this, the state is entitled to an instruction presenting this phase of the case. If the defendant relied upon accidental killing as an excuse, it was proper for her to present this question to the jury, also, and then for the jury to determine, from all the facts and circumstances, as to whether or not the killing was done intentionally and with malice. There is no question but what the defendant killed the deceased, with a deadly weapon. This appearing, the law presumes that it was murder in the second degree. But if, from the state's own showing, or from the testimony of the defendant, it appears that the killing was accidental, then the defendant would be excused. But the jury are to determine this fact. It is true that the burden is upon the state to prove the killing—that it was intentional, and with malice. The state offers evidence to prove the killing, with a deadly weapon, which the defendant herself admits, and this being so, how is it to be determined whether or not it was intentionally done? It must be gathered from all the facts

and circumstances surrounding the transaction, and it is peculiarly within the province of the jury to determine this, according to the well-settled rules of law. And this being so, it is proper for the court to say to the jury that if they believe the homicide was committed with a deadly weapon, and without any or upon slight provocation, that they should find the defendant guilty, unless, from all the other evidence, it appears that it was accidentally done. This is practically what was propounded to the jury in this case. Malice is presumed from the use of a deadly weapon. But if it is shown to have been an accident, this presumption is rebutted. "The defense of accidental and unintentional killing does not preclude the giving of instructions embodying the law relating to any offense charged in the indictment which the evidence tends to prove." *State v. Paul Clifford* (decided at this term) 52 S. E. 981.

It is said that this instruction does not differ in substance and effect from instruction B, given in *Cross' Case*, 42 W. Va. 258, 24 S. E. 996. The vice of instruction B, in that case, was that it told the jury, if the defendant relied upon the defense of accidental killing, that the burden was upon him to prove such defense, and to avail him, he must establish it by a preponderance of the evidence. Where accidental killing is relied upon as a defense, the accused is not required to prove such defense by a preponderance of the evidence, because there is a denial of intentional killing, and the burden is upon the state to show that it was intentional, and if, from a consideration of all the evidence, both that for the state and the prisoner, there is a reasonable doubt as to whether or not the killing was accidental or intentional, the jury should acquit. The court, in giving said instruction B, confounded the doctrine of the law of self-defense with the rules applicable to the defense of accidental killing, as, where self-defense is relied upon, the burden is upon the accused to prove such defense by a preponderance of the testimony, because the killing is admitted, and it is admitted to have been intentional. Therefore, in order to justify it, the burden is upon the prisoner of showing such a state of facts as warranted his course. But where accidental killing is relied upon, the prisoner admits the killing, but denies that it was intentional. Therefore, the state must show that it was intentional, and it is clearly error to instruct the jury that the defendant must show that it was an accident by a preponderance of the testimony, and instruction B, in the *Cross Case*, was properly held to be erroneous. But it does not control the principle involved in the consideration of the instruction here, and we think there was no error committed in giving it. For the same reasons advanced to show that this instruction was properly given, we think there was no error in giving instructions 7 and 9.

As to instructions Nos. 2, 3, 4, and 5: By these instructions it is undertaken to define "reasonable doubt." We see no objection to these instructions as such. They seem to define "reasonable doubt" correctly, and no objection to their correctness is pointed out. But it is urged that the court erred in giving them, because they are upon the same point, and for the same purpose, and that a continued repetition of instructions upon a single point is calculated to prejudice the defendant. It was entirely unnecessary to repeat these instructions. It is manifestly improper to do so. The purpose of instructing a jury is to aid them in arriving at a proper verdict, and not to confuse them, and in order to be of aid, instructions should not be repeated, but when once given, presenting a particular theory of a case, no other instruction presenting the same theory should be given, because to do so is to destroy the very purpose for which instructions are given, and to mystify and confuse the jury. It is true, these instructions present the definition in different language, but there is no necessity for it to be defined more than once. Four long instructions upon "reasonable doubt," which has never yet been defined or made clearer than the words themselves import, can certainly be of no service to a juror. The practice of repeating instructions should be condemned. It is wrong to do this, and thereby prominently impress a single feature of a case upon a juror. Either of these instructions would have been sufficient, but as to whether or not the repetition of them is reversible error, we will not determine, because, on other grounds the judgment will have to be reversed, and upon a second trial the necessity for this criticism can be obviated.

Instruction No. 6 tells the jury that they are the sole judges of the evidence, and that they have the right to believe or refuse to believe any witness, and that, upon the credibility of any witness, they may take into consideration his interest in the matter in controversy, the reasonableness or unreasonableness of his statements, his bias or prejudice in the matter, if any appear, and his demeanor upon the witness stand. There is no objection pointed out to this instruction, and we think it was properly given.

6. The court refused to give instructions 5, 8, 9, and 10, as asked by the defendant, but, over her objection, modified and gave them.

Instruction No. 5: "The court instructs the jury that they are the sole judges of the credibility of the witnesses, and they have a right to believe, or not to believe, any witness who has testified in the case." This instruction was modified by adding the words, "but they cannot arbitrarily disregard the testimony of a witness, unless they believe it untrue." Whether this instruction as asked was proper or not is unnecessary to decide, as the court made a very slight modification and then gave it. The action of the court in

modifying and giving it was certainly not error.

Instruction No. 8: "The court instructs the jury that before they could find the defendant guilty of murder, they must believe beyond all reasonable doubt, by evidence adduced upon the trial of the case, that the defendant willfully, maliciously, deliberately, feloniously, and unlawfully killed her husband, Jay Legg." It is not necessary, in order to find the defendant guilty of murder in the second degree, that the jury believe that she "willfully, maliciously, deliberately, feloniously, and unlawfully" killed her husband, yet this instruction tells them that they must so believe before they can find her guilty of murder, which includes murder in the second degree, and which is charged in the indictment. It would have been clearly misleading to the jury, because it applies to murder of both degrees. To have been proper, it should have been limited to murder in the first degree. Therefore, it was not error to refuse to give it as offered, but the court modified it and gave it in the following form:

Instruction No. 8: "The court instructs the jury that before they could find the defendant guilty of murder, they must believe beyond all reasonable doubt, by evidence adduced upon the trial of the case, that the defendant maliciously, feloniously, and unlawfully killed her husband, Jay Legg." This modification had the effect of reversing the situation. To have given the instruction as offered would have been error against the state, and as modified it was error against the prisoner. Both murder of the first and second degree are charged in the indictment, and it will not do to tell the jury that before they can convict the prisoner of murder, they must believe that the killing was "maliciously, feloniously, and unlawfully" done, because, to have found a verdict of murder in the first degree, as they did find, it was necessary for them to have further believed that the killing was willful and deliberate. But this instruction, by telling them that before they could find the defendant guilty of murder, they must believe, beyond all reasonable doubt, that the defendant "maliciously, feloniously, and unlawfully" killed her husband, practically says to the jury that if they do find it was done "maliciously, feloniously, and unlawfully," they could find a verdict of murder in the first degree, which they did find.

Instruction No. 9: "The court instructs the jury that if they believe from the evidence that Jay Legg was accidentally killed, they should find the defendant not guilty."

Instruction No. 10: "The court instructs the jury that if they believe from the evidence that Jay Legg instructed his wife, Sarah Ann Legg, the defendant, to hand him his gun, and, in accordance with such request, she undertook to get the gun down from the rack to hand him, and it was accidentally discharged and killed said Jay Legg, then the defend-

ant is not guilty as charged in the indictment."

These instructions properly present to the jury the theory of the defense that the shooting was accidental, and it was error to refuse to give them. The jury had been instructed upon the state's theory, and it was entirely proper, under the evidence, to tell the jury that if they believed from the evidence that the deceased was accidentally killed they should find the defendant not guilty. The defendant was entitled to these instructions without any modification. But the court refused to give them as offered, and modified them, so that they read as follows:

Instruction No. 9: "The court instructs the jury that if they believe from the evidence that Jay Legg was accidentally killed, they should find the defendant not guilty, unless they find that such accident was caused by criminal carelessness upon the part of defendant."

Instruction No. 10: "The court instructs the jury that if they believe from the evidence that Jay Legg requested his wife, Sarah Ann Legg, to hand him his gun, and in accordance with such request she undertook to get the gun down from the rack to hand him, and it was accidentally discharged and killed the said Jay Legg, without criminal carelessness upon the part of the defendant, then the defendant is not guilty as charged in the indictment."

There is no evidence to justify this modification. There is nothing from which the jury could find criminal carelessness. But, suppose there were, the instructions as modified would not be proper. What verdict would the jury find, if they should believe the defendant guilty of criminal carelessness? These instructions do not say. They are told that they should find the defendant not guilty, if they believe the killing was accidental, unless they further believe that she was guilty of criminal carelessness. Under the instruction, they might find her guilty of murder in the first degree, which could not be done. Criminal carelessness will not support such a verdict. "One killing another by the mere careless use of a deadly weapon commits only manslaughter." Bishop, *Crim. Law*, vol. 2, § 681. And again, the jury are left to determine what constitutes criminal carelessness, without any instruction upon this point. The question as to what is criminal carelessness is a question of law for the court. The jury are to determine the facts, and the court is to say whether or not these facts are such as to constitute criminal carelessness.

It is charged that the verdict is contrary to the evidence, but, as the judgment is reversed for other reasons, and the case will be retried, it is not proper to express any opinion upon the evidence.

The judgment of the circuit court is reversed, and a new trial awarded the defendant.

(59 W. Va. 343)

**DEEPWATER COUNCIL, NO. 40, O. U. A.
M. OF MT. CARBON, v. RENICK.**(Supreme Court of Appeals of West Virginia.
April 10, 1903.)**1. CORPORATIONS—SALE OF REALTY—VALIDITY.**

A corporation duly incorporated under the provisions of chapter 55 of the Code of 1899, may sell real estate owned and held by it in its corporate name, without resort to a court proceeding under section 9 of chapter 57 of the Code of 1899.

2. SAME—DEED—VALIDITY.

A deed, which is not *ultra vires* as to a corporation, and which is executed in its corporate name and under its corporate seal, by its proper officers, and duly delivered, carries with it the presumption of authority in such officers to execute it and affix thereto the seal of the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1726-1729.]

3. DEEDS—FRAUD—EVIDENCE.

When actual fraud is relied on to set aside a deed, the fraud must be clearly proved. This may be done by direct or by circumstantial evidence, or by both.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 645.]

4. FRAUD—EVIDENCE.

Actual fraud cannot be established alone by proof of circumstances raising only a suspicion of fraud; but the evidence and circumstances must be of such character as to clearly establish such fraud.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 55-57.]

5. CONTRACTS—CANCELLATION — INADEQUACY OF CONSIDERATION.

Where parties, competent to contract enter into a contract, it will not be set aside in a court of equity on the ground of inadequacy of consideration, unless the inadequacy be so gross as to shock the conscience and to amount to proof of fraud. Courts of equity, as well as courts of law, act upon the ground that every person, who is not, from his peculiar condition of circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he pleases; and whether his bargains are wise, discreet, and profitable, or otherwise, are considerations, not for courts of justice, but for the party himself, to deliberate upon.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1171.]

6. FRAUD—EVIDENCE—INADEQUATE CONSIDERATION.

Inadequacy of consideration, although not so gross as to shock the conscience and amount to proof of fraud, may nevertheless be considered with other evidence or circumstances in determining the question of fraud.

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County.

Bill by the Deepwater Council, No. 40, O. U. A. M. of Mt. Carbon, against J. E. Renick. Judgment for defendant, and plaintiff appeals. Affirmed.

Dillon & Nuckolls, for appellant. Payne & Hamilton and Brown, Jackson & Knight, for appellee.

COX, J. On the 20th day of February, 1903, a deed, purporting to convey a certain lot of land near Mt. Carbon in Fayette coun-

ty, was made and executed in the name of Deepwater Council No. 40, Order United American Mechanics of Mt. Carbon, and under its corporate seal, by F. M. Bone, its councillor, and John Nichols, its secretary, and delivered to J. E. Renick, the grantee named therein, and duly admitted to record on the 24th of February, 1903. Deepwater Council No. 40, Order United American Mechanics of Mt. Carbon, is a corporation, duly incorporated under the provisions of chapter 55 of the Code of 1899, and, for convenience, will be hereafter referred to as the "Lodge." On the 1st day of June, 1903, the Lodge instituted this suit in equity, in the circuit court of Fayette county, against J. E. Renick, to set aside said deed upon two grounds: First, want of authority on the part of Bone and Nichols, officers of the Lodge, to make the deed; second, actual fraud in the procurement of the deed. The bill alleged willingness on the part of the Lodge to return the purchase money paid by Renick. Renick, by answer, denied substantially all the material allegations of the bill in relation to want of authority on the part of the officers making the deed, and to actual fraud in its procurement. Many depositions were taken. Upon final hearing, the circuit court of Fayette county entered a decree dismissing the plaintiff's bill. From this decree the Lodge appealed.

The deed did not purport to convey all the property of the Lodge, and thus practically terminate its existence, but only a specific parcel of real estate. The act of conveying this real estate was not *ultra vires*, so far as the Lodge was concerned, if the act was in fact the act of the Lodge; because the very purpose of such corporation, as expressed in the act under which it was incorporated, is to "hold, lease, sell, and convey real property," etc. Section 2, c. 55, Code 1899.

Section 8 of said chapter provides that such a corporation may make and adopt all necessary by-laws and regulations, not inconsistent with the Constitution and laws of the United States and of this state, to enable it to conduct and pursue its business and purpose; and that, except where it is otherwise provided, such corporation shall be subject to and governed by chapters 52, 53, and 54 of the Code of 1899. These chapters relate to joint-stock companies. Section 42, c. 53, Code 1899, provides that the number of stockholders, or amount of stock, necessary to constitute a quorum at a meeting of the stockholders, and the mode of transacting business at such meeting, may be prescribed by the by-laws. Section 49, c. 53, Code 1899, provides that there shall be a board of directors for every corporation subject to that chapter, who shall have power to do, or cause to be done, all things that are proper to be done by the corporation; and that a majority of the board shall constitute a quorum, unless otherwise provided in the by-

laws. Section 55, c. 53, Code 1899, provides that the board of directors, in the exercise of their powers, shall be subject to such by-laws and regulations, not inconsistent with the laws of this state, as the stockholders may pass from time to time in general meeting. These provisions of the statutes in relation to joint stock companies, govern the Lodge, so far as applicable to it. Usually the members of a lodge are not, in a strict sense, stockholders of the corporation. They have no stock which they may assign to others. They are simply members, and, as such, entitled to participate in the business of the corporation, in many respects in like manner as stockholders in a joint stock company, except that such members stand on an equality as to each other. They are entitled to a voice in the proceedings as individual members, and not according to the amount of stock held by them, as in joint stock companies.

We shall discuss the grounds alleged for setting aside this deed, in the order named: First, want of authority in the officers to make the deed. Under this ground, it is contended that the real estate of the Lodge could not be sold without resort to a court proceeding, under section 9, c. 57, Code 1899. In our judgment this section does not apply. At the time the deed mentioned was made this real estate was owned and held by the Lodge in its corporate name, and not by a trustee or trustees for its use. Said section 9 provides for a sale by order of court upon the application of a board of trustees holding the property sought to be sold. Under section 6 of that chapter the trustees mentioned in section 8 of the same chapter are made a corporation. It seems clear to us that section 9 does not refer to or include an active corporation chartered under chapter 55, authorized and competent to transact its own business without the intervention of trustees or of a court order. It is contended that the officers who made the deed were without authority, because that authority had not been conferred upon them by a proper meeting of the members of the Lodge, or by its board of directors. The deed is regular upon its face, under seal of the Lodge, signed and acknowledged by its chief officers, delivered to the grantee, and by him caused to be recorded. Under these circumstances, authority on the part of these officers to make the deed will be presumed, and the burden is on the Lodge to show want of authority. *Fidelity Co. v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180; *Boyce v. Montauk Coal Co.*, 37 W. Va. 91, 16 S. E. 501; *Ruffner Bros. v. Welton Salt Co.*, 36 W. Va. 244, 15 S. E. 48; 4 *Thomp. Corp.* § 5029; *Cook Corp.* § 725; 10 *Cyc.* 1149. It may be claimed that these officers were not the proper officers to sign the deed and to place thereon the seal of the corporation. They were the chief officers of the Lodge, and acted as such without objection at the meet-

ing of the board of directors hereafter mentioned, and were, in our judgment, the proper officers to execute the deed on behalf of the Lodge. The question for determination is: Has the presumption of authority on the part of these officers to make the deed been overthrown by the facts appearing in this record? It was shown that the Lodge had a board of directors, composed of five members, viz., Bone, councillor, Nichols, secretary, Stapleton, Griffith, and Craddock. The by-laws were not produced or copied in the record, although demanded by the appellee. The evidence is ample that by-laws of the Lodge were in existence. The evidence shows that a regular meeting of the members of the Lodge was held on the 18th of February, 1903, at which a quorum for the transaction of business was present; that the Lodge was indebted to Hopkins in something more than \$800, which indebtedness had existed for some time. At this meeting, a letter from Hopkins urging payment was read by the secretary. A motion was adopted in relation to selling the real estate in controversy. Renick, the purchaser, was present, and offered to loan to the Lodge the money with which to pay the Hopkins debt; or to buy the real estate at the price of \$1,000, the Lodge to retain the use of the second story or lodge room for lodge purposes, and for the purpose of renting it to other lodges or societies, for the period of five years. The minutes of the meeting of February 18th show the following: "On motion of H. Stapleton that Deepwater Council No. 40 sell their lot and house or hall to J. E. Renick. Motion carried unanimously. Renick being present, he stated to the Lodge the condition on which he would purchase the building. He said he would give the Council \$1,000.00 for their property, and lease them the upper story for five years, to have full control of the upper part of the building for lodge purposes and to rent to other lodges and get the full amount of rent, and be at no expense for any repairs. The Council resolved that they would sell, and instructed the recording secretary to notify the other two members of the board to be present at J. E. Renick's for the purpose above stated." These minutes were signed by F. M. Bone, councillor, and John Nichols, secretary. The minutes of a subsequent meeting of the members of the Lodge, held on the 25th of February, 1903, show: "Records of previous Council read and approved." These minutes were also signed by F. M. Bone, councillor, and John Nichols, recording secretary.

On the 20th day of February, 1903, there was a meeting of the board of directors, at which three of the five members were present; Griffith and Craddock being absent. At this meeting the deed mentioned was prepared, executed, and delivered. The transaction appears to have been agreeable to all the members of the board present, until it came to signing the deed, when Stapleton

seemed to become offended at being told that it was unnecessary for him to sign it, and that it was only necessary for Bone and Nichols, as chief officers, to sign the deed. There is no claim that the deed was made upon considerations or terms differing substantially from the proposition of purchase made by Renick at the meeting of the Lodge, or as contained in the minutes of that meeting, as recorded; although the language of the minutes is misrecited in the deed. Much oral evidence was adduced as to what action was taken by the Lodge at its meeting on the 18th, and as to the correctness of the minutes of that meeting. This evidence is conflicting. If no recorded minutes of that meeting existed, and if it were attempted to make up true minutes from this oral evidence, we apprehend that the attempt would be without accurate result. At the meeting of the 25th, the minutes of the meeting of the 18th were objected to by Griffith, who was not present at the meeting of the 18th, or at the directors' meeting of the 20th, and perhaps by others. The evidence of the witnesses as to the character of the objection or objections made to the minutes of the meeting of the 18th is also conflicting. No evidence discloses any affirmative action by the Lodge, in relation to the minutes of the meeting of the 18th, at the meeting of the 25th. No motion was adopted or action taken rejecting the minutes, or in any way disapproving them. The objections made to them by an individual member or members seem to have ended without action by the Lodge. There is also conflict in the evidence as to who prepared the minutes of the meeting of the 25th; but, without endeavoring to reconcile this conflict, it is undisputed that they were signed by Bone, councillor, and Nichols, secretary, without any act of the Lodge disapproving them. The minutes of the meeting of the 25th show the following, about which there is no controversy in the evidence: "On motion of C. C. Griffith that the Council reconsider the transaction of sale of the property to J. E. Renick. Motion carried." This minute goes very far to sustain the contention of the appellee that the Lodge had a previous transaction in relation to a sale of property to Renick; otherwise, there would have been nothing to reconsider. Upon the evidence and facts appearing, we think the recorded minutes of the meeting of the 18th must be taken as showing the action of the Lodge in relation to the sale of the property in controversy. It is contended that the record discloses that no legal action was taken by the board of directors authorizing the making of the deed. Of the five members composing the board of directors, three were present at the meeting at which the deed was prepared and executed. This meeting was held on the 20th of February. Notice of this meeting was sent by Nichols, secretary, by mail, on the 19th of February to the absentees, and in reasonable time for them to attend the meeting if they

received the notice by due course of mail. The evidence shows, without contradiction, that Craddock, one of the absentees, said that he had received the notice, but could not attend. The evidence of Griffith, the other absentee, was taken on behalf of the Lodge. After carefully examining his evidence, we are unable to say that it shows that he did not receive the notice in time to attend the meeting. He was asked when he received the notice, and answered: "On the 19th of February." This witness seems to have had in mind the two meetings, one by the Lodge on the 18th and the other by the board of directors on the 20th, at neither of which was he present, and to have confused the two meetings in some of his answers. It is also contended that the notice itself was insufficient, because it notified the members of a meeting to make arrangements to raise the money owing to Hopkins, and not to make sale of the property. The raising of money appears to have been uppermost in the mind of the secretary, who gave the notice, and, indeed, the raising of the money to pay the Hopkins debt seems to have been the reason which prompted the action of the Lodge at its meeting on the 18th of February. One way to accomplish that purpose was to sell the property. The by-laws of the Lodge, and the rules and regulations of its board of directors, in relation to notice of meetings of its board, do not appear in the record. We cannot say that the notice did not meet every requirement of such by-laws, rules, or regulations; and it was incumbent on the Lodge to show that the action of the board was illegal, else the presumption that the deed was with authority must prevail. It does not appear under the facts presented that the action of the board was illegal. The record disclosing the action of the members of the Lodge in regular meeting assembled, and also the action of the board of directors, it is unnecessary to discuss the question whether or not the action of both bodies was necessary, or, if not, the action of which body was proper and binding on the Lodge. Bearing upon this question, however, see *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; 3 *Thomp. Corp.* § 3977; section 33, p. 110, c. 35, *Acts 1901*; *Fidelity Co. v. R. R. Co.*, supra; *Burr's Ex'rs v. McDonald*, 3 *Grat.* 215.

This brings us to the consideration of the other ground alleged for setting aside the deed—actual fraud in its procurement. Where actual fraud is relied on to set aside a deed, it must be clearly proved. This may be done by direct or by circumstantial evidence, or by both. *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Parker v. Valentine*, 27 W. Va. 677; *Frank v. Zelgler*, 46 W. Va. 614, 33 S. E. 761. Inadequacy of consideration is alleged. The estimates of the witnesses of the cost of the property in controversy, including lot and improvements, range from \$2,200 to \$2,500. The estimates of the wit-

nesses of the actual value of the property range from \$1,500 to \$3,500, the greater number of the witnesses placing it at \$3,000. The estimates of actual value seem to be based principally upon the present rental value under existing conditions. The upper story or lodgeroom had at the time of the sale a rental value of about \$288 per year, exclusive of use by the Lodge for lodge purposes. The first story had a rental value of about \$200 per year. The terms of purchase by Renick were \$1,000; the Lodge retaining the second story with privilege to rent it to others for the period of five years. The rental value to the Lodge of this story, exclusive of use by the Lodge, for the five year period would amount to about \$1,500, thus making a total consideration of about \$2,500 which the Lodge received, or will receive. No actual offer or proposition to purchase this property at the time it was sold is shown, other than the proposition by Renick. The Lodge was indebted to Hopkins in excess of \$600. This \$600 debt had been carried by the Lodge for some time. It had not grown less in amount. The membership of the Lodge in good standing and paying dues had greatly decreased. Under these circumstances, the sale was made to Renick. These parties were competent to contract, and entered into the contract. It will not be set aside in a court of equity on the ground of inadequacy of consideration, unless the inadequacy be so gross as to shock the conscience, and to amount to proof of fraud. Courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise, discreet, and profitable, or otherwise, are considerations not for courts of justice, but for the party himself, to deliberate upon. 1 Story Eq. § 244; Jones v. Degge, 84 Va. 685, 5 S. E. 799; Lowther Oil Co. v. Guthrie, 52 W. Va. 88, 43 S. E. 101; Wood v. Harmison, 41 W. Va. 376, 23 S. E. 560; Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150. It is clear that the deed cannot be set aside on the ground of inadequacy of consideration. This is conceded by the brief of counsel for the Lodge. Inadequacy of consideration, although not so gross as to shock the conscience or amount to proof of fraud, may nevertheless be considered with other evidence or circumstances in determining the question of fraud. 14 Am. & Eng. Enc. Law, 516. What evidence in this record shows actual fraud in the procurement of the deed mentioned? The bill alleges that the "deed was obtained by said J. E. Renick, with the assistance of John Nichols, for the purpose of obtaining the title to plaintiff's property without paying a just and adequate consideration for the same, and thereby defrauding plaintiff of its property."

Where is the proof of this allegation? We are unable to point to it in this record.

It is said that John Nichols, secretary, did not enter correctly the minutes of the meetings of the Lodge held on the 18th and 25th of February; but, as we have seen, those minutes stand duly signed as the minutes of the Lodge, unimpeached by action of the Lodge. It is also said that Nichols urged haste in consummating the sale, and declared on the day of the directors' meeting that something would have to be done, or that the property would go for \$600. The acts and conduct of Nichols, secretary, may have manifested a desire to speedily consummate the sale, laboring perhaps under the fear of dire consequences from the enforcement of the Hopkins debt. It is not shown that the acts and conduct of Nichols were prompted by an improper motive, or were not in good faith. In the matter of haste, Nichols does not stand alone. Other members of the Lodge, and perhaps all the members present at the meeting of February 18th, manifested a like desire to consummate a sale. The date of the meeting of the board of directors was fixed for the 20th, at the meeting of the Lodge on the 18th, not by Nichols, but by another member. We cannot impute improper motives to Nichols from his conduct and declarations, or to the other members of the Lodge from their conduct and declarations. We have examined this record for proof of fraud on the part of Renick, and find nothing substantial or conclusive in that regard. One witness was produced who said that he was asked by Renick to "talk in favor of him getting" the property, but no terms were mentioned, no price named, at that time. It is not shown that this witness acted according to that request. On the contrary, he said that he did not. The evidence of this witness, at most, cannot be construed as raising more than a mere suspicion of fraud, if it is even sufficient for that purpose. Fraud cannot be established alone by proof of circumstances raising only a suspicion of fraud; but the evidence and circumstances must be of such character as to clearly establish the fraud. 1 Story, Eq. § 190.

The circuit court weighed the evidence and circumstances appearing in this record, and determined the conflicts therein in favor of the appellee. The decree appealed from carries with it the presumption of correctness. Having examined this record, we are clearly of the opinion that the circuit court was fully justified in its determination of this case. The action of the Lodge in selling the property was perhaps hasty. It may have been an instance of acting in haste and repenting at leisure; but we find no sufficient evidence to sustain the allegations of fraud in the transaction.

The decree of the circuit court is affirmed.

(59 W. Va. 360)

KENNEWEG CO. et al. v. MILEY.(Supreme Court of Appeals of West Virginia.
April 10, 1906.)**TRIAL—DIRECTING VERDICT.**

Where a case depends on the weight of evidence and deduction from it, and conflicting evidence and credit of witnesses, the court should not instruct a verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 376-380.]

(Syllabus by the Court.)

Error to Circuit Court, Hardy County.

Petition by the Kenneweg Company and others against John R. Miley. Judgment for plaintiffs, and defendant brings error. Reversed.

H. B. Gilkeson, for plaintiff in error. Benjamin Dalley, M. W. Gamble, and C. W. McCauley, for defendants in error.

BRANNON, J. The Kenneweg Company and other creditors of John R. Miley levied certain executions against him upon a stock of store goods as his property. J. Watson Miley executed a suspending bond, and a forthcoming bond, and claimed that said stock of goods was his property, and not liable for the debts of John R. Miley. Then the Kenneweg Company and other creditors filed a petition in the circuit court of Hardy county asserting the liability of said property to their execution and asking that the court make an order requiring J. Watson Miley to appear and state the nature of his claim to said property, and maintain or relinquish the same, and the court made such order, and when J. Watson Miley appeared the court stated as the issue whether the stock of goods was the property of John R. Miley or J. Watson Miley and made the creditors plaintiffs in the issue. This issue was tried by the jury, and on the trial the court instructed the jury that the evidence did not warrant a verdict for the defendant, and required it to find for the plaintiffs, and the jury did so, and the court gave judgment that the property, at the time of said levy, was the property of John R. Miley, and subject to the levy of said execution. J. Watson Miley brought the case to this court on writ of error.

The only question of moment in this case is one purely of fact. Was the stock of goods the property of John R. Miley or J. Watson Miley? It was purchased from S. L. Harper in the name of J. Watson Miley; but the creditors claim that he was a mere figure-head, and that the purchase was really for John R. Miley, and that it was his stock of goods, and that the business, though carried on in the name of J. Watson Miley, was really the business of his elder brother, John R. Miley, who was a man of extensive business, but had met with business disaster, and was utterly insolvent, and that the purchase and transaction of the business in the name of J. Watson Miley was a sham to

protect the property and business from the pursuit of John R. Miley's creditors. A great number of witnesses were examined, a great number of facts and circumstances were given in evidence; the evidence was materially conflicting in vital matters; and not only this, but the credit of witnesses was deeply involved. The version of John R. Miley and J. Watson Miley as witnesses were in the case, and their credit involved. The manager of the store business, Shearer, whose evidence was vital in the case, necessarily so, because he conducted the store business, was a witness. Not only was his credit involved from the nature of the case, but his general reputation for truth and veracity was attacked, and a number of witnesses introduced as to it. I think this statement is enough at once to show that the case was one peculiarly appropriate for a jury. It is useless to detail evidence and circumstances. It is enough to say that the decision of the court depended on the quantity and weight of evidence and inferences to be deduced from facts and circumstances, numerous and varied in kind, and depended upon their weight, that is, jury questions. *Smith v. Railroad*, 48 W. Va. 69, 35 S. E. 834. Then, too, the evidence was highly conflicting. Especially reflect that Shearer's evidence was assailed and witnesses, introduced to impeach him, were equivocal in their evidence, and the force of their evidence depended very largely upon their faces, countenances, demeanor, reluctance and emphasis, which could be judged of only by the jury. Scarcely any case was more appropriate for a jury. We cannot think that the court carried out legal principles in withdrawing the case from the jury. In *White v. Brewing Company*, 51 W. Va. 259, 41 S. E. 180, it is held that a court may instruct a verdict where the evidence plainly and decidedly preponderates; but at the same time it put in the precautionary point: "If the material facts are doubtful and a verdict for either party would be sustained, the circuit court should not instruct the jury to find against such party."

It is very difficult, in practice, to lay down in words just where a court may strike out evidence or instruct a verdict. Each case depends upon itself largely. This difficulty is well stated by Judge Sanders in *Cobb v. Glenn Boom & Lumber Co.* (W. Va.) 49 S. E. 1006, where many of the authorities are discussed. Some of the cases there cited say that wherever the evidence tends in a fairly appreciable degree to sustain a plaintiff or defendant, the court should not strike out the evidence or instruct a verdict. That case holds what is, I think, the true test; that is, whether the court should set aside a verdict in favor of the party against whom the verdict is instructed. In *Manass-Bruning Shoe Co. v. Prince*, 51 W. Va. 510, 41 S. E. 907, we held that "A verdict which, on the fixed facts of the case, is contrary to law, must be set aside." But what are the fixed facts of this

case? Are they indisputable under the evidence? Cannot men reasonably differ about them? Test this case by these principles. We say that the questions of fact solving this case are severely involved under the evidence. Especially, we add, as a matter of decided emphasis in this court, that the evidence is conflicting, not merely upon clashing circumstances, but the credit of the witnesses is involved. We cannot say, under the peculiar character of the evidence of witnesses assailing the general reputation for truth and veracity of Shearer, whether he is to be believed or not, their evidence being equivocal and indefinite; but jurors face to face with the witnesses, face to face with Shearer, could judge as we cannot. Granting that if it were a question of mere preponderance, this court might take up the scales and weigh the evidence and say whether it greatly and decidedly preponderated for the creditors; yet when the credit of the witnesses is involved, not only of the two Mileys, but especially of Shearer, our path would go through the forest of uncertainty. This is for a jury. *Young v. Railroad*, 44 W. Va. 218, 28 S. E. 932. We are unable to say what was proven in this case, and in view of another trial we desire to be understood as saying that we do not express an opinion on the evidence, because we say that it is a proper case for the decision of a jury.

The deposition of J. Watson Miley was introduced in the case by the plaintiffs. We think there is no error in this. It was given in another case in which the debts of John R. Miley were being ascertained, and in which he filed a claim, and it involved matters involved in this suit, and it was admissible as admissions by J. Watson Miley proper to go before the jury.

Therefore we reverse the judgment, set aside the verdict, and remand the case for a new trial.

(59 W. Va. 363)

HOPKINS v. PRICHARD et al.

(Supreme Court of Appeals of West Virginia.
April 10, 1906.)

1. APPEAL—INTERLOCUTORY DECREE—MATTERS REVIEWABLE.

When an interlocutory decree is rendered in a cause which so far settles the principles of the cause as to make the decree appealable, and subsequent decrees carrying out the principles so settled are entered in the cause, an appeal from such interlocutory decree alone will not bring up for review such subsequent decrees, although the same were entered long prior to the granting of such appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3530.]

2. SAME—REVERSAL—EFFECT.

After the reversal of the interlocutory decree on such appeal, the subsequent decrees mentioned not having been set aside, reversed, or corrected by a bill of review, appeal, or otherwise, the same remain firm and valid, although inconsistent with the judgment of this court in reversing the first-mentioned decree.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill by J. C. Hopkins against R. H. Prichard and others. Decree for plaintiff, and defendants Harvey, Hagen & Co. appeal. Reversed.

Wallace & Fitzpatrick, for appellants. Vinson & Thompson, for appellees.

McWHORTER, P. This cause was here once before, brought to this court by L. H. Burks, who had come into the cause by petition claiming prior liens on certain lands sought to be sold, and appealing from a decree entered on the 7th day of July, 1898. See 51 W. Va. 385, 41 S. E. 347. The decree then appealed from, referring to the report of Thos. R. Shepherd, commissioner, filed on the 28th day of May, 1898, and the exceptions thereto of L. H. Burks, says: "And the court having maturely considered the exceptions to said report and the question of law arising upon the ownership of the lands reported to be held by R. H. Prichard, in his individual capacity and as trustee, submitted to the court by Commissioner Shepherd, is of the opinion that the several tracts of land shown by the commissioner and by the record in this cause to have been standing in the name of R. H. Prichard, trustee, and R. H. Prichard at the time of the levying of the attachments mentioned and described in this cause, were purchased by R. H. Prichard with his individual assets, and that the same were not purchased with the partnership funds of Burks & Prichard for partnership purposes, and that there is therein no resulting trust in favor of the creditors of Burks & Prichard superior to the rights of the attaching creditors in this cause acquired under their attachment, but that said land is first subject to the attachments. It is therefore considered by the court that the exceptions of L. H. Burks to said commissioner's report be and they are hereby overruled, and the said commissioner is directed to carry out the former decree of reference herein in accordance with these views. And by consent of all parties it is further adjudged and ordered that said commissioner complete and file his further report herein at the present term of this court." The lands involved were two tracts, of 600 acres and 828 acres, respectively. The court holding, as shown by the decree just quoted, that said lands were "first subject to the attachments," the decree was reversed as to the 828-acre tract, giving the appellant, Burks, priority of lien on said tract. 51 W. Va. 385, 41 S. E. 347. It seems that on the 21st day of December, 1898, a decree of sale was entered by the circuit court of Cabell county, and a sale of the said two tracts of land together had thereunder, for the sum of \$1,500, and on the 11th day of December, 1899, the net proceeds of the sale of said two tracts of land, amounting, after the payment of costs of sale and suits and taxes, to \$780, was paid to Harvey, Hagen & Co. on account

of its lien, which had been decided by the circuit court to be the first lien on both tracts. On the 11th day of April, 1903, the cause was heard in the said circuit court, upon the former proceedings and upon the mandate of this court, when Harvey, Hagen & Co. moved the court to set aside the sale of the two tracts, and proposed to refund the money received from the special commissioner in case there should be a resale of said tracts decreed, which motion the court overruled. Said Harvey, Hagen & Co. then moved the court to refer the cause to a commissioner to ascertain what proportion of costs, taxes, and expenses should be borne by said 600 and 328 acre tracts of land, respectively, and what part of the \$780, the net proceeds of sale received by it, should be refunded and paid back by said Harvey, Hagen & Co., which motion was also overruled, and the court refused to make such reference, "and the court being of the opinion, from the mandate and opinion of the Supreme Court, that the 828-acre tract of land was the land of Burks & Prichard, and that L. H. Burks was entitled to the proceeds from the sale thereof, and that the said Harvey, Hagen & Co. was not entitled to the \$780 paid it or any part thereof, and that the whole thereof with interest should be paid to said L. H. Burks," decreed accordingly that said Burks recover from said Harvey, Hagen & Co. \$935.22, being the principal and interest of said \$780 from December 11, 1899, until the date of the decree, with interest on said \$935.22 from date of decree until paid, and awarded execution therefor; from which decree Harvey, Hagen & Co. appealed, claiming that the court erred in refusing to set aside the sale of the two tracts, and in refusing to order a resale thereof; also in refusing to refer the cause to a commissioner for the purposes set out in its motion; that it erred in holding that appellant was not entitled to retain any of the fund realized from the sale of said tracts of land which had been paid to it on the 11th day of December, 1899; that it erred in rendering judgment against appellant for \$935.22, in favor of L. H. Burks. The former appeal in this cause was alone from the decree of July 7, 1898, which, while interlocutory, settled the rights of the parties as to the priorities of their liens on the said two tracts of land; the present appellant, Harvey, Hagen & Co., claiming prior lien thereon by virtue of its attachment, and L. H. Burks, who was not a party to the suit, coming in by petition and answer, claiming that said two tracts of land were not the property of Prichard individually, and not liable to the attachment of Harvey, Hagen & Co., but were the property of Burks & Prichard, and first liable to the social debts of the firm then represented by him, and for which he had the prior lien. Neither the decree of sale which was entered on the 21st of December, 1898, nor the decree confirming the sale made thereunder, and under which the net proceeds of sale were paid on the 11th

day of December, 1899, to Harvey, Hagen & Co., was vacated, annulled, set aside, or appealed from, and if those decrees remain undisturbed, firm, and valid, what should have been the action of the circuit court on the 11th day of April, 1903, when the decree now complained of was entered?

Did the former appeal from the decree of July 7, 1898, bring in review before this court, decrees and orders entered by the circuit court in the cause subsequently thereto? In that thorough and exhaustive chapter under the title "Appeal and Error," 3 Cyc. 229, we find: "While an appeal from an interlocutory, as well as from the final judgment or decree, brings up for review all the proceedings in the cause anterior to the final judgment or decree, an appeal from an interlocutory order or decree alone brings up for review only the order or decree appealed from." In *Railway Company v. Railway Company*, 100 Ill. 21, it is held: "An appeal brings up for review only such matters as precede the entry and perfecting of the appeal, and not any matter occurring subsequently, and a refusal of an appeal as to such subsequent proceedings will not have the effect of bringing them up for hearing on the first appeal," and in *Pa. Company v. Greso*, 79 Ill. App. 127, it is held: "Where no appeal is taken from an order overruling a motion to vacate a judgment, the appellate court, on appeal from the judgment alone, cannot review such order." *Kahn v. Kahn*, 15 Fla. 400: "Where an inferior court, after appeal and proper measures to secure a stay of proceedings, continues to proceed, the proper remedy is an appeal to the exercise of the power of the appellate court, and not by an injunction from a court of equity." It has been held by both the Court of Appeals of Virginia and this court that a judgment on a forthcoming bond, and a decree or previous judgment on which the execution issued, on which the forthcoming bond was given, constitute but one proceeding so far as the supersedeas is concerned. In *Laidley's Adm'r's v. Bright's Adm'r*, 17 W. Va. 779, in rendering the opinion of the court, Judge Green says: "The judgment of a forthcoming bond is not considered as brought up by a supersedeas to the first judgment. See *Moss v. Moss' Adm'r*, 4 Hen. & M. 303. But the two judgments constitute one proceeding, so far as granting a supersedeas is concerned; and if the judgment on the forthcoming bond has been rendered before the supersedeas is issued, and the error exists in the first judgment, the petition ought to pray a supersedeas," citing *Monroe v. Webb's Ex'rs*, 4 Munf. 73; *McCormick v. Bailey*, 17 W. Va. 585. He further adds: "So far have the courts gone in holding that it is proper for the appellate courts to try the whole matter in one case, that an appellate court may properly extend the supersedeas first awarded to the judgment subsequently obtained on the forthcoming bond. See *Bell v. Bugg*, 4 Munf. 260. We must there-

fore consider this case on the merits." It will be observed that the court say: "The petition ought to pray a supersedeas to both judgments; and they should be both embraced in the supersedeas." In the case cited of *Bell v. Bugg*, the court, on motion of the plaintiff in error, extended the original writ of supersedeas to a judgment which had subsequently been obtained upon a forfeited forthcoming bond. In case at bar, the decree of sale entered on the 21st of December, 1898, was a final decree and appealable, and might have been heard with the appeal taken in the cause from the decree of July 7, 1898, if the party in interest, whose rights were prejudiced thereby, had by petition asked that the appeal and supersedeas be extended to embrace such decree or decrees.

The errors assigned in the petition for appeal were confined exclusively to the decree of the 7th of July, 1898, and the prayer was for an appeal from, and supersedeas to, the said decree, although it appears that the appeal was not granted until June 30, 1900, more than six months after the proceeds of the sale of the two tracts of land had been paid over to the attaching creditor, Harvey, Hagen & Co., under the decrees of the court. The briefs of counsel in the cause on that appeal made no reference whatever to any decree entered subsequent to that of July 7, 1898, and the cause was decided upon the appealability of that decree. The appellant having failed to contest the validity or correctness of the subsequent decrees, the decree of December 21, 1898, and the one subsequent thereto, confirming the sale of said tracts of land, the same not being set aside, annulled, or appealed from, remain firm and valid, and the circuit court had no power or control over them, hence it committed no error in overruling the motion of Harvey, Hagen & Co. on the 11th of April, 1903, to set aside the sale of the two tracts of land, as well as the other motion to refer the cause to a commissioner for the purposes stated in its motion; but the net proceeds of sale of said tracts of land having been paid over to Harvey, Hagen & Co. in the cause under decrees therein, which were appealable, but which were never sought to be set aside, reversed, or corrected by bill of review, appeal, or otherwise, the court erred in rendering its decree and judgment in favor of L. H. Burks against said Harvey, Hagen & Co., for the said \$935.22.

For the reasons herein set forth, the decree of April 11, 1903, now complained of, is reversed, set aside, and annulled.

On Rehearing.

Counsel for appellee, in their petition for rehearing, contend that the said decree of sale and confirmation of sale, rendered after the decree of July 7, 1898, which was brought to this court on appeal by the appellee here, were mere nullities, and void. The appellee had, with the consent of the court, by petition and answer, made himself a party to the

cause and defending his rights therein, and his interests were directly affected by said decrees of sale and confirmation; and, although said decrees were rendered some months after that from which he appealed and before his appeal was taken, and were final and appealable, he failed to embrace or include them in his said appeal of June 30, 1900, and to have the same reviewed, as he could and should have done.

It is further contended that the appeal should be dismissed for the reason that the only question involved between appellant and appellee is one of costs. This cannot be the case when the decree of December 21, 1898, for sale, and the subsequent decree of confirmation remain undisturbed. The whole judgment in favor of appellee against appellant is necessarily involved, and that the appellee failed to have said decrees reviewed is his misfortune.

The propositions of appellant Harvey, Hagen & Co., contained in the decree here complained of, to refund the \$780, the net proceeds of sale of the two tracts of 600 acres and 828 acres of land, in case a resale of the said tracts should be decreed, or, that the cause should be "referred to a commissioner to ascertain what proportion of costs, taxes, and expenses should be borne by said 600 and 828-acre tracts of land respectively, and what part of the \$780, the net proceeds of sale received by it, should be refunded and paid back by said Harvey, Hagen & Co.," whether made in a spirit of equity or under a misapprehension of the effect of the decree of sale entered December 21, 1898, and the subsequent decree confirming the sale, were retracted and withdrawn by it upon the rendition of the decretal judgment against it for the sum of \$935.22 in favor of L. H. Burks, from which decree it has appealed and which retraction it had a right to make and rely upon the effect of the said decrees of sale and confirmation, which redounded to its interest, upon its propositions or motions being rejected by the court.

We see no reason for changing the former decision in this cause in November, 1904, and the decree complained of is reversed.

(59 W. Va. 653)

CHENOWETH et al. v. NATIONAL BUILDING ASS'N.

(Supreme Court of Appeals of West Virginia. April 24, 1906.)

1. USURY—PERSONAL DEFENSE.

The defense of usury is personal to the debtor.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, § 364.]

2. SAME—WHO MAY ASSERT.

A purchaser of real estate charged with an usurious debt, who assumes to pay such debt in consideration of his purchase, cannot defend against the usury.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, §§ 386-388.]

3. NOVATION—DEFINITION.

Novation is the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Novation, §§ 1-5.]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill of L. D. and Florida Chenoweth against the National Building Association of Baltimore City and L. H. Keenan. Decree for plaintiffs, and defendant association appeals. Reversed, and plaintiffs' bill dismissed.

L. H. Keenan and Fred O. Blue, for appellant. James A. Bent, for appellees.

SANDERS, J. On the 14th day of April, 1896, the National Building Association of Baltimore, Md., advanced to Ida B. Nestor the sum of \$520 on 13 shares of its capital stock at that time owned by her, and she agreed to pay to the association, on the 15th of each and every month, as dues, 60 cents for each of said shares, and also all fines and other charges properly chargeable thereto, until the shares matured and became of the par value of \$100 each, and to secure the payment of the same she and her husband conveyed to L. H. Keenan, trustee, a lot in the town of Elkins. On the 15th day of July, 1896, Ida B. Nestor and husband conveyed the said lot, with covenants of general warranty, to L. D. and Florida Chenoweth, and Ida B. Nestor assigned to the Chenoweths her stock in the association, and at December rules, 1902, of the circuit court of Barbour county, the grantees in the last-named deed filed their bill against the association and L. H. Keenan, trustee, alleging that the contract was usurious; that they had made payments thereon, which together with a tender made by them were more than sufficient to pay off the debt. The association demurred, and also filed its answer to the bill, denying the usury, and the cause was referred to a commissioner to take and state an account between the parties, and to report upon the same in two aspects; the first as claimed by the association, and the second, treating the loan made by the association to the plaintiffs as a loan, made at 6 per cent. interest, and the several payments made by the plaintiffs thereon under whatever name or designation as partial payments paid upon said loan. The commissioner reported the sums due under each theory of the case, and recommended that the sum reported by him as due, when treating the transaction as a loan at 6 per cent. interest, be accepted as the basis of settlement. The court accepted the recommendation of the commissioner, and at the final hearing entered a decree in accordance therewith, and the association appeals.

It is not contended that the provision of the contract by which Ida B. Nestor agreed

to pay the dues and fines assessed against the stock, in accordance with the charter and by-laws of the appellant, until said shares should mature, is anything other than a device or scheme adopted for the purpose of evading the usury laws. Still, for the decision of this case, it is entirely unnecessary for us to so decide, neither do we think it necessary to decide, the point raised by the appellant that, granting the contract usurious at the time it was entered into, it was purged of its usury by the action taken at a meeting of appellant's stockholders in January, 1901, by which it was determined that under no circumstances should any stockholder be called upon to pay more than 100 installments upon his stock. It may be well to remark, in passing, however, that the question as to whether or not the manner of payment can be changed after the time of making the contract, so as to make the payments definite and certain, and thereby relieve the contract of the taint of usury, is discussed in *Harper v. Building Ass'n*, 55 W. Va. 149, 48 S. E. 817. There it did not appear that the by-laws copied into the record were those under which the contract was made, they having been amended some time after the making of the contract, and, as so amended, exhibited with the answer. The court, in its opinion in that case, says: "As they are not the by-laws under which the loan was made, we are without evidence of the character of the by-laws under which it was made. On that question the record is silent, and the only evidence concerning the nature of the premlums is found in the deed of trust and the contract, and the provisions respecting it found there clearly indicate that the premium was a fixed sum to be paid monthly for an indefinite period of time, namely, until the stock should mature."

But the question we have to determine is whether or not the appellees, as between themselves and the appellant, are in a position to plead the usury, if such there be, in the contract between the appellant and Ida B. Nestor. The deed from the Nestors to the appellees provided that the latter were to assume the payment of the amount granted on the property by the appellant, and a vendor's lien was retained to secure said sum. This was a part of the consideration for the purchase of the property. The appellant contends that Ida B. Nestor being the original subscriber, and the shares of stock held by her having been transferred to the appellees, she was a necessary party to the suit, and that the appellees cannot plead usury without her consent appearing in the record; such defense being personal to the debtor. The case of *Harper v. Building Ass'n*, supra, is relied upon to support this position. In that case the land upon which a deed of trust had been given to secure a debt to the association was twice conveyed, and Mrs. Lawrence, to whom the loan was originally made, as well as her immediate

grantee, Sallie A. Harper, filed their separate answers, averring an assignment of the usury to the plaintiff, and praying the usury be expunged from the debt and decreed to him. This, it was held, undoubtedly gave the plaintiff the right to have the usury eliminated from the debt. The court said, "By this, Mrs. Lawrence, the original debtor, was benefited, for, in the event of a deficiency, she would have been liable to the building association for the balance due." *Stephens v. Muir*, 8 Ind. 352, 65 Am. Dec. 764, is authority for the position that the vendee may plead usury, with the consent of the party who made the contract; it being there held: "Usury, it seems, may be set up by the vendee of real estate subject to the usurious mortgage, with consent of the party who made the usurious contract and who was to suffer by it; and, if such person be made a party to the action, he may urge usury as a ground of equitable relief to himself."

Ida B. Nestor, with whom the contract by the appellant was originally made, not being a party to this suit, and it nowhere appearing in the record that she consents that the usury be expunged, the question is: Have the appellees the independent right to plead usury? They are not parties to the loan, but purchased the premises upon which the deed of trust had been given, and assumed and agreed to pay the debt. By a long line of decisions in Virginia and this state, it is held that the plea of usury is a defense personal to the debtor, and so the purchaser of land subject to a previous lien cannot object that the lien is usurious, but is bound to discharge the lien, as a part of the purchase price of the land. *Spengler v. Snapp*, 5 Leigh (Va.) 478; *Crenshaw's Adm'r v. Clark*, 5 Leigh (Va.) 65. "One who purchases land that is under a deed of trust for a usurious debt cannot set up the usury against that debt." *Smith v. McMillan*, 46 W. Va. 577, 33 S. E. 283; *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549; *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250; *Harper v. Building Ass'n*, *supra*. Having agreed to pay the debt of the appellant, as it stood, to allow the appellees to take the benefit of the usury would be giving them the property for less amount than they agreed to pay. "One standing in the relation of purchaser of mortgaged property cannot have the mortgage debt reduced for usury. The plea of usury is personal to those bound upon the borrowing contract." *Enslava v. Building Ass'n*, 121 Ala. 480, 25 South. 1013. Ida B. Nestor will be presumed to have waived the usury in the contract, inasmuch as her consent that it be expunged does not appear in the record. "Where land subject to an usurious deed of trust is conveyed to a grantee, who assumes the payment of the debt named therein as a part of the consideration

for the conveyance, he cannot set up the usury as a defense to a sale under the deed of trust. He has received a consideration for his undertaking to pay the debt, and will not be permitted to get rid of its payment by relying upon a defense which is personal to the original debtor, and which he has waived." *Dickenson v. Loan Co.*, 93 Va. 498, 25 S. E. 548, citing *Michie v. Johnson*, 21 Grat. (Va) 834; *Christain & Gunn v. Worsham*, 78 Va. 100.

It is insisted on behalf of the appellees that, inasmuch as they became responsible for the debt of Ida B. Nestor to the appellant, by consent of all the parties, they thereby became new parties to the contract by novation. There is nothing in the record to show that the appellant released Ida B. Nestor, or that the appellees were recognized by the appellant as liable for the debt, further than after the transfer of the stock an account was opened with them on the books of appellant. "Novation requires the creation of new contractual relations, as well as the extinguishment of old. There must be a consent of all the parties to a substitution, resulting in the extinguishment of the old obligation and the creation of a valid new one." *Izzo v. Ludington* (Sup.) 79 N. Y. Supp. 744; *Crosby v. Jeroloman*, 37 Ind. 264; *Appeal of Shafer*, 99 Pa. 246; *Wallace v. Axtell*, 5 Colo. App. 432, 39 Pac. 594. "The original agreement of which novation is sought must be absolutely extinguished, and the new agreement substituted for it." 16 Am. & Eng. Ency. Law (1st Ed.) 864. "The agreement of a purchaser of real estate to pay a debt evidenced by a promissory note and secured by a mortgage, as a part of the purchase price, even where the payee subsequently agrees to accept the purchaser as the payor and release the maker, does not constitute a novation." *Kelso v. Fleming*, 104 Ind. 180, 3 N. E. 830. "A novation is never presumed, but must be established by the full discharge of the original debt by the express terms of the agreement or the acts of the parties, whose intention must be clear." *Henry v. Nobert* (Tenn. Ch.) 35 S. W. 444; *McCartney v. Klipp*, 171 Pa. 644, 33 Atl. 233. So, we cannot say that the facts presented bear out the contention that there was a novation of the contract. And, again, the appellees assumed to pay the debt. The payment of this debt was the consideration for the land conveyed to them. What difference to them whether the debt be usurious or not? They must pay the sum agreed to be paid by them for the land.

Holding as we do, it is unnecessary to go into the question as to whether or not the tender claimed to have been made by the appellees is such a tender as is contemplated by law.

The decree of the circuit court is reversed, and the plaintiffs' bill dismissed.

(59 W. Va. 681)

BENNETT v. PRESTON.(Supreme Court of Appeals of West Virginia.
April 24, 1906.)**1. INJUNCTION—WRIT OF POSSESSION.**

The execution of a writ of habere facias possessionem will be enjoined at the suit of a person in possession of the land to which it relates, who was not a party to the suit in which it was awarded, and does not claim title thereto or the right to possession thereof under any party to such action or suit.

2. SAME—DECREE.

In such case, the decree perpetuating the injunction will save to the parties the right to litigate all questions of title between them in any other proceeding they or any of them may see fit to institute.

(Syllabus by the Court.)

Appeal from Circuit Court, Raleigh County.

Bill by L. M. Bennett against A. D. Preston. Decree for defendant, and plaintiff appeals. Decree reversed and injunction reinstated.

J. W. McCreery and W. H. McGinnis, for appellant. J. E. Summerfield, for appellee.

POFFENBARGER, J. L. M. Bennett seeks reversal of a decree of the circuit court of Raleigh county, dissolving an injunction previously awarded him, dismissing his bill, and canceling certain deeds under which he claims title to a tract of land, by way of affirmative relief to the defendant, A. D. Preston, pursuant to the prayer of his answer, setting up new matter as ground therefor. The object of the bill was to prevent the execution of a writ of possession, awarded to Preston, as the purchaser of a tract of land, under a decree of sale in a suit instituted by the state for the sale thereof, as delinquent and forfeited, to which Bennett, who claimed the land and was in possession thereof, was not made a party, and to cancel Preston's deed.

The following are the material facts disclosed by the record: The land was returned as delinquent for nonpayment of taxes for the year 1893, as a tract containing 373 acres, in the names of Jessie M. Myers and Nettie M. Ferguson. It was returned, for the year 1894, as delinquent, in the name of Margaret Ferguson, as a tract of 350 acres; she having acquired the title to it, or an undivided interest in it, by a deed dated February 5, 1894. For the delinquency of both years, it was sold by the sheriff of the county, on the 4th day of November, 1895, as if it were two separate tracts; R. V. Buckland, J. P. Buckland, and G. M. Smith purchasing it, as a 373-acre tract for the delinquency of 1893, and the state purchasing it as a tract of 350 acres, for the delinquency of 1894. Buckland and others, having procured a deed pursuant to their purchase, conveyed three parts of the tract, containing, respectively, 50 acres, 24 acres, and 19 acres, to L. M. Bennett, by a deed bearing date May 24, 1898, who then entered upon the land and began cutting the

timber. Having been continued on the land-books, it was resold to the state for delinquency for the years 1895 and 1896. The state then instituted a suit, pursuant to her purchase, for the purpose of causing the land to be sold, and such proceedings were had as resulted in a sale thereof to Preston in the year 1901, and the awarding of said writ of possession to him, on the confirmation of the sale.

As Bennett was a claimant of the land, he should have been made a party to the suit. The records disclosed his relation to the land, and the statute requires all known claimants to be made parties. Section 6, c. 105, Code 1899. Being in possession, he was entitled to a hearing before being ousted by judicial process. Whether, in such case, a purchaser is entitled to have a writ of habere facias possessionem, on the confirmation of the sale, we do not decide. If he is, a person in possession, who was not made a party, may enjoin the execution of the writ. *Bushong v. Rector*, 32 W. Va. 311, 9 S. E. 225, 25 Am. St. Rep. 817. That the state repurchased the land for delinquency for years subsequent to the one for delinquency as to which she originally purchased, but before her suit was brought, is immaterial. If any title thereby vested, it went into the state, not Preston. Whether he got any title from the state depends upon the question of right in Bennett to redeem. Bennett had no right to a cancellation of Preston's deed, because he had not shown title in himself; nor did Preston have any right to cancellation of Bennett's deeds, for he was not in possession, and had not established any title as against Bennett. To obtain such relief, the plaintiff must ordinarily be in possession and show good title. In view of these conclusions, the court should have perpetuated the injunction, but without prejudice to the right of any of the parties to take such further proceedings, either at law or in equity, as may be available for the vindication of any rights they may have, and done nothing more.

Therefore the decree complained of will be wholly reversed, annulled, and set aside, and a decree entered here reinstating the injunction, making the same perpetual, without prejudice as aforesaid, dismissing so much of the defendant's answer as seeks affirmative relief, and awarding to the appellant his costs in both this court and the court below—all of which will be certified to said court.

(59 W. Va. 677)

YOKUM et al. v. STALNAKER et al.(Supreme Court of Appeals of West Virginia.
April 24, 1906.)**APPEAL—DENIAL OF CONTINUANCE—REVIEW.**

Where it appears, upon consideration of all the facts and circumstances in the cause, that the action of the lower court in denying the motion of a party for a continuance, and in ruling him into a hearing, was plainly erroneous,

the appellate court will reverse such action and the decree against him.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by Martha D. Yokum and others against Benjamin C. Stalnaker and others. Decree for complainants and defendants Harriet S. Wamsley and another appeal. Reversed and remanded.

W. B. Maxwell and M. Peck, for appellants. Dailey & Bowers, for appellees.

COX, J. This cause was decided by this court upon a former appeal, reported in 56 W. Va. 296, 49 S. E. 141. A full statement of the cause, and of another cause heard therewith, may there be found. It is unnecessary to repeat the statement here.

The object of this suit is the partition of a tract of mountain land, said to contain 2,387 acres. This appeal is by Harriet S. Wamsley and Boston Stalnaker, from a decree of the circuit court of Randolph county denying their motion to continue the cause to enable them to procure evidence in support of their exceptions to the commissioners' report of the partition of said land, and overruling said exceptions, and confirming the partition as reported. After the case was remanded upon the former decision, the surveyor who acted in the former partition, and two other commissioners, were appointed to make this partition. The three thus appointed reported substantially the same partition as the one set aside by this court. This partition is peculiar, to say the least. The appellants Wamsley and Stalnaker, each being entitled to a one-thirteenth of the land, are each by this partition given a strip of land about 37 rods wide and nearly three miles long, as appears from the face of the plat filed.

Appellants complain because their motion to continue the cause, for the purpose of producing evidence in support of their exceptions, was denied. The report of the commissioners was filed on April 10, 1905. The appellants filed their 16 several exceptions to the report, dated April 12th, following. The term of court commenced on that day. The first order of the court which noticed the filing of the exceptions was entered on April 20th. This order recites that the cause was submitted at a former day of the term, upon the commissioners' report, upon the motion of appellants for time to offer evidence in support of their exceptions, and upon their amended answer. The court by this order, without passing upon the exceptions, gave the appellants until April 25th at 3 o'clock p. m. to offer such evidence. The decree appealed from was entered on April 28th. This decree recites that the appellants had, on April 25th, filed the affidavits of Melville Peck and Boston Stalnaker in support of the motion for

a continuance. Some of the grounds of the exceptions are, in effect, as follows: That the commissioners did not lay off the land according to quantity and quality; that the land was laid off in such shape that the shares of appellants are of no value to them; that the plat of partition is not accurate by several hundred acres; that the parcel of land assigned to appellant Wamsley, when correctly platted according to the courses and distances reported, will overlap and include 20 or 30 acres of land outside of the boundary of the tract sought to be partitioned; that the courses and distances of the parcel of land assigned to appellant Stalnaker as reported, when correctly platted, will cut such parcel into two pieces; and that neither of the parcels assigned to the appellants is a full, fair one-thirteenth of the value of the land sought to be partitioned.

In order to make some of these exceptions avail, the appellants must produce evidence to sustain them. *Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67; *Henrie v. Johnson*, 28 W. Va. 190. The exceptions named went to the very merits of the controversy, and involved questions of fact raised for the first time by the commissioners' report. The appellants could not presume in advance that the commissioners would report substantially the old partition. The appellants had a right to file their exceptions to the report, and to produce evidence to sustain them. The question then is, were the appellants given a reasonable time, under all the circumstances of the case, to produce their evidence? The report was filed so near the commencement of the term as practically to prevent the taking of evidence before the term. The exceptions were filed promptly. The court on April 20th allowed appellants until April 25th—five days—to take evidence. The five days allowed were during the term of court, when lawyers are supposed to be therein engaged. The subject-matter of the litigation is a large tract of land in the mountains, probably some distance from the county seat. The affidavits showed that the time allowed by the court was not sufficient to enable the appellants to produce their testimony, and the reasons why such time was insufficient. If the appellants had a right to except, they had a right to a reasonable time to produce their evidence. It would be useless to give a party the right to except as to a question of fact, and then deny him the right to a reasonable time to produce evidence in support of his exception. Such a course would be equivalent to a denial of the right to except. The evidence of the surveyor acting in this partition was taken at the bar of the court. His evidence disclosed that no survey had been made for this partition. Consequently, to sustain some of the exceptions it would probably be necessary for the appellants to have a survey or plat of the land. It is the well-settled rule that a motion for a continuance is addressed to the sound

discretion of the court, under all the circumstances of the case; and that the appellate court will not reverse a judgment or decree because of the action of the lower court on such motion, unless the action was plainly erroneous. *Hannum v. Hill*, 52 W. Va. 166, 43 S. E. 223; *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484. The rule in relation to a continuance was never intended to defeat the ends of justice; and it is therefore well established that where it appears, upon consideration of all the facts and circumstances of the case, that the action of the lower court in denying the motion of a party for a continuance, and in ruling him into a hearing, was plainly erroneous, the appellate court will reverse such action and the decree against him. *Buster v. Holland*, 27 W. Va. 510; *Hewitt v. Commonwealth*, 17 Gratt. (Va.) 627. The ground for a continuance in this cause was not alone the absence of a witness, and for that reason the rule prevailing on such motion on the ground alone of the absence of a witness does not control. The ground for a continuance here involves practically the right to make defense to the report. To sustain the exceptions would require investigation, and evidence on the part of appellants. No amount of diligence could have foreseen the evidence necessary in support of the exceptions, before the report was made. There is no intimation in this record that the motion for a continuance was not in good faith, or was merely for the purpose of delay.

It is urged that a continuance should not have been granted because of the pendency of an injunction against the cutting of timber from the land sought to be partitioned, in a cause brought by one of the appellants. We do not think that the pendency of the injunction was sufficient ground for overruling the motion for a continuance. The court, in the cause in which the injunction was granted, had full power to continue the injunction, dissolve it, or modify it in accordance with the principles of equity. The rights involved in the cause at bar are of importance to the parties. It appears to us, from all the circumstances, that there was plain error in overruling the appellants' motion for a continuance, and that the time given by the court to produce evidence was unreasonably short. As the motion for a continuance should have been granted, the exceptions to the report should not have been acted upon at the time the decree complained of was entered, and the decree should not have been entered. Our views upon the action of the lower court upon the motion for a continuance make it unnecessary to discuss any other reason advanced for reversing the decree.

For the reasons stated, the decree complained of is reversed, and the case remanded, to be further proceeded with according to the principles herein announced, and the rules governing courts of equity.

(125 Ga. 36)

MORRIS v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

ROBBERY—WHAT CONSTITUTES.

The evidence in this case, even if sufficient to support a finding that the purse of the prosecutor was stolen by the accused, was clearly insufficient to warrant his conviction of robbery under the act of August 6, 1903 (Acts 1903, p. 43), which declares that this offense may be committed by "the sudden snatching, taking, or carrying away, of money or other thing of value from the owner or person in possession or control thereof, without his consent. The offense proved, if any, was that of larceny from the person, committed by fraudulently and secretly taking the purse from the pocket of the prosecutor, without his knowledge, and without resort to any force or violence in making the theft. Pen. Code 1895, § 175.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 46; vol. 42, Cent. Dig. Robbery, §§ 6-9.]

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; Robt. G. Mitchell, Judge.

J. A. Morris was convicted of robbery, and brings error. Reversed.

G. A. Whitaker, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

EVANS, J. Judgment reversed. All the Justices concur.

(124 Ga. 913)

WILLIAMS v. WALDEN.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. EVIDENCE—PAROL EVIDENCE—WRITTEN CONTRACT.

Though ordinarily it is to be conclusively presumed that a writing which purports to evidence a full and complete agreement embraces every stipulation assented to by the contracting parties, yet when one of them unreservedly admits in his pleadings that he in fact did assume an obligation not set forth or referred to in the writing, it is the right of the other party to disprove by parol the accompanying assertion that this obligation was fully met.

2. APPEAL—HARMLESS ERROR—FAILURE TO INSTRUCT.

Where the plaintiff, in an action to rescind a contract on the ground of nonperformance by the defendant of his obligations thereunder, fails to show that he has really committed a breach of his covenants, the defendant cannot be prejudiced by the failure of the court to instruct the jury that a contract may be rescinded only when both parties can be restored to the condition in which they were before the contract was made.

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Action by J. J. Walden against John B. Williams. Judgment for plaintiff, defendant brings error. Reversed.

J. J. Walden instituted a proceeding against John B. Williams, with a view to rescinding a contract of sale respecting a tract of land in Jefferson county, upon which was

located a mill pond, a mill house, and certain appurtenances. The alleged purchase price was \$1,600, of which amount the plaintiff claimed he had paid \$1,110 and given his promissory notes for the balance, taking from Williams a bond for title. The petition contained the following allegations with regard to the terms of the contract and an alleged breach thereof on the part of the defendant: At the time of the purchase, the milldam was out of repair, high waters having caused a break in the same, and Williams was then engaged in making necessary repairs on the dam. It was agreed between the plaintiff and Williams that these repairs should be completed, and the dam put in a first class condition by Williams by the 1st day of January, 1898, when he should turn over and deliver up the mill and the tract of land, and put plaintiff in full and complete possession thereof, with the mill in good running order. About the time the repairs to the dam were being completed, the water, which had risen in the pond, washed out and destroyed the repairs, before the delivery of the mill and tract of land to plaintiff. They then met at the mill and agreed upon plans and specifications for the repairing of the milldam, in accordance with which Williams was to repair the dam and put it in good condition, and was to deliver the premises to plaintiff on the 1st day of June, 1898, with the mill in good running order; he agreeing on his part to extend the time for the completion of the repairs and the delivery of the premises to that date. Williams fails and refuses to repair the dam and deliver possession of the property under his contract, and, on account of this breach of obligation, the plaintiff has elected to rescind the contract of sale. Of this election he has given Williams due notice, and has demanded of him a return of the money paid and a surrender of the outstanding purchase-money notes, but Williams refuses to return them or refund the money paid to him under the contract.

The defendant filed an answer, which, as finally amended, set forth substantially the following defense: The agreed purchase price for the mill property was only \$1,320, of which \$880 was paid by delivery to him of a note for that amount, signed by a third person, also named Walden. Defendant did not agree to put the dam in first-class condition and the mill in good running order by January 1, 1898, and then turn over the mill and deliver up the tract of land to plaintiff. Defendant had already delivered possession of the premises to the plaintiff, and the former "was only to repair said dam, which he did do, and when done plaintiff inspected and accepted same as full completion" of the defendant's contract, in so far as the making of repairs on the dam or mill was concerned. Subsequently the plaintiff "stopped the water on said dam and held

the same so long thereon that it went beyond the strength and capacity of said dam, and thereby it broke and washed out again, without any fault whatever on the part" of the defendant. This did not occur before delivery of the premises to the plaintiff, as he alleges; nor did defendant, after the dam was washed away, enter into any agreement with the plaintiff with regard to replacing it and putting the mill in good running order. On the contrary, defendant complied with his original undertaking to repair the dam, and fully completed his contract, and delivered to plaintiff all of the property, which was taken and accepted by the latter. Having thus complied with all his obligations, defendant is entitled to judgment on such of the purchase-money notes held by him as are due or may become due pending the litigation, and to a special lien on the land for the unpaid purchase money.

A trial was had on the merits, and the jury returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, in one of the special grounds of which he complained that the court erred in allowing the plaintiff to testify: "When I traded for this mill property, the dam was washed away and the defendant was repairing it. He agreed to build a tumbling dam, complete it by the 1st of January following, and give me possession by that date. He did not build this dam and deliver this property to as he agreed to." This testimony was objected to on the ground that the contract of sale was in writing, being evidenced by the notes given by the plaintiff for the purchase money and by a bond for title made to him by the defendant, and that the written contract of purchase could not be added to or varied by parol. Further complaint was made that the court failed to instruct the jury that the rescission of a contract could not be decreed unless both parties could be restored to the condition in which they were before the contract was made, such a charge being essential in presenting to the jury the law bearing upon a vital issue in the case. The motion for a new trial was overruled, and the defendant excepted to the judgment rendered thereon. The motion contained one special ground, but it was abandoned on the argument before this court.

B. F. Walker and J. K. Hines, for plaintiff in error. E. P. Davis and R. L. Gamble, for defendant in error.

EVANS, J. (after stating the facts). 1. It is not to be questioned that, as an almost universal rule, where the parties to a contract have reduced to writing what appears to be a complete and certain agreement, it is to be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or stipulations is inadmissible to add to, take

from, or vary the written instrument. *Bullard v. Brewer*, 118 Ga. 918, 45 S. E. 711. In the present case, however, the defendant voluntarily conceded in his answer that, under the contract between himself and the plaintiff, he was obligated to repair the dam, notwithstanding there was no stipulation to this effect in the writings evidencing the contract; and on the trial he testified that prior to the negotiations between them the dam had been practically all washed away, and he had started to replace it, having made a contract with Gus and John B. Williams to rebuild the same for the sum of \$87.50. The defendant further admitted that when trading with Walden, he told him he could have all his rights under this contract; that the plaintiff could have these contractors finish the dam, and that he (defendant) would pay them the balance which he would owe them on their contract for building and repairing the dam. In view of the solemn admission in *judicio* which the defendant made in his answer, we are of the opinion that he estopped himself from insisting that the writings which passed contained no reference to the obligation he had assumed with respect to putting the dam in repair, and that the plaintiff was not at liberty to testify as to whether or not this obligation had been met. It appeared from the defendant's evidence that he had contracted with the parties who were to repair or replace the dam that they should erect what was known as a "tumbling dam," such being the character of the dam which had previously been washed away. Considered in the light of these facts, the testimony of the plaintiff to which objection was made did not have the effect of engrafting upon the written contract any stipulation or obligation on the part of the defendant which he did not admit he had assented to and assumed but simply amounted to a denial of his contention that he had fully complied with his recognized obligation to place the dam in a state of repair and usefulness. Accordingly, we conclude that the admission of the testimony objected to did not afford cause for granting a new trial.

2. Our Civil Code 1895, § 3712, expressly provides that one party to a contract can elect to rescind it because of nonperformance by the other party of his covenants, "only when both parties can be restored to the condition in which they were before the contract was made." But the failure to so charge in the present case did not operate to the prejudice of the defendant, since this rule is not applicable except in a case where the party claiming a right to rescind establishes by proof that the other party did not comply with his obligations. The plaintiff did not establish his alleged right to treat the contract as rescinded, and therefore a charge based upon the assumption that he had would have worked no benefit to the defendant. His real cause of complaint is that the court did not grant a new trial on the ground that

the evidence did not warrant a finding in favor of the plaintiff.

The evidence introduced in behalf of the defendant disclosed that he employed, as contractors, Gus and John B. Williams to rebuild the dam, stipulating that they were to do the work according to certain specifications. The slanting part of the dam, next to the water, was to be sheeted with boards, which were to be covered with dirt for the space of three or four feet from the bottom; when the dam was sheeted and this dirt put on the boards, the water was to be turned on until it rose a foot on this dirt, and then lowered; then it was to be turned on and allowed to rise two feet, and then turned off again; and so on, until the dirt and dam had fully settled and the dam was tested. If this were not done, the dam would be sure to wash out when a full head of water was turned on. The breast boards were to be put on without nailing them, so they could be instantly taken off in the event any leak should spring when the water was turned on. One of the contractors, Gus Williams, testified that the defendant particularly instructed them to put dirt on the planks which covered the frame of the dam, which slanted toward the water, the dirt to be put on for three or four feet from the bottom of the dam; and that the defendant also cautioned them with regard to testing the dam in accordance with his instructions as to turning on the water. This witness further testified that after the sheeting had been put on, but before any dirt had been placed on the plank at the bottom of the dam, as directed by the defendant, and as done on all tumbling dams, Walden told witness to turn the water on—that he wanted a head of water, so he could grind the following Monday. The witness told Walden what the defendant had said about turning the water on, and about the contract to put dirt on the dam; but Walden replied that the defendant had nothing to do with the mill any more, that he had bought it, and that he would take the risk; whereupon, "witness told him all right, if he would stand between him and John B. Williams, and Walden said he would, and ordered the water turned on, notwithstanding witness warned him of the danger. They then turned the water on and during the succeeding night the dam was washed out, as witness had predicted. The other contractor, John B. Williams, testified to the same effect, regarding the instructions given by the defendant as to how the dam should be constructed and tested, and added that Walden had ordered the breast boards to be nailed on, notwithstanding he was told of defendant's instructions to the contrary, saying the property was his and he had charge of it, and ordering witness to put in plenty of nails, as defendant was furnishing them.

Opposed to this evidence was the testimony of the plaintiff, who denied that he had ordered the breast planks nailed on, or had

told Gus Williams to turn the water on, as it was his property and he would take the risk, or that he had said he wanted a head of water by Monday morning, so he could go to grinding. The plaintiff admitted, however, that he was at the mill on Saturday before the night of the washout, and was at work helping Gus Williams finish the dam, and that he (plaintiff) had "told him John B. Williams said to turn the water on." The plaintiff did not undertake to assert that, in point of fact, the defendant, John B. Williams, had authorized him or any one else "to turn the water on," nor did the plaintiff offer any explanation with regard to the statement he admitted having made to Gus Williams. The defendant testified that the water was turned on in violation of his express instructions to the contractors, and that he knew nothing about the matter till after the dam had been washed out during the night of Saturday, January 8, 1898. Unless he did direct that the water should be turned on, despite the incompletion of the dam and the danger attending such a course, or one of the contractors wrongfully did so of his own motion, the defendant would certainly not be responsible for the consequences. According to the evidence, as it appears in the record before us, the plaintiff was alone responsible for the loss of the dam, and by his conduct relieved the defendant of any obligation he may have assumed in reference to the rebuilding of the dam. The plaintiff swore that on the morning after the new dam was thus destroyed, he went to the defendant and told him he did not want the property, as the defendant had failed to complete the dam by January 1, as he had agreed to do; that after talking over the matter for some time, it was agreed that they should meet at the mill the next day and see what could be done; and on the following day plaintiff finally consented to keep the property if the defendant would build a block dam, completing it by June 1st; that the defendant agreed to this proposition, but never did anything toward carrying out his agreement, and that on June 1st plaintiff told him the mill was his and demanded that he pay back the money paid to him under the contract. With equal positiveness, the defendant swore that he never entered into any such agreement. Whatever may be the truth in this regard, the fact remains that the defendant had been fully relieved by the conduct of the plaintiff from taking any further steps to replace the dam; and even if the defendant did in fact agree to thereafter construct a block dam, his undertaking to do so was a mere nude pact, being wholly without any consideration.

It may be that on another hearing the plaintiff will be able to offer some reasonable explanation of his statement to one of the contractors that the defendant had "said to turn the water on" the uncompleted dam, contrary to his previous positive directions

not to do so till sufficient dirt had been placed on the plank near the bottom, and then in such a way only as to observe the precautions he had particularly instructed them not to neglect. But as the case now comes to us, we are constrained to hold that the jury was not warranted in returning a verdict in favor of the plaintiff.

Judgment reversed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 955)

SLATON v. FOWLER.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. APPEAL—NEW TRIAL—SUFFICIENCY OF EVIDENCE—CONFLICTING EVIDENCE.

It is the duty of juries to seek to arrive at the truth under the evidence. It is the duty of the presiding judge, on a motion for a new trial properly raising the point, to consider whether the verdict is contrary to evidence, or decidedly and strongly against the weight of the evidence, or without evidence to support it. In determining whether or not a new trial should be granted on the ground that the verdict is contrary to evidence, decidedly and strongly against the weight of the evidence, he should exercise a sound discretion. But when he has done so and has approved the verdict, this court will not grant a new trial merely because the evidence is conflicting, or even if there should appear to be a preponderance of evidence against the verdict, if there is sufficient evidence to support it.

2. EVIDENCE—OPINION EVIDENCE—VALUE.

Where the value of an article is relevant, it may be shown by the opinion of witnesses, although they may not be experts, if they have knowledge of facts on which to predicate such opinion. *Central Railroad v. Wolff*, 74 Ga. 664.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2271, 2274.]

3. BILLS AND NOTES—ACTION—FAILURE OF CONSIDERATION.

Whether or not want of consideration can be pleaded to a suit based on a promissory note under seal, failure of consideration may be so pleaded.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 168.]

4. APPEAL—REVIEW.

No error appears in this case which requires a reversal.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by A. W. Slaton against J. S. Fowler. Judgment for defendant, and plaintiff brings error. Affirmed.

Slaton, as indorsee of certain promissory notes amounting to \$80, given by J. S. Fowler to the Cable Company for the purchase money of an organ, brought suit against the maker, in a justice's court. The notes were under seal. The case was carried to the superior court by appeal. The defendant pleaded failure of consideration, and that he had already paid \$15 on the purchase money, which he pleaded as a "setoff". On the trial the evidence was conflicting. That on behalf of the defendant tended to show, that directly on delivery of the instrument, complaint in regard to it was made to Slaton, who was the

agent of the vendor; that repeated efforts were made to repair it, but they were unsuccessful, and the instrument never operated properly. It also appeared that the defendant had given to the vendor, in part payment of the purchase money, a small organ, the value of which was \$15; and there was testimony to the effect that the organ which he purchased was of little value, and not worth more than that which he delivered to the company. There was also evidence tending to show that Slaton was not an indorsee for the value before due and without notice. The jury found for the defendant. The plaintiff moved for a new trial, which was refused, and he excepted. The grounds of the motion were, that the verdict was contrary to law and the evidence; that the testimony of certain witnesses, that, "they thought the little organ was worth as much, as a musical instrument, as the one defendant bought of the Cable Company," was illegally permitted to go before the jury, over the movant's objection that "the effect of said evidence went to show that the notes sued on were without consideration, the same being sealed instruments;" and the court erred in charging the jury as follows: "If you find that the organ bought by defendant from the Cable Company, on account of the alleged defects, was not worth any more than the organ he let said company have at the time of the purchase and giving the notes sued on, you will find for the defendant."

Starr & Erwin, for plaintiff in error. R. J. & J. McCanny, for defendant in error.

LUMPKIN, J. Our decision in regard to some of the questions involved in this case will sufficiently appear from the headnotes. It is only necessary to add that at common law, as a general rule, a seal imported a consideration, and a contract under seal was not open to attack on the ground that it was without consideration. Whether this rule applies to a promissory note under seal so as to prevent a plea of want of consideration, or whether the seal only raises a presumption of consideration which can be rebutted, has never been definitely decided in this state; but it has been held that failure of consideration could be pleaded to a note under seal. *Albertson v. Holloway*, 16 Ga. 377. The reasoning in that case was criticised and the general subject discussed by Mr. Justice Cobb in *Sivell v. Hogan*, 119 Ga. 167, 169-171, 46 S. E. 67. It was declared in the opinion distinctly that no ruling was made as to whether want of consideration could be pleaded to a suit on a promissory note under seal; but it was said: "We rather prefer the view of the Supreme Court of South Carolina, that a seal raised a presumption of the existence of a consideration at the time the contract was entered into, but not that it had not since failed either wholly or in part; and that while want of

consideration could not be pleaded, failure might." See, also, *VanDyke v. VanDyke*, 123 Ga. 680, 51 S. E. 582. Sometimes it may appear that the practical result of defeating a recovery on a promissory note by pleading and proving a total failure of consideration, arising out of some defect or reason existing when the note was given, is not very different from accomplishing the same end by calling it a want of consideration. But there is a technical difference between an absence or want of consideration and a failure of consideration, and in some cases the difference is substantial as well as technical. This is more manifest where the failure is only partial. 6 Am. & Eng. Enc. Law (2d Ed.) 780.

Judgment affirmed. All the Justices concur.

(124 Ga. 1073)

PARK v. MULLINS.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. EXECUTORS AND ADMINISTRATORS—SALE OF LAND—ORDER OF ORDINARY—COLLATERAL ATTACK.

In a suit by an administrator against an heir to recover land of the estate in his possession, for the purpose of distribution, when the evidence relied upon to establish that it was necessary for the administrator to have possession for the purpose of distribution is an order of distribution granted by the ordinary, the heir may attack such order by showing that no personal notice of the application for such order had been served upon him, and this is true, notwithstanding it appears that the order was passed after the usual citation had been published according to the law. The opinion of the majority of the court, in the case of *Davis v. Howard*, 56 Ga. 430, followed and approved.

2. SAME—EFFECT OF ORDER.

In such a case, the order authorizing the sale is prima facie evidence as to the necessity of a sale for distribution; and, when the evidence shows that the heirs of the estate are the defendant and his minor children, mere proof that there were no debts, and that the land is capable of division in kind, will not be sufficient to overcome the prima facie case made by the order of the court of ordinary. Aliter, if all the heirs were of age and were parties and had agreed upon a division in kind, or if the infant heirs were parties represented by a guardian ad litem, and it should appear to the court that a division in kind was to their best interests.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1446.]

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Suit by W. G. Park, administrator of Mrs. Lula T. Mullins, against H. H. Mullins. There was judgment for defendant, and plaintiff brings error. Reversed.

Mrs. Lula T. Mullins died possessed of certain property in Troup county, and W. G. Park was appointed her administrator. The administrator applied to the court of ordinary for leave to sell the land for the purpose of distribution among the heirs, notice

of such application was published as required by law, and the order was granted. The administrator then brought suit against H. H. Mullins to obtain possession of the land, and for mesne profits, alleging that Mullins had been in possession of the land since the death of Mrs. Mullins; that it was necessary to recover possession for the purpose of administering the estate of Mrs. Mullins. The defendant, answering the petition, admitted possession of the land, and further alleged that he and his children, who were tenants in common, were living upon the land, that he was supporting them from the proceeds, and that there was no indebtedness against the estate of Mrs. Mullins. By amendment the defendant further pleaded that there was no necessity to sell the land, that it could be divided in kind among the heirs, and that the defendant, as one of the heirs, wished the property so divided; and also that "none of the defendants" had any notice of the application to sell the land, or citation of the ordinary. Plaintiff moved to strike the amendments to the plea. This motion was overruled, and the amendments allowed. By amendment to the petition it was alleged that the defendant had personal notice of the application for leave to sell the land. A verdict was found for the defendant, and the plaintiff filed a motion for new trial, which contained the general grounds, and also several special grounds; one of the latter being that the court erred in allowing the defendant's counsel, while the defendant was testifying, to ask the following question, and the witness to answer it, as follows: "Can the property sued for be divided in kind among the heirs? Is it necessary to sell it for division? and do you desire it divided in kind?" Answer: "It can be divided in kind without decreasing its value. It is not necessary to sell it for division, and we desire to have it divided in kind." The objection to this testimony was that the order of the ordinary granting leave to sell was conclusive, and the defendant could not go behind the same. It was further alleged that the court erred in not directing a verdict for plaintiff, on the ground that the order to sell was conclusive, and in not striking the amendments to defendant's plea, on the ground that the order was conclusive. The motion for a new trial was overruled, and the plaintiff excepted.

E. T. Moore, for plaintiff in error. F. M. Longley, for defendant in error.

COBB, P. J. (after stating the foregoing facts). In *McDade v. Burch*, 7 Ga. 559, 50 Am. Dec. 407, it was held that an order of the court of ordinary, granting leave to sell the land belonging to the estate, is a judgment of a court of competent jurisdiction, and cannot be attacked or impeached collaterally by an heir claiming such land. In that case the lands had been divided among the

heirs, and an administrator subsequently appointed had obtained an order authorizing a sale of the land. The heir in possession interposed a claim, and on the trial the claimant offered testimony to prove the division of the estate, and that there were no debts due by the intestate at the time of his death. It was held that this evidence could not be admitted, for the reason that it collaterally attacked the judgment of the court of ordinary. So far as the record discloses, the only notice given of this application was the usual citation issued from the court of ordinary when such application was made. While this case was not a technical action to recover land from the possession of an heir for the purpose of administration, it was in its effect and result the same as if it had been. When the Code was adopted, there was a provision inserted expressly authorizing an administrator to recover possession of any part of the estate from the heirs at law or any purchaser from them. But the administrator was not allowed to recover land, unless it was shown that either the property had been in his possession and was held without his consent by the heir, or that it was necessary for him to have possession for the purpose of paying debts or making distribution. It was also provided that an order for sale or distribution, granted by the ordinary after notice to the defendant, "shall be conclusive evidence of either fact." Civ. Code 1895, § 3358.

As a general rule, no other notice is required of a proceeding in a court of ordinary than that by publication of the citation according to the practice of that court. "The same strictness, as to matters of service and pleading, which is required in cases at common law, is not observed in the ecclesiastical courts or in our courts of ordinary, which derives its practice, in this regard, from the ecclesiastical courts of England. Accordingly, service is perfected on kindred and creditors, in these courts, by citation." *Mitchell v. Pyron*, 17 Ga. 417. No service other than by citation is required, unless by express statute some other character of notice is essential. In *Davis v. Howard*, 56 Ga. 430, it was held that the notice required in the section above referred to was personal notice to the heir, or to the purchaser from him. Upon this all three judges agreed. As to whether an order granted without such notice could be attacked collaterally, there was a difference of opinion; the majority of the court holding that, in an action of ejectment against the heir in possession, such an order could be attacked collaterally if there was no personal notice. Judge Jackson dissented from this proposition. If personal notice is required (and such is the rule under the unanimous decision above referred to), then an heir who has not had personal notice has never been served, has never had his day in court, and is no more bound by the judgment than any other per-

son would be bound by a judgment of any court where there is no service upon him. The heir, like all other persons interested in the estate, is bound by the judgment authorizing the sale of the land, except in the single instance where the order of sale is used as evidence in an action of ejectment against him to recover the land from his possession. When it is sought to use the order as conclusive evidence against him in such a proceeding, he is entitled, under the statute as construed by this court, to personal notice of the application. Until this character of notice is given, the court is without jurisdiction to render a conclusive judgment. In the absence of such notice, he is at liberty to attack the judgment whenever it is sought to be used as evidence against him as the foundation for a recovery of land of the estate in his possession. The order is, however, in any event *prima facie* evidence against him. *Dixon v. Rogers*, 110 Ga. 510, 35 S. E. 781; *Luttrell v. Whitehead*, 121 Ga. 703, 49 S. E. 691. But the *prima facie* showing thus made may be overcome, in a proper case, by any competent evidence showing that there is no necessity for a sale.

The statute does not declare what shall be the contents of this personal notice, nor how it should be served; and the contents of the notice and manner of service must be left to the determination of the court, which, under the statute, is not only given jurisdiction in reference to the matter, but is required to see that the service is perfected. When a court has jurisdiction of a case, it may frame such order as may be necessary to perfect service upon the parties to be affected. *Mitchell v. Southwestern Railway*, 75 Ga. 398; *Coakley v. Southern Ry. Co.*, 120 Ga. 960, 488 S. E. 372. The service must be formal, and an entry must appear upon the records showing the service. Mere casual notice to a party, of pending proceedings, is not such service as the law requires. *Baker v. Aultman*, 107 Ga. 339, 33 S. E. 423, 73 Am. St. Rep. 132.

2. As the title to lands vests in the heirs immediately upon the death of the decedent, the heirs, by agreement, may divide the land in kind, if the rights of other persons are not affected by the transaction. If there are no debts, and none of the heirs are minors or laboring under disabilities, a division of the land may be had by agreement among them. They are, however, not compelled to agree upon a division, and any heir may insist upon a sale and distribution of the proceeds. In order to defeat the right of an administrator to recover the land for distribution, it is therefore necessary for the heir in possession not only to show

that the land can be divided in kind, but that it is the purpose and intention and desire of all the heirs that it shall be so divided. In the present case, the order of the ordinary authorizing a sale of the land for the purpose of distribution was not conclusive upon the defendant, for the reason that he had not had the personal notice required by law, but it made out a *prima facie* case against him, and the burden was on him to show that there was no necessity for a sale, for the reason that the heirs had agreed to divide the land in kind. He failed to carry this burden, for the evidence showed that the heirs of the estate were the defendant and his minor children, who had no capacity to make any agreement for a division. If the defendant had filed an equitable plea alleging that it was for the best interest of the minors that the land should be divided in kind, and they had been made parties to the case and served, and a guardian ad litem appointed for them, it may be that the court would have had jurisdiction to render a decree declaring that a sale was unnecessary, and providing for a division of the land in kind between the defendant and his children. But, certainly, the defendant cannot defeat the suit of the administrator by simply showing that he desired a division in kind, and thus be left in possession of the property, representing owners who were minors, in no other capacity than that of a parent. In the case of *M. C. Cook v. Pond*, 72 Ga. 150, an injunction was granted to restrain the administrator from selling the land, upon the ground that no sale was necessary, but to this proceeding all the heirs were parties. In the present case the heirs who were infants were not parties, they have not been heard, and it may be that, if they had been heard through a proper representative, it would have been made to appear that a division in kind was not to their interest, but that it would be best, so far as they are concerned, for the land to be sold and the proceeds divided and invested for their benefit. The judgment, in effect, leaves the land in the possession of the father to the exclusion of the administrator, and the interests of the infant heirs are left for the future solely to the judgment of the father. Until he has been regularly appointed guardian for them, or until he has filed a bond as natural guardian, he is not in a position to authoritatively represent them, either in court or in the administration of their interests in the estate. The judge should have granted a new trial on the ground that the verdict was unauthorized by the evidence.

Judgment reversed. All the Justices concur.

(124 Ga. 1087)

DIX et al. v. BIGHAM et al.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. PARTITION—JUDGMENT—CONSTRUCTION AND EFFECT.

A man died, leaving a considerable estate and several heirs. The estate became involved in litigation. Apparently, from the record sent up, the children of the decedent and certain persons claiming to be creditors were before the court. It does not appear that the wife or child of the son mentioned below were parties, or claimed any interest in the estate. A verdict and decree were rendered, which contained the following clause: "The jury further find, decree, and direct that the estate of said James T. Dix, Sr. [the decedent] be divided and distributed as follows: First, we find and decree that the place known as the 'Beasley' place now occupied by Robert G. Dix [a son of the decedent] and family, shall stand and remain as the sole and separate property of Mary J. Dix, his wife, and their children, free from the control, debts, and liabilities of said Robert G. Dix." *Held*, that this clause of the decree is not to be construed as a judgment inter partes, settling rights asserted by the wife and child of the son of the decedent, but is rather to be considered in the nature of a voluntary conveyance by him to them of property which would otherwise have belonged to him under a division of his father's estate.

2. SAME.

So construed, the clause of the decree set out in the preceding note vested a fee-simple estate in the wife of the son of the decedent and their child then in esse (there being but one child then living), and after-born children took no interest under such decree.

3. SAME—CASE DISTINGUISHED.

This case differs from that of *Toole v. Perry*, 7 S. E. 118, 80 Ga. 681, where, under the peculiar language of the will then being construed, it was held that certain after-born children took an interest.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by Tom Dix and others against M. J. Bigham and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Tom Dix, for himself and as next friend for three minors, and Bonnie Dix filed their equitable petition against Mary J. Bigham, executrix, and others, seeking to recover certain land and mesne profits. It was alleged that their grandfather, James T. Dix, died leaving a large estate to be divided among his children; that it became involved in litigation, which resulted in a decree, in the year 1870. One clause of the verdict found by the jury was as follows: "The jury further find, decree, and direct that the estate of said James T. Dix, Sr., be divided and distributed as follows: First, we find and decree that the place known as the 'Beasley' place, now occupied by Robert G. Dix and family, shall stand and remain as the sole and separate property of Mary J. Dix, his wife, and their children, free from the control, debts, and liabilities of said Robert G. Dix, without prejudice to claims of Toole & Mabry and R. M. Young." Provision was made in regard to another place, known as the "Dix" or

"Roberts" place, not material to be here recited, and it was then said: "This includes all the land connected with and near said place not included in the place decreed to be settled on the wife and children of Robert G. Dix, as aforesaid." This verdict was made the decree of the court. It does not appear, in terms, who were parties to the case, but apparently the children of James T. Dix, Sr., and certain persons who claimed to be creditors, were so, but not the wife and child of Robert G. Dix. A demurrer was filed by the defendants, and, for the purpose of settling the controlling question in controversy, it was admitted by the plaintiffs that Tom Dix was "barred by the statute of limitations [prescriptions]," and that he was the only child of R. G. Dix in life when the decree was rendered; the plaintiffs did not insist on any right as being heirs of Mary J. Dix, since deceased. The court sustained the demurrer, and the plaintiffs excepted.

D. J. Gaffney, B. M. Young, and Harwell & Lovejoy, for plaintiffs in error. F. M. Longley and H. A. Hall, for defendants in error.

LUMPKIN, J. (after stating the facts). The controlling question in this case is whether, under the decree, the material portion of which is set out in the statement of facts, the property vested in the wife of R. G. Dix, and the child then in esse, or whether children born afterward also took an interest. The pleadings are not clear as to what issues were involved in the former litigation. None of the record in that case is set out except the verdict and decree. It does not even appear with certainty who were the parties. But it may be inferred that the children of James T. Dix, Sr., and certain persons claiming to be creditors, were before the court. It does not appear that the wife or child of Robert G. Dix were parties, or had any claim or interest to assert. But it is inferable that, in the division of the estate of his father, with his consent or by his direction the clause of the decree quoted was inserted. Dealing with it in this light, the part of the decree quoted is to be construed, not as a judgment inter partes determining disputed claims of right, but rather as in the nature of a voluntary conveyance from Robert G. Dix of an interest in his father's estate which otherwise would have belonged to him. *Bunn v. Braswell* (N. C.) 51 S. E. 927. If the property in question had been set apart to him, and he had then made a voluntary conveyance of it to his wife and their children, under the repeated rulings of this court the title would have vested in his wife and the child then in esse, there being but one, and after-born children would have taken nothing under such a conveyance. *Baird v. Brooklin*, 86 Ga. 709, 12 S. E. 981, 12 L. R. A. 157;

Hollis v. Lawton, 107 Ga. 102, 32 S. E. 846, 73 Am. St. Rep. 114; *Plant v. Plant*, 122 Ga. 763, 50 S. E. 961, and *cit.*, *Greer v. Pate*, 85 Ga. 552, 11 S. E. 869; *Davis v. Hollingsworth*, 113 Ga. 210, 38 S. E. 827, 84 Am. St. Rep. 233. The same rule is recognized in *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274. But under the peculiar language of the will then under consideration, it was held that the "children of a daughter of the testator, who, with her, survived the life tenant, were entitled to share, in common with their mother, in the remainder interest which, upon the death of the testator, vested in the mother, subject, however, to open and let in such children."

It is contended that the superadded words contained in this decree take it out of the usual construction. It is first insisted that the expression "now occupied by Robert G. Dix and family," etc., indicates that Dix or the person drafting the decree had in mind not merely his wife and child, but an aggregation constituting a family. So far as the use of the word "family" throws any light upon the construction to be adopted, we think it has an effect contrary to that insisted on. It says, "now occupied by Robert G. Dix and family." Of course, it could not then have been occupied by any family except the one in existence, which consisted of his wife and child. In fact, however, those words were evidently used rather for the purpose of describing or identifying the property referred to than for the purpose of determining the character of the estate to be created. It is also said that the words, "shall stand and remain as the sole and separate property" of Mrs. Dix and their children, indicate an idea of permanency. But so does the conveyance of a fee-simple estate, which commonly includes the clause, "to have and to hold" to the grantee, his heirs and assigns forever. It is further urged with much earnestness that the use of the plural word "children" shows that more than one child was intended, and that, to give this clause of the decree full effect, after-born children must also be included. But the same argument could not be urged to upset the rule in *Wild's Case* and the many decisions following it. If where there is a child in life, the use of the plural word "children" has the effect of changing the well-established rule of construction, with much more force could it be urged that where, at the time of making the conveyance, there are no children in esse, the intention of the grantor is to let in after-born children. But the cases cited above show that this court has ruled to the contrary; and this very argument has been considered in the case of *Hollis v. Lawton*, 107 Ga. 106, 32 S. E. 846, 73 Am. St. Rep. 114.

The contention is made that the declaration in the decree, that the property should remain as the sole and separate property of the wife of Robert G. Dix and their chil-

dren, "free from the control, debts, and liabilities of said Robert G. Dix," brings the case within the ruling in *Toole v. Perry*, 80 Ga. 681, 7 S. E. 118. But in this view we cannot concur. In that case the testator directed that all of the property which was to go to his daughters and their children under his will should be "free from the control, debts, and liabilities of their present or any future husbands," and for their sole and separate use; it being provided that husbands of those under coverture when the will should take effect should be the trustees, respectively, of the portions given to their wives and children. At the time of the making of the will, one of the testator's daughters was married and had two children. It was held that children of such daughter, born after the testator's death, took an interest. Stress was laid upon the words "free from the control, debts, and liabilities of their [his daughters'] present or any future husbands." That the ruling was based on the language of the peculiar will then under construction is pointed out both in *Baird v. Brookin*, 86 Ga. 716, 12 S. E. 981, 15 L. R. A. 157, and *Hollis v. Lawton*, 107 Ga. 107, 32 S. E. 846, 73 Am. St. Rep. 114. Doubtless the fact that some of the testator's daughters were not married when the will was executed, and that provision was made in regard to their possible future husbands and children, had much weight in producing the decision which was reached in *Toole's Case*. No such state of facts existed in regard to the woman and child now being considered. They were both in life, the vesting of the estate was not postponed, and nothing was said in regard to any future husband, or other children who might be born, but merely that the property should be free from the control, debts, and liabilities of Robert G. Dix. The case of *Vinson v. Vinson*, 33 Ga. 454, which is cited by counsel for plaintiff in error, has been discussed both in the decisions in *Hollis v. Lawton* and *Plant v. Plant*, *supra*.

In the latter part of the decree under consideration it was declared that a certain place known as the "Dix" place should remain the sole and separate property of Sarah C. Grady and her children, and then the words were added, "This includes all the land connected with and near said place not included in the place decreed to be settled on the wife and children of Robert G. Dix, as aforesaid." It will be seen that these words were descriptive of the land which it was declared should remain as the property of Sarah C. Grady and her children, and stated what such place included. It was not dealing with the estate or quantity of interest in the wife or children of Robert G. Dix; and there is nothing in this clause which changes the construction already placed upon the decree. As the wife and child in esse at the date of the decree took the entire estate in the land described which

otherwise would have gone to Robert G. Dix in the division of his father's property, and after-born children took no interest thereunder, the court properly sustained the demurrer.

In the absence of any effort, duly made to alter or amend the decree, an amendment to the pleading in the present case, alleging that Robert G. Dix gave instructions for it to be drawn so as to admit after-born children, was properly rejected. So, likewise, was the proposed amendment alleging that another part of the decree provided that a different piece of land should remain as the separate estate of the wife and children of another son of James T. Dix, and that such son had no children. We have treated the provision of the decree in regard to the wife and children of Robert G. Dix as if it were a voluntary conveyance from him to them. If there was what was equivalent to a conveyance from another person to his wife or wife and children, the possible situation of intention of such other person would not throw light on the part of the decree now under consideration.

Judgment affirmed. All the Justices concur.

(124 Ga. 1063)

DANIEL v. MADDOX-RUCKER BANKING CO.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. PRINCIPAL AND AGENT—CREATION OF RELATION—EVIDENCE.

The following proposition from one engaged in the cotton business was submitted by letter to a cotton buyer and accepted by the latter: "We will pay you 25 cts. a bale commission, give you a basis on which to buy and on which we will take the cotton bought on that day, subject to change as the market fluctuates. Your cotton will be received here, and returns sent you for it as soon as possible after we receive it. We are going to give you a good basis. If you buy your cotton with any judgment, with the 25 cts. commission you ought to make a little money." *Held*, that this arrangement did not create the relation of principal and agent relatively to the business transacted in virtue of the contract.

2. EVIDENCE—EXPERT TESTIMONY.

The terms "basis" and "returns," used in the foregoing contract, are technical terms of trade, and testimony of experts in the cotton business was admissible to explain their meaning.

3. APPEAL—REVIEW—EXCLUSION OF EVIDENCE—ASSIGNMENTS OF ERROR.

Where evidence is admitted without objection, and a motion is subsequently made to exclude it, the correctness of the ruling on the motion cannot be considered when no error is assigned thereon.

(Syllabus by the Court.)

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by the Maddox-Rucker Banking Company against R. W. Daniel. Judgment for plaintiff, and defendant brings error. **Affirmed.**

J. R. Terrell, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

EVANS, J. R. W. Daniel, of Bullochville, Ga. was a cotton buyer and entered into a contract with the Maddox-Rucker Banking Company, of Atlanta, Ga., to sell and ship to that company such cotton as he might buy under the terms expressed in a letter addressed to him by the banking company, the material portions of which were as follows: "We will pay you 25 cts. a bale commission, give you a basis on which to buy and on which we will take the cotton bought on that day, subject to change as the market fluctuates. Your cotton to be received here, and returns sent to you for it as soon as possible after we receive it. We are going to give you a good basis. If you buy your cotton with any judgment, with the 25c. commission you ought to make a little money. But just now there is so much wet gin cotton coming in that we do not want to handle it, and advise you to let it alone until the cotton begins coming in of good quality." During the pendency of this business arrangement, the banking company advanced to Daniel various amounts of money, and bought, in pursuance of the terms of the contract, a certain amount of cotton, the proceeds of which, together with the 25 cents per bale commission, were credited upon the amount advanced, leaving a balance due for which the banking company brought suit. The defendant pleaded that he was not indebted to the plaintiff; that he bought cotton during the preceding season as the plaintiff's agent, and that after crediting the amount advanced to him with the sums expended in the purchase of cotton and with the agreed commission of 25 cents per bale, the banking company would be found to be indebted to him in a certain amount stated, for which he asked judgment. Upon the trial of the case the jury returned a verdict in favor of the plaintiff for the full amount sued for, whereupon the defendant made a motion for a new trial, complaining that the verdict was contrary to the evidence, and that the court omitted certain testimony set out in the motion for a new trial. The motion was overruled, and the defendant excepted.

1. The dealings between the plaintiff and the defendant were conducted entirely by correspondence. The contract between them is fully expressed in the letter, the material portions of which are quoted in the foregoing statement of facts. None of the subsequent letters could be construed as changing the contract between the parties as thus expressed. The defendant insists that this contract created the relation of principal and agent, and that the defendant was not responsible for any loss of weight in the cotton occasioned by the failure of the railroad company to promptly transport the cotton to Atlanta;

that the weights of the cotton at the place of purchase were correctly ascertained, and that the losses in weight caused by the delay in shipment fell upon his principal. We are unable to agree with his counsel in this contention. The plaintiff bank obligated itself to furnish, as the market fluctuated, a basis upon which it would take the cotton, at Atlanta weights, and guaranty the specified price to the defendant; and the plaintiff agreed, in addition thereto, to pay the defendant a commission of 25 cents for each bale purchased. There was no obligation on the part of the banking company to furnish money to the defendant with which to purchase the cotton. The advances which it made to him were entirely voluntary and for his accommodation. The business of the defendant was that of an independent cotton buyer who had prudently undertaken to arrange with a purchaser, in advance, to take such cotton as he might be able to buy on the basis of certain prices to be furnished him from time to time by such purchaser. The defendant thus sought to protect himself against sudden market fluctuations and to assure himself of a profit of at least 25 cents a bale on all cotton which he bought in case there was no loss in weights at the delivery point and the cotton was properly classified on the purchasing basis. If he was able to buy at a price less than that stated in the basis furnished him by the banking company, he would make an additional profit. The contract amounted to no more than an agreement to pay for cotton shipped to the banking company a specified price, on delivery at Atlanta, with an additional allowance of 25 cents per bale. This agreement did not constitute the defendant the agent of the banking company. *Central Georgia Land Co. v. Exchange Bank*, 101 Ga. 345, 28 S. E. 863. On the contrary, the various letters of the defendant recognize that the relation between the parties was that of buyer and seller, and not one of agency.

2. On the trial it was agreed between the parties that either side might offer in evidence properly executed affidavits of witnesses in lieu of interrogatories, subject only to the objections of immateriality or irrelevancy. The plaintiff tendered several affidavits from persons who were experts in the cotton business and were familiar with the meaning of the terms "basis" and "returns," as commonly used in cotton transactions. The witnesses deposed, that the word "basis" when used in connection with the purchase or sale of cotton always and everywhere means the price per pound for cotton of the grade known as "middling," relatively to which the prices of all other grades are fixed; and that the word "returns," as universally understood in the cotton business, referred to a statement showing the

marks and number of each bale, the time it was received by the consignee from the carrier, its weight when so received, the price per pound on the basis on which it was bought, the classification made of it by the consignee, and its net proceeds, as determined by multiplying the weight so arrived at by the price so arrived at, which were to be credited to the account of the shipper. The objection to these affidavits was that they were irrelevant because the contract between the parties, as expressed in the letter written to the defendant by the banking company, was unambiguous. The terms "basis" and "returns," as understood in the cotton business, are technical terms of trade, and without a knowledge of their meaning as employed in that letter, the court would be unable to correctly construe it. The contract was to this extent ambiguous, and the court properly received the evidence objected to. Not only was it relevant, but the correspondence between the parties conclusively shows that each understood these terms in the contract to mean what the witnesses testified they signified when employed in cotton dealings, and the parties gave effect to the contract as thus mutually understood by them.

3. The parties further agreed in writing that all letters offered by either might be admitted in evidence without objection except as to relevancy. The plaintiff's counsel tendered the entire correspondence of the defendant relating to his transaction with the banking company, and this evidence was admitted without objection. When counsel for the plaintiff, while arguing the case to the jury, commented upon a certain letter received from the defendant, his counsel moved to rule it out on the ground that it submitted a proposition of compromise. The court overruled the motion to rule out this evidence. In his motion for a new trial, the defendant complains that "the court erred in admitting as evidence" the letter from the defendant to the plaintiff just referred to. There is, however, no assignment of error upon the refusal of the court to rule out the letter, after it had been admitted in evidence without objection, upon the motion made by defendant's counsel pending the argument to the jury. We are not, therefore, called on to decide whether the trial judge rightly refused to rule out the letter because of the stipulation of the parties that all letters were to be received in evidence, subject only to the objection of immateriality or irrelevancy.

The evidence fully authorized, if it did not demand, the verdict returned by the jury, and for no reasons assigned did the court below err in overruling the defendant's motion for a new trial.

Judgment affirmed. All the Justices concur, except LUMPKIN, J., disqualified.

(124 Ga. 1056)

SALMON v. CITY ELECTRIC RY. CO.(Supreme Court of Georgia. Feb. 21, 1906.)
CARRIERS—INJURY TO PASSENGERS—PETITION—AMENDMENT.

The proposed amendment was germane and material, and the objection to it, as a whole, should have been overruled; and the petition, so amended, stating a cause of action, was good as against a general demurrer.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by E. D. Salmon against the City Electric Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

McHenry & Maddox, for plaintiff in error.
Denny & Harris, for defendant in error.

BECK, J. This was a complaint against a street car company for personal injuries. The plaintiff alleged in substance as follows: He was riding on the back platform of one of defendant's cars, engaged in smoking, it being a rule of the defendant company that all smokers should occupy that portion of the car; and while standing there he projected his head two or three inches beyond the side line of the car for the purpose of expectorating, when it came in violent contact with a pole which the company had placed very near the track, and he was severely injured. The defendant filed a general demurrer to the petition, but, before it was passed on by the court, the plaintiff offered an amendment in which it was alleged that the conductor knew of his presence on the platform, but did not warn him of the line of poles that the defendant company had erected very close to the track, much closer than it is customary for railroads of this character to erect them; and that there was no guard or gate to keep defendant from protruding his head beyond the line of the car. He also alleged that it was a rule of the company that no one should spit on the floor of the car or platform. The demurrer was sustained, the amendment disallowed, and the petition dismissed, and the plaintiff excepted.

It was manifest error for the court to hold that the plaintiff in this case was as a matter of law so lacking in care and caution that he was precluded from recovering damages for the injury sustained. What the jury may find when the case is submitted to them under proper instructions we do not know. If the plaintiff supports the allegations of his petition and the amendment thereto by evidence, the question as to whether he is entitled to recover against the company is eminently one of fact, to be determined from all the facts and circumstances of the case. It appears that the plaintiff was rightfully on the platform of the car; he was there by permission, and at the invitation of the defendant company. He was smoking at the time of receiving the injury complained of, or

rather he was engaged in doing that which is a usual and natural concomitant of indulgence in the pleasure of smoking, he was spitting. And, for the purpose of complying with a rule of the company which forbade spitting on the floor of the car, he momentarily projected his head beyond the line of the side of the car some two or three inches, and in that instant his head was violently brought in contact with one of a line of poles constructed and maintained by the defendant company for the purpose of supporting its trolley wires, and severely injured. The fact that he was on the platform when injured in no way lessens or affects the degree of care and diligence to be exercised by the street railway company to secure his safety. "A railway company has the right to make reasonable rules and regulations prohibiting passengers from occupying positions on its cars considered to be dangerous, except at their own risk; but when, notwithstanding such rules, passengers are permitted, and in some instances required, to occupy such positions, the company is still under the duty to exercise extraordinary care and diligence for their safety." *Augusta Ry. & Elec. Co. v. Smith*, 121 Ga. 29, 48 S. E. 681. And the rule of law requiring railway companies to exercise extraordinary care and diligence in protecting their passengers applies as well to the construction and maintenance of tracks as to the operation of cars thereon. *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756. (4). And this rule is not complied with if permanent obstructions are allowed to remain on or so near to the track as to imperil the safety of passengers on passing cars. 6 Cyc. 620, citing numerous decisions; *Seymour v. Railroad Co.*, 114 Mo. 266, 21 S. W. 739; *Kird v. Railroad Co.*, 105 La. 226, 29 South. 729. And the ruling of this court in holding that it was error to dismiss the plaintiff's petition upon demurrer is sustained by numerous well considered decisions by the courts of many states.

In the case of *Spencer v. Railroad Co.*, 17 Wis. 487, 84 Am. Dec. 758, it was held that "in an action against a railroad company for damages done to the plaintiff while riding as a passenger in one of its cars, and alleged to have resulted from the defendant's negligence, it was not error for the circuit court to refuse to instruct the jury that if the plaintiff was sitting with his elbow or arm projecting out of the window, and sustained the injury complained of by reason of that fact, he could not recover." So, also, the Supreme Court of South Carolina has held that "in an action against a railway company for personal injuries, a charge was properly refused that if plaintiff was sitting with his elbow out of the car window, whereby he was injured, he was guilty of contributory negligence, since that question is exclusively for the jury." See, also, *Kird v. R. Co.*, supra; *Railroad Co. v. Rood*, 62 Ill. App. 550. In a very similar case to the one at bar it was

held by the Supreme Court of New York that "whether a passenger on an open electric street car, who, leaving his seat, went to the platform where the conductor was standing, and, for the purpose of observing a fire, projected his head beyond the side of the car, so that he was struck by a tree, was guilty of contributory negligence, is a question for the jury." *Sias v. Ry. Co.* (Sup.) 36 N. Y. Supp. 378. Rulings of similar import might be multiplied many times. We are aware that a contrary doctrine is laid down in other jurisdictions and the contrary view is very strongly maintained by able judges and text-writers. See 2 Woods on Ry. Law, 1106, note 1, and the collection of cases there made; *Hutch. Car.* § 655 et seq.; *Railway Co. v. Underwood* (Ala.) 8 South. 116, 42 Am. St. Rep. 756. But it seems to us that the sounder views are embodied in the case of *Spencer v. R. Co.*, supra, and the authorities holding with it.

Judgment reversed. All the Justices concur.

(124 Ga. 1063)

BROADWAY NAT. BANK v. KENDRICK.
(Supreme Court of Georgia. Feb. 21, 1906.)
NEW TRIAL—HEARING—BRIEF OF EVIDENCE—FILING.

The hearing of a motion for a new trial having been set for a future day in term time, by an order which required the movant to file a brief of the evidence on or before a specified date, it was not within the power of the judge, before the hearing and at a time when the court was not in session, to extend, by an ex parte order, the time within which the brief of the evidence should be filed. But, when the motion came on for a hearing, it was within the discretion of the court to decline to dismiss it on the ground that the brief of the evidence had not been filed within the time limited by the original order, if the movant was not chargeable with laches in failing to comply with the terms thereof.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Claim case between A. D. Kendrick against the Broadway National Bank. Judgment for claimant, and the bank brings error. Reversed.

Henry Walker, for plaintiff in error. M. B. Eubanks, for defendant in error.

EVANS, J. This was a claim case which was tried in the superior court of Floyd county on January 27, 1905, during the regular January term of that court. The presiding judge directed a verdict in favor of the claimant, and on February 25th the Broadway National Bank, the plaintiff in *fi. fa.*, filed its motion for a new trial. By an order passed on that day, the movant was given until March 16, 1905, to file a brief of the evidence in the case, and until the hearing to complete its motion; and in the same order the claimant was called on to show cause during the term why the motion should not

be granted. By a previous order, passed on February 1st it was provided that in so far as the transaction of business requiring the presence of a jury was concerned, the court would take a recess till such time as might thereafter, by order of the judge, be designated; but in the meantime, and till the final adjournment of the court for the term, it should remain open for the transaction of all business, and for all purposes not requiring the presence of a jury. On March 15th, during this recess and while the judge was holding the superior court of Chattooga county, one of the courts of his circuit, he received by mail from movant's counsel an urgent request for an extension of the time allowed for filing a brief of the evidence; and, in response to this request, the judge signed and at once sent to movant's counsel an order extending the time to March 20th. On that date, at the earnest solicitation of counsel for the movant, the judge passed another ex parte order, giving counsel till March 24th to file a brief of the evidence, with the terms of which order movant's counsel complied by filing the brief on that day in advance of a hearing of the motion for a new trial on its merits, that date having been fixed for such hearing. When, on March 24th, the motion for a new trial came on to be heard, counsel for the respondent moved to dismiss the same "for want of a brief of evidence filed according to law." After argument of counsel on the motion to dismiss, it was sustained by the court, on the ground that the order of March 15th, extending the time for filing the brief of the evidence to March 20th, "was improvidently granted, and that the judge, at the time and place and under the circumstances, was without authority to grant said extension of time." To this judgment of dismissal exception is taken.

The motion for a new trial was, by the order passed February 25th, set for a hearing during the January term of the superior court of Floyd county, which had not at that time been finally adjourned, and could be called at any time during that term, upon due notice to counsel, when the court was in session. But it affirmatively appears that the court was not in session on March 15th when the judge, while holding the superior court of Chattooga county, passed an ex parte order giving to movant's counsel additional time within which to file a brief of the evidence. This being so, the judge was without jurisdiction to then and there pass any order affecting the rights of either of the parties to the motion for a new trial, their respective rights having been previously fixed by the order of February 25th, passed before a final adjournment of the January term, setting the hearing of the motion for some future day during that term. If it became impossible for movant's counsel to comply with the terms of that order with respect to filing a brief of the evidence on or

before March 16th, this fact could not be properly brought to the attention of the court until such time as it might, while actually in session, call up the motion for a hearing on its merits and give to it such direction as might be necessary and proper. Then, but not until then, would any order affecting the rights of the parties be binding upon them.

As has been repeatedly held, a trial judge may in term time, "by order passed when the motion for new trial is made, extend the time" prescribed by Civ. Code 1895, § 5484, "for filing the brief of evidence to any day in the future before the motion is finally heard and determined." *Cross v. Coffin-Fletcher Co.*, 123 Ga. 818, 819, 51 S. E. 704. But when the movant, "instead of pursuing the strict law in such cases provided, obtains an order allowing him until a future time * * * to prepare and file a brief of the evidence in the case and to amend the motion, he must abide by the terms of the order thus obtained," and cannot, as matter of right, demand additional time within which to present the required brief. *Baker v. Johnson*, 99 Ga. 374, 27 S. E. 706. Unless the order be passed by consent of the respondent, the trial judge may, at the hearing of the motion for a new trial, decline to dismiss it because of the movant's failure to file a brief of the evidence within the time limited by the order. *Williams v. Central Railroad*, 77 Ga. 612, 3 S. E. 88. So long as the court has jurisdiction over the motion, it may, in its discretion, extend the time for filing a brief of the evidence. *Maynard v. Head*, 78 Ga. 190, 1 S. E. 278; *Thomas v. Dockins*, 75 Ga. 347; *Napier v. Heilker*, 115 Ga. 170, 41 S. E. 689. Accordingly, when the motion filed in this case came on to be heard on March 24th, it was within the power of the judge, notwithstanding the rights of the movant had not been preserved by the ex parte orders of March 15th and March 20th to approve the brief of the evidence and hear the motion on its merits. Of course, it would have been proper for the judge to call upon movant's counsel to show cause why the brief of evidence had not been filed in accordance with the terms of the original order of February 25th, and what reasons counsel had for invoking the ineffectual order of March 15th, purporting to grant further indulgence. However, as it is apparent that the judge did not undertake to exercise any discretion in the matter, but sustained the motion to dismiss upon the idea that the order passed on the date last named was a nullity and the court was without jurisdiction to deal with the motion for a new trial on its merits because the brief of evidence had not been filed on or before March 16th, the judgment of dismissal should be reversed (*Napier v. Heilker*, supra), to the end that the movant may have an opportunity of showing to the satisfaction of the court that the failure to comply with the terms of its original order was not due to the laches of

counsel, if such be the truth of the matter. Judgment reversed. All the Justices concur.

(124 Ga. 1060)

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. HOWELL.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. ELECTRICITY—PERSONAL INJURIES—PLEADING—DECLARATION—SUFFICIENCY.

Where a declaration alleged that a telephone company, in stretching wires along a public street of a city, permitted one of them to sag while heavily charged with electricity, or to become so charged with electricity while thus sagging, at a place where it was likely to injure pedestrians, and gave no warning of the danger arising from such charge, in consequence of which a person walking along the street came in contact with the wire and was seriously injured by the electric charge, this sufficiently stated a case of negligence on the part of the defendant to withstand a general demurrer.

2. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE.

It is not negligence as a matter of law for a pedestrian to cross a public street at a point where there is no cross-walk. The use of public streets between crossings is not limited solely to animals and vehicles. Such use by footmen does not necessarily constitute negligence, if due caution is exercised.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 457, 460; vol. 36, Cent. Dig. Municipal Corporations, § 1515; vol. 44, Cent. Dig. Street Railways, § 206.]

3. ELECTRICITY—PERSONAL INJURIES—DECLARATIONS—CONTRIBUTORY NEGLIGENCE.

Where a declaration alleged that a pedestrian was going along a street and started to cross it, when he was struck in the face by a wire which a telephone company had negligently allowed to sag while highly charged with an electric current, or to become so charged while sagging, without giving warning of the danger, and that while seeking to guard his face from the wire, the plaintiff's hands came in contact with it and was injured by reason of the electric current, and that he was without fault or negligence in and about the transaction, and was in the exercise of due caution and diligence, a general demurrer, on the ground that the plaintiff was not in the exercise of ordinary care and prudence for his own protection, and that by the exercise of such care he could have avoided the injury, was properly overruled.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by Mot Howell, by his next friend, against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Mot Howell, by his next friend, brought an action for damages against the Southern Bell Telephone & Telegraph Company, alleging, in substance, as follows: The agents and employes of the defendant were engaged in stretching wires on the arms at the top of certain poles situated on a public street of the city of Rome. There was a windlass under the charge of one of the defendant's servants, from which a wire was run to the cross-arm of a pole. The wire sagged from

the pole to the windlass. The plaintiff was going along the street and started to cross it. The wire struck him in the face. He threw up his hand to get it out of the way, and caught hold of it with his right hand. He was unable to turn loose, and was seriously burned and injured. He was without fault or negligence in or about the transaction, and was in the exercise of due care and diligence. The defendant was negligent in allowing and permitting its wire to sag, when heavily charged with electricity as it was, and in permitting it to be or become charged with electricity while it was thus sagging on a public street, where it was likely to injure pedestrians, and in not notifying plaintiff that to touch the wire was dangerous, and that it was charged with electricity. The defendant demurred to the petition, on three grounds: (1) That it set forth no good cause of action; (2) that it showed that the plaintiff was not in the exercise of ordinary care and prudence for his own protection; and (3) that in the exercise of ordinary care and prudence the plaintiff could have avoided the injury. The demurrer was overruled, and the defendant excepted.

Hunt, Chipley, McKenny & Maddox, for plaintiff in error. Seaborn & Barry and Wright, Lipscomb & Willingham, for defendant in error.

LUMPKIN, J. (after stating the facts).

1. There was no special demurrer for want of sufficient fullness in any particular allegation; but the demurrer filed was general in its nature. As against such a demurrer the petition stated a good cause of action. An allegation that a telephone company, while engaged in stretching wires along a public street of a city, permitted one of them to sag while charged with electricity, or to become heavily charged with electricity while thus sagging, at a place where it was likely to injure pedestrians, and gave no warning of the danger arising from such charge, sufficiently stated a case of negligence to withstand the demurrer. See *Jones v. Finch*, 128 Ala. 217, 29 South. 182; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Ahern v. Oregon Tel. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Devine v. Brooklyn Heights Co.*, 1 App. Div. 237, 37 N. Y. Supp. 170; *Texarkana Gas & Elec. Co. v. Orr*, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; *Burns v. Delaware & Atlantic Tel. Co.*, 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956. The decision in *Read v. City & Suburban Ry. Co.*, 110 Ga. 165, 35 S. E. 170, is in harmony with that here made. There the plaintiffs, while driving along a street, were injured by a wire which sagged from the poles of a street railway company. The presiding judge granted a nonsuit, on the ground that they could have avoided the re-

sult of the negligence of the defendant, by the exercise of ordinary care; but this judgment was reversed. On a second trial there was evidence to show that as the vehicle was approaching the sagging wire, the employés of the company gave to the occupants repeated warnings of the danger ahead, which were either unheard or ignored, and that these warnings were such as necessarily to have attracted the attention of an ordinarily prudent man. The jury found for the defendant, and the judgment was affirmed. *Read v. City & Suburban Ry. Co.*, 115 Ga. 366, 41 S. E. 629.

2, 3. It is not negligence, as a matter of law, for a pedestrian to cross a public street at a point where there is no cross-walk. In doing so he may "assume a greater risk from passing vehicles and animals using the main thoroughfare than he does when passing over a cross-walk (*Brunswick Ry. Co. v. Gibson*, 97 Ga. 489, 25 S. E. 484), but he does not in doing so assume any greater risk from obstructions other than those necessary for the use of some public utility, such as water plugs, telegraph and telephone poles, and the like. Even a telegraph or telephone wire, placed so low on a sidewalk or street that a person using the street might come in contact with it, would be an obstruction." *City Council of Augusta v. Tharpe*, 113 Ga. 158, 38 S. E. 889. In *City of Denver v. Sherret*, 88 Fed. 235, 236, 31 C. C. A. 499, it was said: "The use of the public streets between crossings is not limited solely to animals and vehicles, but may be used by footmen, due caution being exercised. *Elliott, Roads & S. 622; Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440."

This case differs from those cited on behalf of the plaintiff in error. Thus, in *City of Columbus v. Griggs*, 113 Ga. 597, 38 S. E. 953, 84 Am. St. Rep. 257, a street was rendered unsafe by reason of certain work which had been done on it. Two persons, with full knowledge of the situation, which was palpably and obviously dangerous, undertook at night to drive over the place where the street had been worked. They not only knew of the situation and danger, but discussed it a few moments before the catastrophe happened. In *Barfield v. So. R. Co.*, 118 Ga. 256, 45 S. E. 282, plaintiff's own evidence showed that he undertook to drive under a low trestle with which he was perfectly familiar, and to avoid injury by crouching in his wagon. His mules became frightened and made a lunge, which threw him upward, and he was hurt. None of the other decisions relied on by the plaintiff in error were in cases similar to that at bar. The plaintiff alleged that he was without fault or negligence in the transaction, and was in the exercise of due care and diligence; and upon general demurrer we cannot declare that this was untrue. There are no facts set out in the declaration which disprove the statement

Dempsey v. Rome, 94 Ga. 420, 20 S. E. 335; Central R. Co. v. Weathers, 120 Ga. 475, 477, 47 S. E. 956; Seaboard Air-Line Railroad v. Pierce, 120 Ga. 230, 47 S. E. 581; Hudgins v. Coca-Cola Bottling Co., 122 Ga. 699, 50 S. E. 974.

Judgment affirmed. All the Justices concur.

(125 Ga. 17)

FLEMING v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. GAMING—EVIDENCE.

The court erred in admitting irrelevant testimony, calculated to prejudice the accused in the minds of the jury.

2. SAME.

The verdict was without evidence to support it, and the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Lexington; P. W. Davis, Judge.

Jim Fleming was convicted of gaming, and brings error. Reversed.

Paul Brown, for plaintiff in error. Hamilton McWhorter, Jr., for the State.

FISH, C. J. Jim Fleming was convicted of the offense of gaming, and excepted to the overruling of his motion for a new trial.

1. The court permitted a witness for the state, over the objection of the accused, to testify: "This gambling took place the same night Echols was killed at Mann Cox's." The objection was that such testimony was irrelevant and tended to prejudice the accused in the minds of the jury. It appeared that the card playing occurred on the same night and at the same place as the homicide referred to. It does not appear that the statement of the witness in reference to the killing of Echols was admitted for the purpose of showing when the alleged gambling occurred. There was no effort to fix the date of the one transaction by its coincidence with the proved date of the other occurrence. In exceptional cases this might, perhaps, be allowable, where the witness testifying in reference to an alleged crime is unable to say whether it occurred prior to the finding of the indictment, or the date of the accusation, or whether it occurred within the period covered by the statute of limitations, but knows that it occurred on the same day that some other occurrence of the character here indicated happened, the date of which could be established by other witnesses. Clearly, without some reason of this character existing, the statement with reference to the killing of Echols was irrelevant and inadmissible. The fact that there was a homicide, as well as the card playing, alleged to be gambling, on the same night and at the same place, might have prejudiced the case of the accused in the minds of the jury.

2. There was no evidence to warrant the jury in finding the accused guilty. The record indicates that the accused was tried upon an "accusation of gambling," but no copy of the accusation appears in the record. The bill of exceptions recites that the plaintiff in error was convicted of the offense of "gaming." The only witness for the state who claimed to have been present when the offense was alleged to have been committed testified: "I saw Jim Fleming, Oscar Dirt, Monroe Cox, and John Cox playing cards. They were playing at John Cox's house, under a shelter near John's house. * * * I got there about 7:30 o'clock p. m., and they were playing then. * * * I saw the boys playing cards. * * * I told Mr. W. H. Stewart that the boys were not playing cards. I admit that I told him a lie. I told Mr. Stewart that Jim Fleming was not gambling. * * * This gambling took place at the time John Cox killed Echols." It is clear that the evidence was not sufficient to authorize a finding that the accused was playing and betting at cards for money or other thing of value. "Gambling" means the playing of a game of chance or skill for stakes, or the betting on the result of the game, or gaming or playing for money. Anderson's Law Dict. "Gamble." While the witness testified that the accused was playing cards, there was no evidence that he was betting for money or other thing of value. The statement by the witness that the accused was "gambling" was the mere opinion or conclusion of the witness, and clearly would not authorize a conviction. The court should have granted a new trial.

Judgment reversed. All the Justices concur.

(125 Ga. 5)

EDWARDS v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—CONVICTION IN CITY COURT—CERTIORARI—WRIT OF ERROR—SECOND TRIAL—JURISDICTION.

The plaintiff in error was convicted of a misdemeanor in a city court, and carried the case by certiorari to the superior court, where the certiorari was overruled. He thereupon sued out a writ of error to the Supreme Court, where the judgment of the superior court was reversed. 51 S. E. 505. A remittitur was transmitted to the superior court; but, before any order or judgment was rendered in that court remanding the case to the city court, the accused was again tried in the city court, on the same accusation upon which he had been previously convicted. As, at the time of this last trial, the right to grant new trials had been conferred by statute upon the city court, and the writ of error from that court to the Supreme Court provided for, he moved for a new trial, and, upon its being refused, sued out a writ of error to this court to review this ruling. Held that, as the case was taken out of the city court by the writ of certiorari, and had never been remanded thereto, that court had no jurisdiction over it, and the proceeding purporting to be a trial of the case therein was a mere nullity. As the city court erred in as-

suming jurisdiction of the case, the judgment is reversed, with direction that such proceeding be declared void and of no effect by the judge of the city court on the record of such court.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Johnson Edwards was convicted of a misdemeanor, and brings error. Reversed.

Payton & Hay, for plaintiff in error. J. H. Tipton, for the State.

FISH, C. J. Judgment reversed, with direction. All the Justices concur.

(125 Ga. 39)

REAGAN v. POWELL.

(Supreme Court of Georgia. March 23, 1906.)

INSANE PERSONS — INQUISITIONS — APPEAL FROM DECISION—CONFINEMENT PENDING APPEAL—HABEAS CORPUS.

Pending an appeal from the judgment of the ordinary, entered upon the return of a committee appointed under the provisions of Civ. Code 1895, § 2573, to inquire whether a person alleged to be of unsound mind is a fit subject for commitment to the State Sanitarium, such person cannot legally be confined to that institution unless a guardian for him has been duly appointed or his mental condition becomes such as to justify recourse to the summary proceeding authorized by section 2581 whenever a person without a guardian is violently insane or, for other good and sufficient reason, should not longer be left at large. An appeal by the person adjudged by the committee to be insane suspends the judgment of the ordinary ordering him to be committed to the State Sanitarium, and the superintendent thereof cannot successfully rely upon the judgment as authorizing the confinement of the appellant in that institution whilst the appeal remains undisposed of in the superior court. Nor has the judge of that court, on the hearing of a habeas corpus proceeding, brought in behalf of the appellant, any discretionary power to place him in the custody of that official or of any one else.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Petition by Frank Reagan for habeas corpus against T. O. Powell. From judgment denying writ, petitioner brings error. Reversed.

Under regular proceedings instituted before and conducted by the ordinary of Henry county for the purpose of inquiring into the sanity of I. R. Pair, he was adjudged to be a fit person to be committed to the State Sanitarium. An appeal to a jury in the superior court was entered in his name on July 14, 1905. Pending the appeal, Pair was sent to and confined in the State Sanitarium, of which institution Dr. T. O. Powell is the superintendent. While Pair was being thus restrained of his liberty, a petition for habeas corpus, in the name of Frank Reagan, "attorney for I. R. Pair," was presented to the judge of the superior court, who passed an order directing that the writ prayed for should is-

sue against Dr. Powell, in his capacity as superintendent of the State Sanitarium. In this petition, which recited the facts under which Pair had been restrained of his liberty, the applicant alleged that the detention of Pair pending his appeal was illegal, inasmuch as the entering of the appeal suspended the verdict and judgment rendered in the proceeding before the ordinary. The respondent filed no answer to the writ, but produced Pair and brought him before the superior court on the day set for the hearing. The facts stated in the petition for habeas corpus not being controverted, the applicant introduced no evidence other than a certified copy of the proceedings had before the ordinary, and the appeal which had been entered. No question concerning the right of the applicant, as attorney for I. R. Pair, to apply for the writ appears to have been raised. The presiding judge passed upon the merits of the case as presented by the petition and evidence submitted, deciding against the contention of the applicant that the entering of the appeal suspended the judgment of the ordinary, and for that reason Pair should be discharged pending the appeal. To this decision, as well as to the order of the court remanding Pair to the custody of the respondent, exception is taken.

Frank Reagan, for plaintiff in error. E. M. Smith, for defendant in error.

EVANS, J. (after stating the facts). The Georgia State Sanitarium is a public institution sustained by the state for the case of such of its citizens as may have become bereft of reason, either temporarily or permanently. In the establishment and maintenance of this benign charitable institution, not only was the protection of the body politic from the violently insane considered, but a means was provided for the treatment by skilled physicians of persons whose unfortunate mental condition might be improved or cured under the facilities there afforded. Two methods of commitment to the asylum are provided for by the statute. One is under section 2582 of the Civil Code of 1895; the other under section 2573. When an insane person has no guardian, or where the guardian of an insane person fails or refuses, on notice, to confine his ward, any person may make oath that the insane person, for the public safety, or other good and sufficient reason, should not longer be left at large, and the ordinary is thereupon authorized to issue a warrant as in criminal cases for the arrest of such insane person and to have him brought before him (the ordinary) on a specified day. Upon an investigation of the facts, the ordinary may commit the insane person to the asylum, and, if necessary, cause him to be temporarily committed to jail until he can be removed to the asylum. This summary proceeding, which is authorized by Civ. Code 1895, § 2582, may be instituted before and conducted by the judge

of the superior court, whenever the ordinary is absent from the county, or when he is unable to act, for any cause. Thus, so far as regards persons who may be violently or helplessly insane, a speedy mode of procedure is pointed out for placing them beyond the power of doing injury, either to the public or to themselves.

An altogether different procedure is pointed out by section 2573, to be observed whenever a person believed to be mentally unbalanced, though neither violent nor unable to look after his own immediate safety, is without a guardian. A formal petition, under oath and alleging either that he is "liable to have a guardian appointed" or that he is "subject to be committed" to the State Sanitarium, must be duly presented to the ordinary, who, "upon proof that 10 days' notice of such application has been given to the three nearest adult relatives of such person, or that there is no such relative within this state," is authorized to issue a commission directed to a specified number of disinterested and discreet persons, including a physician, who, after being duly sworn, shall "examine by inspection" the person whose sanity is questioned and hear testimony, if necessary, as to his mental condition, and who shall "make return of such examination and inquiry" to the ordinary, therein specifying whether or not it is proper to commit him to the asylum or appoint for him a guardian. Upon this return, the ordinary may enter up an appropriate judgment, but it is by no means conclusive, either upon the party applying for the commission or upon the person alleged to be insane. Either may appeal to a jury in the superior court, the latter being allowed to do so in his own name, if capable, or through any friend or relative. Civ. Code 1895, § 2575. If a guardian be appointed by the ordinary, he "shall act as such pending the litigation." *Id.* In that event, not only will the guardian be authorized to take charge of the property of his ward until the issue is settled in the superior court, but the guardian is expressly authorized to confine his ward or place him in the asylum, if such a course is necessary either for his own protection or for the safety of others. *Id.* § 2581. In case a guardian is not appointed by the ordinary, there is no provision of law for interfering with the liberty of the person believed to be insane, pending the appeal, notwithstanding the committee before which he was examined may have found that he was a fit person to be committed to the State Sanitarium. He is not under arrest pending his examination before the committee or pending the appeal, since authority to issue a warrant for his arrest is not conferred upon the ordinary. True, the statute declares that it is the duty of the committee "to examine by inspection the person for whom" guardianship or commitment to the asylum is sought, and it is therefore necessary that he should be brought before the committee for examination. The

method of securing his presence is not specifically pointed out; but the ordinary, as the presiding officer of the court of inquisition, must necessarily have the implied power to summon him to appear, and, if he disobeys the mandate of the court, to resort to the usual means of enforcing compliance with its process. To compel the attendance of parties and witnesses upon the hearing is a power inherent in the court, and not one dependent upon authority expressly conferred by the words of the statute. At the same time, as the inquisition is a civil rather than a criminal proceeding, and the power to issue a warrant for the arrest of the person alleged to be insane seems to have been advisedly withheld from the ordinary, the former is not to be arbitrarily treated as an offender against the public, and as such, subject to arrest and confinement, without the privilege of bail which is ordinarily given to the common criminal. Pending the initial investigation, and while the proceeding is before the superior court, the person whose sanity is in issue is to be regarded as an interested party to a civil case, unless his mental condition becomes such as to warrant recourse to the summary proceeding authorized by section 2582 of the Civil Code of 1895, above discussed.

In the present case, the petition presented to the ordinary alleged merely that I. R. Pair had recently become insane, and for that reason he was a fit and proper subject to be committed to the asylum. The appointment of a guardian for him was not sought by the applicant, nor did the committee in its return find that the appointment of a guardian would be proper, nor did the ordinary assume to appoint a guardian. The order of the ordinary was that Pair should be committed to the asylum. As the superintendent of that institution, Dr. Powell did not become his guardian, and could not exercise the authority conferred by Civ. Code 1895, § 2581, upon duly appointed guardians of insane persons, respecting their confinement in the asylum or at some other suitable place of detention. The respondent to the writ of habeas corpus relies upon the order passed by the ordinary, as authority for depriving Pair of his liberty pending the appeal, an order which does not undertake to appoint the respondent or any other person as the guardian of the person who entered the appeal. Such a guardian, and such a guardian only, would have a statutory right to assume control over the appellant pending his appeal to the superior court. The General Assembly recognized that a person whose sanity was questioned might, notwithstanding the return of the committee that he was insane, have sufficient mental capacity to attend to his own affairs and to be "dissatisfied with the return of the committee" and desirous of entering an appeal in his own name, and have the right to have it set aside. He was expressly given the right to enter such an appeal, and to thus

appear before the superior court in the attitude of one mentally capable of conducting the case, rather than in the attitude of one who confessedly did not have sufficient capacity to do so, but had to rely upon some friend or relative to enter an appeal in his behalf. That he should be arbitrarily confined, pending the appeal, was not, it would seem, within legislative contemplation. The uncertainty as to his real mental condition might well warrant a restraint upon his right to manage his property, if he was possessed of means, yet would not necessarily justify the restraint of his liberty. The General Assembly contented itself with providing that in a case where a guardian was appointed, he should "act as such pending the litigation," and be under a positive duty of taking charge of the estate of his ward, but not of his person, unless such a course became necessary for his own protection or for the safety of others. The statute was so framed upon the assumption, doubtless, that the remedy pointed out for cases of emergency would be followed whenever a person became violently insane, or for "other good and sufficient reason should not longer be left at large." The record before us does not disclose that there is any good and sufficient reason why Pair should be deprived of his personal liberty pending the appeal, or that any such reason has ever existed, or that any danger is to be apprehended unless he is confined. The judge of the superior court was, we think, without any discretion in the matter.

The expression of a contrary view, appearing in the opinion of Mr. Justice Lamar in *Allen v. Barnwell*, 120 Ga. 539, 48 S. E. 176, was purely obiter; the person who was ordered into temporary custody of the respondent to the writ of habeas corpus did not complain of the order of the court, the excepting party being the respondent, and no question being raised by him as to the authority of the judge to exercise any such discretionary power. Had the law been observed in the present case, Pair would never have been sent to the State Sanitarium pending the appeal, and the judge of the superior court would certainly have no power to pass an order authorizing Pair to be placed in the custody of any one. The mere fact that Pair, in order to enforce his right to be released from the custody of the respondent, would have to submit himself to the jurisdiction of the superior court, would not confer upon the judge any discretionary power over his liberty and warrant an order remanding him into the custody of the respondent, upon the idea that it was to the best interest of Pair himself that he should be illegally restrained of his liberty. Even if he was supposed to be violently insane when brought before the superior court, the course to be pursued would be, when the fact was judicially ascertained that he was in illegal restraint, to call upon the ordinary (unless he was absent from the county or was for some other

reason unable to act) to make "an investigation of the facts," and, if necessary, cause Pair to be temporarily committed to jail, until he could be committed to the State Sanitarium in the summary manner provided for by the statute. Civ. Code 1895, § 2582. Unless the ordinary was unable to act in the matter, the judge of the superior court could not assume to take jurisdiction over the person of Pair and, without regard to the requirements of the statute, undertake to pass upon his mental state or to temporarily make him a prisoner. We do not understand that the presiding judge did assume to exercise any discretion in the matter. On the contrary, he held, in effect, that Pair was in the lawful custody of Dr. Powell, inasmuch as the appeal from the judgment of the ordinary did not suspend its operation. We have reached a different conclusion. The general rule of law in cases of appeal unquestionably is: "An appeal suspends but does not vacate judgment, and if dismissed or withdrawn, the rights of all the parties are the same as if no appeal had been entered." Civ. Code 1895, § 4470.

There is, so far as we are informed, no exception to this general rule in cases of appeal from a judgment of the ordinary in the proceeding authorized by section 2573, save only when a guardian is appointed by the ordinary for the person adjudged to be insane. The fact that an appeal by him is authorized is inconsistent with the idea that the general rule as to appeals should in no case apply. Again, it is to be noted that whenever the insanity of a person is of such a character that he should not longer be left at large, provision is made that a warrant may issue, as in criminal cases, for his immediate arrest and confinement; no appeal lies from the judgment committing him to the asylum, and he must necessarily remain under the legal restraint put upon his liberty from the moment of his arrest, if, as is his right, he sues out a writ of certiorari to review that judgment. Thus, the scheme of our law seems to be that if a person be subject to immediate arrest because of supposed insanity of an advanced stage and serious character, he may be at once apprehended and kept in custody whilst judicial inquiry is being made into his true mental state; but where there is no pretense that he is a person who should not longer remain at large and control his own movements, he is not to be arrested in the first instance nor restrained of his liberty pending a judicial investigation as to whether he should be sent to the State Sanitarium for necessary care and treatment, to be from thence discharged whenever his mental condition is such as will justify his release. The return of the committee appointed to inquire into his sanity not being conclusive, but an appeal therefrom being expressly authorized, we fail to perceive why the usual incidents of an appeal from the judgment of an inferior judicatory

should not be held to attach, and the appellant be left free to walk into, instead of being dragged into, the superior courtroom when the case on appeal is there called for a hearing.

Judgment reversed. All the Justices concur.

(125 Ga. 49)

JONES v. STATE.

(Supreme Court of Georgia. March 23, 1906.)

1. CRIMINAL LAW—CONTINUANCE—REFUSAL.

When this case was sounded in the trial court, counsel for the accused asked for a postponement, on the ground that he had but a few minutes before been retained by another attorney who had been employed by the accused to represent him, but who "was imperatively called out of town"; that there had since been no opportunity to investigate and prepare the case for trial, nor to subpoena witnesses and confer with them and the accused; and that the three witnesses whose names had been furnished counsel were not in court, and he had not seen them nor talked with them about the case. Upon the statement of the solicitor general that these witnesses were in the city and within the call of the court, the trial judge announced that a bailiff would be placed at the disposal of counsel for the accused, in order to secure their attendance. They were subsequently brought into court, and, after the conclusion of another case, the trial of which occupied about an hour and a half, the case against the accused was called and tried; his counsel not insisting that the opportunity afforded him of conferring with his client and his witnesses had not been ample, nor presenting any further objection to being forced to trial. *Held*, that under these circumstances there was no abuse of discretion by the trial judge in declining to grant the postponement asked for. *Hardy v. State*, 43 S. E. 434, 117 Ga. 40.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1316, 1317.]

2. SAME—RECORD.

There having been an utter disregard of the requirement of law as to making a brief of the evidence adduced on the trial, the assignment of error that the verdict was contrary to law and the evidence cannot be considered. *Hathcock v. McGouirk*, 47 S. E. 563, 119 Ga. 973.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Tom Jones was convicted of crime, and brings error. Affirmed.

Geo. T. Jackson, for plaintiff in error. J. S. Reynolds, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

(125 Ga. 122)

HOOKS v. BROWN.

(Supreme Court of Georgia. March 24, 1906.)

1. WILLS—PROBATE IN COMMON FORM—CONCLUSIVENESS.

The probate and record of a will in common form is not conclusive upon any one interested in the estate adversely to the will, and such person, within seven years from the time of such probate and record, may require proof in solemn form and interpose a caveat.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 914.]

2. SAME—REVOCATION—DECLARATION OF INTENT.

A privy in estate of the sole heir at law, who had acquired his interest before the probate of the will in common form, has such an interest in the estate of the decedent as will entitle him to cite the executor to prove the will in solemn form; and if on the trial of the issue of *devisavit vel non* raised by the application, the final judgment should be adverse to setting up the will, the court will revoke the probate in common form and declare an intestacy.

3. SAME—CAVEAT—DEVISAVIT VEL NON.

The statute declares that a will may be probated in common form without notice to any one, and upon the testimony of a single subscribing witness; the ordinary is without jurisdiction to entertain a caveat by an objecting party or to pass upon the issue of *devisavit vel non* on an application to probate the will in common form; and an appeal by consent to the superior court from such a proceeding does not lie.

4. SAME—PROBATE IN SOLEMN FORM.

Although the nominated executor of a will renounces his trust, yet afterwards offers the will for probate in common form and it is so probated, a party at interest who applies to have the executor cited to probate the will in solemn form cannot set up such renunciation as a bar to the probate of the will per testes.

5. SAME—WHO MAY ATTACK.

A creditor of a decedent cannot controvert the validity of a will, for it is indifferent whether he receives payment of his debt from an executor or an administrator.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 550.]

6. SAME—PROBATE—COLLATERAL ATTACK.

Where a will has been proved in common form, the judgment of probate cannot be collaterally impeached in the superior court by any pleadings attempting to raise the issue of *devisavit vel non*.

7. SAME—SETTING ASIDE—JURISDICTION.

The superior court has no power to set aside a will which has been admitted to probate.

8. INJUNCTION—SUIT BY REMAINDERMAN.

The judge of the superior court did not abuse his discretion in enjoining the suit of the remaindermen under the will probated in common form against a grantee of the sole heir at law before such probate, until the issue of *devisavit vel non*, made by the application of the latter to require proof of the will in solemn form, has been finally determined.

(Syllabus by the Court.)

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by S. B. Brown against W. W. Hooks, next friend of W. W. Hooks, and others. Judgment for plaintiff, and defendant brings error. Affirmed.

Ware G. Martin, Jos. Taylor, and Shipp & Sheppard, for plaintiff in error. E. A. Hawkins, for defendant in error.

EVANS, J. On the 17th of May, 1889, V. A. Clegg, of Lee county, Ga., executed before witnesses a paper which purported to be his last will and testament. He died on the 23d of that month, leaving as his sole surviving heir at law a daughter, Mrs. Susan Elizabeth Hooks. On May 27th she applied for and obtained temporary letters of administration upon his estate, and on the same day qualified and gave bond as temporary administratrix. Three days later, J. M. McBride filed

In the court of ordinary an application to be allowed to probate in common form the instrument purporting to be the will of V. A. Clegg, in which the applicant and E. L. Kleckley, then a minor, were named as executors and legatees, and under the terms of which Clegg's plantation in Lee county, consisting of 1,100 acres, was devised to Mrs. Hooks for life, with remainder to such of her children as might be living at her death. This application was accompanied by the affidavit of one of the subscribing witnesses, establishing the due execution of the will, sworn to before the clerk of the court of ordinary on May 30th. Objections in writing, in the form of a caveat, were interposed by Mrs. Hooks to the granting of the application for probate, she thereby insisting that her father did not have sufficient mental capacity to make a will, did not know the contents of the instrument offered for probate, and was fraudulently induced to sign it by McBride and Kleckley, who had him under their control and influence. At the July term, 1889, of the court of ordinary, counsel, representing the propounder, entered into a written agreement with counsel for Mrs. Hooks that the "application to probate the last will and testament of V. A. Clegg, deceased, be and go to the appeal by consent," intending that the issue between the parties to the agreement should be carried to the superior court by appeal, and there tried before a jury. No action was taken by the court of ordinary upon the application for probate, nor with reference to the agreement of counsel to enter an appeal. This written agreement was filed in the office of the clerk of the superior court on July 2, 1889, and an entry was made on the docket of that court of a case between these parties appealed by consent from the court of ordinary. At the May term, 1900, the presiding judge made an entry on the docket indicating that the case had been settled, and signed a written order, dated May 7th, reciting that the parties had arrived at a settlement, and adjudging that "the movants be chargeable with the costs" of the proceeding. No other action was taken in the superior court. Under the settlement referred to, Kleckley received from Mrs. Hooks a warranty deed to 700 acres of land in Lee county, while McBride was given a deed signed by her to a tract of 800 acres in that county, described as the "Vinson place." Both Kleckley and McBride signed the following instrument, which was dated May 31, 1889, and which was subsequently entered of record in the minute book of the court of ordinary of Lee county: "In the matter of V. A. Clegg, deceased. We, the undersigned, being the named executors in the last will and testament of the said V. A. Clegg, recognizing that he was laboring under a mental aberration, and that he was non compos mentis when he made his will we decline to act as his executors, as the instrument probated is not his last will and testament. And we do this of our own will and accord, and we surrender

his entire estate to the said Mrs. Elizabeth Hooks, his true and only lawful heir, and we renounce all claim to his estate under the will or otherwise." By an instrument dated September 7, 1889, and executed by Mrs. Hooks before witnesses, she confirmed and renewed a settlement which was recited to have been between herself and McBride on May 31, 1889, and thereby undertook to convey to him, free from the debts of her father, the tract of land known as the "Vinson place," together with the crops grown thereon, and certain live stock.

At the time of the death of V. A. Clegg he was largely indebted, one of his creditors being S. B. Brown. After the settlement just referred to, Mrs. Hooks, as sole heir at law of her father, undertook to assume charge of and manage his estate. Being without ready means, she applied to Brown for assistance in settling the indebtedness of the estate. Through his efforts, a deduction of 25 per cent. on all of such indebtedness was agreed to by creditors of the estate, and he advanced the amount necessary to settle with them on this basis, some \$13,711, and took a mortgage from her on the Clegg plantation to secure the repayment of this sum. He also advanced to her \$4,239.11 for the purpose of running the plantation for the year 1890, of which sum she repaid to him only \$3,428.45. Subsequently, becoming convinced that she could not keep even with her accounts by farming, much less repay to him the large amounts he had advanced, Brown proceeded to foreclose his mortgage. An execution issuing upon the judgment of foreclosure was levied on the mortgaged premises on March 24, 1892, the Clegg plantation was sold under this levy by the sheriff on the 3d of May following, and S. B. Brown and David Greenfield became the purchasers at the sale, the amount of their bid being \$14,000. The purchasers immediately entered into possession, and their ownership of the plantation was not disputed up to the death of Mrs. Hooks, in July, 1893. At the regular November term, 1902, of the court of ordinary of Lee county, J. M. McBride applied for leave to probate the will of V. A. Clegg in common form, referring, in his application, to the application filed by him on May 30, 1889, and reciting that the court had never granted an order admitting the will to probate, although its execution had been proved by the affidavit of one of attesting witnesses then presented. On November 3, 1902, the ordinary passed an order granting the application of McBride, as executor and propounder, and admitting the will to record as having been duly proved in common form. During the month of April of the following year, W. W. Hooks, as next friend of W. W. Hooks and Jane Lou Hooks, minor children of Mrs. Susan Elizabeth Hooks and petitioner, instituted an action against S. B. Brown, David Greenfield, and Dan Lewis to recover possession of the Clegg

plantation in Lee county, together with mesne profits.

Brown and Greenfield filed an answer in which they stated that Lewis was only their superintendent of the plantation, and had no interest therein, and that their claim of title was based upon the sale made by the sheriff under the foreclosure of the mortgage given to Brown by Mrs. Hooks, the sole heir at law of V. A. Clegg. These defendants also denied that Clegg had executed a will in accordance with the formalities prescribed by statute, and asserted that the minor children of Mrs. Hooks did not, therefore, take as remaindermen under the devise relied on by them for a recovery. As an additional defense, Brown set up the facts concerning the advancement by him of funds with which to settle the indebtedness of the estate of Clegg, and prayed for an accounting in the event the court should determine the issue as to title adversely to him. Owing to the subsequent death of Greenfield and one of the leading counsel, no action was taken in this case till the May term, 1905, of the superior court, when an order was passed referring the same to an auditor. At the June term, 1905, of the court of ordinary of Lee county, Brown presented to that court a petition in which he fully disclosed the interest he had acquired in the estate of Clegg prior to the probate in common form of his alleged will on November 3, 1902, and which embraced a prayer that the judgment admitting it to record be vacated, and that McBride, the propounder, be required to prove the will in solemn form as provided by law, or else suffer the judgment of probate to be set aside on the ground that the paper offered for probate was not the will of V. A. Clegg. The petitioner declared, that the effect of the disposition made of the first application for probate filed in 1889, agreeably to the settlement between the sole heir at law and the executors, which settlement was approved by the judge of the superior court, was to sustain the caveat interposed by Mrs. Hooks and defeat the attempted probate of the will; that after this settlement and after the executors had formally renounced the will, and declined to act thereunder, the court of ordinary was without jurisdiction to entertain the second application for probate, made by McBride in November, 1902, and that for these reasons the order admitting the will to record should be vacated. Upon considering this petition, the ordinary issued a rule nisi calling upon McBride to show cause at the next succeeding term why the order just referred to should not be set aside, and also why he should not proceed to prove the will in solemn form as prayed for. By way of amendment, the petitioner alleged that he was a creditor of Clegg at the time of his death; also, that the probate of his will in November, 1902, was a fraud upon petitioner McBride and W. W. Hooks, the father of the minor children of Mrs. Hooks, having confederated and col-

luded to procure the judgment of probate, notwithstanding McBride had previously renounced the will and taken a benefit adversely thereto.

On July 3, 1905, W. W. Hooks, as next friend of his two minor children, was granted leave to become a party to this proceeding before the court of ordinary, and filed a demurrer and answer in which he challenged the right of Brown, the petitioner, to either set aside the judgment of probate or to require the will to be probated in solemn form. When this cause came on to be heard in the court of ordinary, it was, by consent of counsel, appealed to the superior court, and stood for trial in that court at the November term, 1905, thereof. The suit for the recovery of the Clegg plantation, brought in behalf of the minor children claiming under the will against Brown et al. and referred to an auditor, was assigned for a hearing before him on September 27, 1905. Thus matters stood when, on September 23, 1905, Brown presented to the judge of the superior court an equitable petition to enjoin W. W. Hooks, as next friend of his minor children, from further prosecuting the suit brought in their behalf, until a final determination could be had of the questions presented by the pleadings in the cause instituted by Brown for the purpose of setting aside the probate of the instrument purporting to be the last will and testament of V. A. Clegg, under which these minors claimed title as remaindermen. The reason assigned for invoking the equitable powers of the court was that Brown could not, in defense to the complaint for land brought against him, collaterally attack the order of probate granted by the court of ordinary, and for this reason he would be deprived of his right to show the invalidity of the paper admitted to record as the will of Clegg, if the hearing before the auditor were permitted to take place before the trial of the cause originating in that court and then pending on appeal in the superior court. By proper allegations and exhibits to his petition, Brown set forth the entire history of the litigation, as well as the facts leading up thereto. Hooks, as the representative of his minor children, filed a demurrer and an answer to this equitable petition, and resisted the granting of the restraining order prayed for. He denied the charge that he had colluded with McBride to secure the probate of the will in order to enable him to bring suit for the land as next friend of his minor children, upon the understanding that the probate of the will should in no wise affect the title of McBride to the land conveyed to him by Mrs. Hooks as sole heir at law; he asserted that if, as claimed, the judgment of probate was void for want of jurisdiction to render it, or because it was fraudulently obtained, petitioner was at liberty to attack the same collaterally in the pending suit for the land; and he declared that petitioner showed no right to demand that

the will be probated in solemn form, inasmuch as it did not appear that "he was or is an heir at law of said V. A. Clegg, or interested as a legatee in a former and conflicting will of said V. A. Clegg." Upon the interlocutory hearing the court, after the introduction of the evidence submitted by the respective parties, granted the restraining order sought by the petitioner. To this order exception is taken by Hooks, in his representative capacity, who also makes complaint that the court permitted petitioner to submit proof as to the mental incapacity of Clegg, a matter not in issue, and to introduce a certified copy of the record of the court of ordinary, showing the entry made on the minutes of the written renunciation of the will by the executors, over the defendant's objection that the law did not provide for the recording of such a paper, and the original document was not produced nor accounted for, etc. These objections to evidence need not be specifically dealt with. In the view we take of the case, it was wholly immaterial whether the executors did or did not renounce the will before it was eventually admitted to probate, and it was entirely unnecessary for the petitioner to attempt to show, on the interlocutory hearing, that Clegg was mentally incapable of executing a will. In affirming the judgment of the court below, we place our decision upon what we conceive to be the law controlling the case under the undisputed facts appearing in the record before us.

The petition is ancillary and in aid of the plaintiff's motion to vacate the judgment probating in common form the will of V. A. Clegg. The only relief prayed is for injunction to stay the suit of Hooks, next friend for his minor children, until the issue raised to set aside the probate of the will of Clegg can be determined. The principal defense of the plaintiff in the present proceeding (who is defendant in the complaint for land suit) is that the cause of action of Hooks, next friend for his minor children, is bottomed on the validity of the will of V. A. Clegg, and that the probate of this will should be set aside for the reasons assigned. In deciding the propriety of the grant of the injunction, the two cardinal questions presented are (1) the right of the plaintiff in the present suit to prosecute his motion to vacate the probate of the will of V. A. Clegg, and (2) if he is entitled under the law to attack the probate of this will, can it be done in the superior court as an equitable defense to the suit to recover the land, or must the defendant be remitted to the court of ordinary to obtain this relief. "Probate of a will may be either in common or solemn form. In the former case, upon the testimony of a single subscribing witness, and without notice to any one, the will may be proven and admitted to record. But such probate and record is not conclusive upon any one interested in the estate adversely to the will; and if afterward set

aside, does not protect the executor in any of his acts further than the payment of the debts of the estate. Purchasers under sales from him, legally made, will be protected, if bona fide and without notice." Civ. Code, 1895, § 3281. While any one interested in the estate adversely to the will is not concluded by the judgment of probate in common form, he will become concluded if he delays an attack on the probate longer than seven years. Civ. Code 1895, § 3283. The Code section just cited recognizes in express terms the right of a minor heir at law to require proof of the will in solemn form and interpose a caveat at any time within four years after arrival of age. Indeed it is not controverted that the next of kin may cite the executor of a will probated in common form to prove the will per testes or in solemn form. This privilege is not limited to heirs at law, but is available to any one interested in the estate of the decedent. To hold otherwise would be to announce the anomalous proposition that while, under the statute, a judgment of probate in common form is not conclusive upon all parties in interest until after the expiration of seven years, yet a party interested in the estate, other than an heir at law, may not move to set aside the probate within the prescribed time. Such cannot be the law, because it would deny a party at interest in the estate, other than as heir, an opportunity to attack the probate and thereby, as against such a party, make the probate conclusive, and that too without notice or citation. Who, then, has such an interest in the estate of a decedent as will entitle him to attack the probate of a will in common form? This precise question has not previously been before this court. A creditor of an heir whose debt was in judgment at the death of the ancestor has been held to have such an interest in the estate as to enable him to contest the validity of the probate of the will of the decedent. *In re Langevin*, 45 Minn. 429, 47 N. W. 1133; *Watson v. Alderson* (Mo. Sup.) 48 S. W. 478, 69 Am. St. Rep. 615. A devisee may contest whether or not certain portions of a will offered for probate is the will of the testator. *Wolf v. Bollinger*, 62 Ill. 368. The person to whom administration has been granted on the estate of a deceased person has also been accorded the right to be heard in the probate court upon proceedings to establish the validity of a will subsequently produced. *In re Cornelius' Will*, 14 Ark. 675. In an action to set aside a will admitted to probate, and to establish and probate a lost will, purchasers of land from a devisee under the probated will are proper parties defendant. *Roberts v. Abbott*, 127 Ind. 83, 26 N. E. 565. The grantee of a sole heir at law may file a bill against the devisees under an alleged will of an ancestor to test its validity. *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668. Without multiplying authorities, it seems to us that our statutes relating to the probate of wills in common form clearly contemplate

that any person interested in the estate of the decedent at the time of the probate in common form is not concluded by the probate, but may move to set the same aside at any time within seven years. And no reason occurs to us why the grantee, for value and before probate, of the sole heir of a decedent is not possessed of the same right to attack the validity of the probate which his grantor, the heir, might have.

But it may be said that where proof of a will in solemn form is had, the statute provides for notice only to heirs at law. Civ. Code 1895, § 3282. This does not necessarily imply that a person interested in the estate other than as heir may not move to set aside the probate of a will in common form or cite the executor to prove the will in solemn form. The usual mode of procedure to set aside a will probated in common form is for the complaining party at interest to make application to the ordinary for a citation to issue, calling on the propounder to prove the will in solemn form. If a prima facie case is made by the motion presented by the applicant, the ordinary will issue a rule requiring the propounder to prove the will in solemn form. The only issue raised by the application to require proof of the will per testes is that of *devisavit vel non*, and the propounder assumes the burden of making a prima facie case. *Thompson v. Davitte*, 59 Ga. 472; *Freeman v. Hamilton*, 74 Ga. 317; *Evans v. Arnold*, 52 Ga. 16. If probate of the will in solemn form is refused, the effect is to set aside the probate in common form and declare an intestacy. *Walker v. Perryman*, 23 Ga. 309; *Vance v. Crawford*, 4 Ga. 445; *Brown v. Anderson*, 13 Ga. 171; *Wetter v. Habersham*, 60 Ga. 193. In his motion to set aside the judgment of probate in common form, the petitioner prayed a citation requiring the executor to prove the will in solemn form. As a privy in estate of the sole heir at law who had acquired his interest before the probate of the will in common form, he had the right to apply for the citation to the executor to prove the will of Clegg in solemn form, and if on the trial of the issue of *devisavit vel non* raised by the application the final judgment should be adverse to setting up the will, then in that event the court will revoke the probate in common form and declare an intestacy.

With reference to the abortive effort to probate the will of Clegg on a former occasion, it is only necessary to observe that no estoppel is created by the facts alleged. When the first application was made to the ordinary to probate the will in common form, Mrs. Hooks filed certain written objections, in the form of a caveat. No judgment of probate was entered in the court of ordinary, and the written agreement that the issue should be taken by appeal to the superior court was a mere nullity, inasmuch as the law does not provide for an appeal, by consent or otherwise, in such cases. On the contrary, the statute declares that a will may be probated in common

form without notice to any one and upon the testimony of a single subscribing witness; the ordinary is without jurisdiction to entertain a caveat interposed by an objecting party or to pass upon the issue of *devisavit vel non*, attempted to be raised thereby at this stage of the proceedings, and, of course, can render no decision as to the validity of the will which can properly be made the subject-matter of an appeal. The superior court of Lee county acquired no jurisdiction by reason of the agreement to enter an appeal to that court, and the order passed by the presiding judge, reciting that the settlement between the parties to this written agreement was approved and allowed by the court, was not binding upon any one having an interest under or adverse to the will offered for probate before the ordinary. This being true, there was no reason why the will could not be admitted to record at any time thereafter. If, because the executors had formally renounced the will and declined to act thereunder, neither of them was a proper party to offer it for probate, the minor devisees would certainly have the right to have the will probated in common form upon an application made in their behalf by a next friend. The objection to permitting the executors to offer the will for probate would have to be made at the proper time (*viz.*, when their application was presented to the ordinary or before final action thereon) by some person having a right, because of their renunciation of the will, to offer it himself for probate. The petitioner Brown cannot now call into question the right of the propounder to offer the will for probate in common form. Nor do we think that Brown, merely in his capacity as a creditor of Clegg, could controvert the validity of his will, for it is indifferent whether a creditor receive payment of his debt from an executor or from an administrator. 1 *Williams on Exrs.* 399. However, as Brown acquired possession of the land by purchase at judicial sale had under a mortgage given to him by Mrs. Hooks, as sole heir at law, and acquired his interest therein before the probate sought to be set aside, we have no hesitation in holding that he has such an interest in the estate of Clegg as to enable him to require Clegg's executor to probate the will in solemn form. It was necessary for him to take steps to do this in the court of ordinary, because that court has exclusive jurisdiction of the probate of wills. Civ. Code 1895, § 4232. The superior court has no power to set aside a will which has been admitted to probate. *Tudor v. James*, 53 Ga. 302. Where a will has been proved in common form, the judgment of probate cannot be collaterally impeached in the superior court by any pleadings attempting to raise the issue of *devisavit vel non*. *Maund v. Maund*, 94 Ga. 479, 20 S. E. 360; *Langston v. Marks*, 68 Ga. 435 (3). The defendant in the suit to recover the land could not, therefore, collaterally attack the probate of the will of Clegg in that suit;

his remedy was to proceed, as he has done, in the court of ordinary to set aside the probate of the will in common form.

The judge of the superior court, on the case made at the interlocutory hearing, did not abuse his discretion in enjoining the suit of Hooks, as next friend of his minor children, until the issue of *devisavit vel non*, made by Brown's application to require Clegg's executor to prove the will in solemn form, has been finally determined in the case now pending on appeal in the superior court.

Judgment affirmed. All the Justices concur.

(125 Ga. 115)

LINDER v. WHITEHEAD et al.

(Supreme Court of Georgia. March 24, 1906.)

1. REFERENCE—AUDITOR'S REPORT.

An auditor may file with his report, as a brief of the oral evidence, the questions and answers of witnesses as transcribed from a stenographic report of the case.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reference, §§ 145-147.]

2. SAME—EXCEPTIONS TO REPORT.

The exceptions to the auditor's report, not having been drawn in compliance with the ruling in the case of *First State Bank v. Avera*, 51 S. E. 665, 123 Ga. 598, were properly disallowed.

3. ACCOUNT—DECREE.

The finding of the auditor, when construed in the light of the petition and amendment, was a sufficient foundation for a decree; and the decree as entered was not subject to any of the objections set forth in the assignments of error thereon.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Suit by J. L. Linder against E. M. Whitehead and others. Judgment for defendants, and both parties bring error. Judgment on main bill affirmed, and cross-bill dismissed.

When this case was before this court on a former occasion (116 Ga. 206, 42 S. E. 353) it was held that the petition set forth a cause of action, as against a general demurrer. A full statement of the averments of the petition is contained in the opinion, to which reference is made, instead of reproducing them here. When the case was returned to the trial court the defendants urged their special demurrers, which were overruled, and answers were filed. The case was referred to an auditor, who reported that Linder was indebted to Whitehead in the sum of \$1,571.80. To this report Linder filed exceptions both of law and fact. The judge disallowed all the exceptions and a decree was entered reciting that the auditor having found, "in the matter of account submitted," against Linder "in the sum of \$1,571.80," and that report having been sustained by the court, it was decreed that the defendants recover of plaintiffs on all issues in the pleadings, and that John Flannery Company re-

cover of the plaintiff possession of the premises described in the pleadings, etc. The plaintiff excepted to the judgment disallowing his exceptions, and to the decree as rendered. The defendants, by cross-bill, excepted to the judgment overruling their special demurrer to the petition.

Daley & Bussey, for plaintiff. J. S. Adams, Akerman & Akerman, and J. K. Hines, for defendants.

COBB, P. J. (after stating the foregoing facts). 1. One of the exceptions of law to the report of the auditor was that the auditor did not submit a brief of the evidence with his report, but merely filed therein the stenographic report of the evidence containing the questions and answers. The Code provides that auditors "must reduce to writing a brief of the oral and documentary evidence submitted by the parties." Civ. Code 1895, § 4585. We know of no law requiring an auditor to reduce a stenographic report of the evidence produced before him to a narrative form. The stenographic report of evidence has in such cases been uniformly treated as a part of the record in the case and as subject to be brought to this court as such by a mere specification in the bill of exceptions. *Schmidt v. Mitchell*, 117 Ga. 6, 43 S. E. 371 (1). It is to be regretted that the rule in reference to briefs of evidence on motions for new trials and in bills of exceptions has never been applied to briefs of evidence accompanying auditor's reports. The provisions of Civ. Code 1895, § 5488, apply only to briefs of evidence on motions for new trials. We do not mean to hold that an auditor may not reduce the stenographic report of the oral evidence to a narrative form, but we know of no statute, rule of court, or decision which now requires this to be done.

2. This was an equity case. The exceptions to the report of the auditor did not comply with the rule laid down in *First State Bank v. Avera*, 123 Ga. 598, 51 S. E. 665; and this was a sufficient reason for disallowing all of them.

3. The only remaining question is whether the decree was authorized by the auditor's report. The report was merely an accounting between the parties, and a finding by the auditor that the result of the accounting was a liability of Linder to Whitehead in a stated sum. The original petition averred that Linder had, from time to time, paid to Whitehead "divers sums of money," and that his indebtedness to Whitehead on account of the purchase money of the land was paid off and discharged. There was an amendment to the petition which added a prayer that an accounting be had between the parties, and, in the event it be found that plaintiff had fully paid off the purchase price of the land, that a decree be entered in his favor; and, in the event an accounting should show that he was still indebted to plaintiff, that a decree be entered allowing him a reasonable

time to pay the amount into court; and that upon such payment the title to the land be decreed to be in him. The order of reference is not in the record, but it is to be presumed that it was in accordance with the pleadings and prayer, and that the auditor was therein directed to take an account and ascertain what amount, if any, should be paid by Linder to obtain a title to the land. The report of the auditor is to be construed as a finding of the amount necessary for that purpose. It does not appear that Linder tendered to Flannery or to Whitehead the amount found against him by the auditor, nor does it appear that there was any motion made to have a decree entered allowing him a reasonable time to pay the amount into court or to the parties. The decree does not seem to be erroneous for any of the reasons assigned.

Judgment on main bill affirmed. Cross-bill dismissed. All the Justices concur.

(125 Ga. 114)

WHITE v. J. S. BAILEY & CO.

(Supreme Court of Georgia. March 24, 1906.)

INJUNCTION—RESTRAINING ACTIONS AT LAW.

There was no equity in the petition, and it was properly dismissed on demurrer.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Suit by J. T. White against J. S. Bailey & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

K. J. Hawkins, for plaintiff in error. R. L. Wade, for defendant in error.

LUMPKIN, J. Bailey & Co. sued out an attachment against White for the purchase money of a logging machine and other personal property bought by the defendant under a written contract. They also sued out a second attachment against him for the purchase money of certain cattle and other personal property, bought under another written contract. Both were returned to the city court of Dublin. To the second suit the defendant pleaded only a denial of indebtedness and a partial payment. To the first suit he pleaded certain payments, and also that the consideration of the contract sued on was another contract, entered into by him and one Zachary on one side and the plaintiffs on the other, whereby he and Zachary were to saw and ship certain lumber for the plaintiffs on the terms specified in the contract with them; that plaintiffs had committed various breaches of that contract, had failed to make payments in accordance with it, had taken possession of lumber and failed to make a report of it, and had committed various other breaches. The defendant sought to set up these alleged breaches of the contract with him and Zachary by way of recoupment or set-off against the suit brought

against him. He also alleged that he had offered to rescind the contract between him and the plaintiffs, which offer had been refused, and that the consideration had failed. He prayed for a judgment against the plaintiffs. He then filed an equitable petition in the superior court, alleging that the plea involved the granting of affirmative equitable relief, of which the city court had no jurisdiction, and prayed that injunction be granted to prevent both of the attachments from proceeding, that they be removed to the superior court and consolidated, and the issues involved be there tried. Zachary was not a party, nor did it appear what were the respective interests of him and White. Under these facts there was no equity in the petition, and it was properly dismissed on demurrer.

Judgment affirmed. All the Justices concur.

(125 Ga. 113)

BEACHAM v. KENNEDY.

(Supreme Court of Georgia. March 24, 1906.)

1. TRIAL—INSTRUCTIONS.

The extract from the charge upon which error is assigned was substantially correct in regard to the matters therein dealt with, and is not erroneous by reason of the fact that other and distinct propositions relating to the same subject were not embraced.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 524.]

2. APPEAL—REVIEW.

The evidence, though conflicting, was sufficient to authorize the verdict, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action between J. H. Beacham and A. O. Kennedy. From the judgment, Beacham brings error. Affirmed.

Peyton L. Wade, for plaintiff in error. G. H. Williams, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(125 Ga. 109)

J. H. SMITH & CO. v. EVANS et al.

(Supreme Court of Georgia. March 24, 1906.)

1. HEALTH—SALE OF SECONDHAND CLOTHING.

Pen. Code 1895, § 490, which provides: "If any person shall bring into this state for sale, or shall buy, barter or receive for the purpose of selling, any secondhand or cast-off clothing, he shall be punished for a misdemeanor"—is only applicable to transactions relating to the purchase and sale of secondhand or cast-off clothing imported into this state.

2. SALE—ACTION FOR PRICE—DEFENSES—ILLEGALITY OF TRANSACTIONS.

As the defendants' special plea failed to allege that the goods, for the purchase price of which the suit was brought, were secondhand and cast-off clothing imported into the state of Georgia, and, as the demurrer specifically pointed out this omission, the plea was properly stricken.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action by Samuel Evans, Jr., and others against J. H. Smith & Company. Judgment for plaintiffs, defendants bring error. Affirmed.

A. S. Thurman, for plaintiffs in error. W. S. Florence and Glawson & Fowler, for defendants in error.

EVANS, J. This was an action on an account. By amendment to the answer filed by the defendants they alleged, that the articles embraced in the bill of particulars were secondhand and cast-off clothing which they had bought from the plaintiffs, and that the contract of sale was void because the goods were not accompanied by a certificate from the proper officer of the board of health of the place from which they had been shipped, stating that they had been duly disinfected and that there was no danger of spreading contagious diseases, showing the character and number of the garments and the date when they were disinfected; and that no such certificate was recorded in the clerk's office of the superior court of the county where the clothing was offered for sale, and before the offer of sale was made. In the amendment it was further alleged, that it was a misdemeanor for any person to buy, barter, or receive any secondhand clothing for the purpose of selling the same, without complying with the law regulating the sale of such articles, and that the plaintiffs had not, at the time of the sale of the goods to the defendants, complied with the requirements of the statute regulating the sale of secondhand and cast-off clothing, and knew that the defendants were buying and receiving the goods for the purpose of illegally reselling the same. The plaintiffs demurred to the amended answer of the defendants, on the ground that the same set forth no defense, because it failed to allege that the goods had been imported into this state for sale. The court sustained the demurrer, and, upon proof of the account, directed a verdict for the plaintiffs. The defendants sued out a bill of exceptions, assigning error upon the direction of the verdict and upon the striking of their special defense.

The sole point presented by this record involves a construction of the Penal Code 1895, §§ 490, 491: "If any person shall bring into this state for sale, or shall buy, barter or receive for the purpose of selling, any secondhand or cast-off clothing, he shall be punished as for a misdemeanor." "The foregoing section shall not apply to secondhand clothing which shall be accompanied by a certificate from the proper officer of the board of health of the place from which such clothing may have been shipped, stating that it had been properly disinfected, that there is no danger from it of spreading contagious diseases, and giving the character and num-

ber of garments and the date when they were disinfected, which certificate shall be recorded in the clerk's office of the superior court of the county where the clothing is offered for sale and before the offer is made." These sections are a codification of the act approved October 15, 1885. Acts 1884-85, p. 137. The first section of that act provides that "it shall be unlawful for any person or persons to import into the state of Georgia, for the purpose of sale, any secondhand or cast-off clothing." The second section makes it "unlawful for any person or persons to buy, barter or receive for the purpose of selling, any *such* secondhand or cast-off clothing." Pen. Code 1895, § 490, embraces all of the first section of the act and that part of the second section which precedes the proviso, which is contained in the Penal Code 1895, § 491. It will be observed that the word "*such*," italicized above, is omitted in the codification. Had the code section contained this word, it is clear that the buying, bartering, or receiving for sale, secondhand or cast-off clothing would have reference only to such clothing as might be brought into this state for the purpose of sale. It is contended that the effect of this omission is to create two offenses; one committed by bringing secondhand clothing into the state for sale without complying with the statutory requirements, and the other by buying, bartering, or receiving for sale any secondhand clothing in this state, independently of the fact of importation from beyond the limits of the state.

This is a criminal statute and must be strictly construed. It is uncertain from the manner in which the act was codified in section 490 whether or not the buying, bartering, or receiving for the purpose of sale, of secondhand or cast-off clothing was limited to such clothing as might be brought into the state for sale. The exception embraced in section 491, while not limited in express words to clothing shipped from beyond the borders of this state, would seem to have particular application to shipments brought into the state. "In the codification of the laws it is almost impossible to go into all the details of the different statutes codified. Where the code sections are incomplete or ambiguous, they must be construed in connection with the original acts." *Bacon v. Jones*, 116 Ga. 139, 42 S. E. 401. To the same effect, see *Lamar v. McLaren*, 107 Ga. 599, 34 S. E. 116; *Mitchell v. Ga. & Ala. Ry.*, 111 Ga. 768-770, 36 S. E. 971, 51 L. R. A. 622, and citation. When we look to the original act, it becomes manifest that the Legislature only intended to prohibit the sale of secondhand or cast-off clothing imported into this state without inspection and to require proper evidence of inspection to be recorded. The act of 1885 has the following preamble: "Whereas, the practice of importing secondhand or cast-off clothing into the state for sale has grown to such an extent that the sanitary condition of the state is endangered

thereby," therefore, etc. While the preamble is not, strictly speaking, any part of the act itself, yet where the body of an act is ambiguous or uncertain, resort may be had to its preamble for the purpose of ascertaining the legislative intent. *Eastman v. McAlpin*, 1 Ga. 157; *Price v. Bradford*, 5 Ga. 370; *Johnson v. Reese*, 31 Ga. 605. The intention of the General Assembly is still more apparent from the title of the act, which is: "An act to prevent the importation of secondhand or cast-off clothing into the state of Georgia, and the sale of the same." A statute is never to be construed in a way such as will render it unconstitutional, if it will admit of another construction under which it may be constitutionally upheld. Our Constitution declares that no law shall pass which contains matter different from what is expressed in the title thereof. Civ. Code 1895, § 5771. The title of the act of 1885 is confined to the importation into the state of secondhand or cast-off clothing and the sale of the "same"; that is, the sale of such clothing of that character as may be imported into this state. By giving the statute the interpretation that only the buying, bartering, or receiving for sale, without inspection as prescribed, of secondhand or cast-off clothing imported into the state, was intended to be prohibited, the act will not be obnoxious to the constitutional provision just mentioned, and full effect can be given to all the words of the statute. The purpose of the Legislature, as therein expressed, was not changed by the codification of the act, though without reference to it the meaning of the provisions of Pen. Code 1895, §§ 490, 491, is not altogether clear.

As the defendants' special plea failed to allege that the goods, for the purchase price of which suit was brought, were secondhand and cast-off garments imported into the state of Georgia, and the demurrer specifically pointed out this omission, the plea was properly stricken; and as no evidence was offered in support of any other defense relied on, the court did not err in directing a verdict for the proven value of the goods.

Judgment affirmed. All the Justices concur.

(125 Ga. 121)

ATLANTIC & B. RY. CO. v. COBB.

(Supreme Court of Georgia. March 24, 1906.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

This case is controlled by the well-settled rule that, where it does not appear that the verdict was demanded under the law and the evidence, the first grant of a new trial will not be disturbed, though based on a specified ground of the motion, without regard to the merit of such ground. *Smith v. Hightower*, 51 S. E. 28, 123 Ga. 110.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Action by Emeline Cobb against the Atlantic & Birmingham Railway Company. Ver-

dict for defendant. From an order granting a new trial, it brings error. Affirmed.

J. L. Sweat and Crum & Jones, for plaintiff in error. J. H. Hall, Bushie & Bushie, and Warren Roberts, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(125 Ga. 121)

WALL v. MOULTON.

(Supreme Court of Georgia. March 24, 1906.)

1. CONTRACTS—EVIDENCE—OFFERS OF COMPROMISE.

On the trial of a case in which the contested issue is whether or not the defendant entered into the contract declared on, it is not permissible for the plaintiff to make proof of implied admissions of liability thereunder, made by the defendant pending negotiations for a settlement by way of compromise; nor is the plaintiff at liberty to show, as an independent fact, that immediately after their conference the defendant stated to a disinterested person that a compromise had been agreed on, "but he had decided that he wasn't going to pay [the plaintiff] a cent, and was going to keep the money to fight him with."

2. APPEAL—REVIEW.

No error was committed by the trial judge in rejecting testimony offered by the plaintiff, nor in failing to charge the jury on the subject of implied admissions arising from the silence or other conduct, nor in declining to set aside the verdict in favor of the defendant, on the ground that the evidence did not establish his defense.

(Syllabus by the Court.)

Error from Superior Court, Schley County; Z. A. Littlejohn, Judge.

Action by J. J. Wall, executor, against C. A. Moulton. Judgment for defendant, and plaintiff brings error. Affirmed.

W. P. Wallis and C. R. McCrory, for plaintiff in error. W. B. Short and G. P. Monroe, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(125 Ga. 222)

CENTRAL OF GEORGIA RY. CO. v. McKENZIE.

(Supreme Court of Georgia. March 28, 1906.)

RAILROADS—INJURY TO STOCK ON TRACK.

In a suit against a railway company for damages for injuring stock by the running of its cars, where the plaintiff's testimony disclosed that the stock recently broke from his lot, and ran down the railroad track, closely pursued by one of his servants, who, upon the approach of the train which injured the stock, stood in the center of the track in front of the train and signaled it to stop by waving his hat, which signals were unheeded by the railway employes, but which, if heeded, would have enabled the engineer to avert the collision of the train with the stock, and where this evidence was contradicted by the defendant's evidence, an issue of fact was raised as to whether, had proper diligence been exercised by the railway employes, the injury to the stock would have been caused. The evidence was sufficient to authorize the ver-

dict, which has the approval of the trial judge, and the judgment refusing a new trial will not be disturbed.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1618.]

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action by E. M. McKenzie against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Wm. D. Kiddoo, for plaintiff in error. E. A. Hawkins, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(125 Ga. 205)

SEABOARD AIR LINE RY. CO. v. OLIVER.

(Supreme Court of Georgia. March 28, 1906.)
APPEAL—REVIEW.

There being no complaint that the court erred on the trial, and the evidence warranting the verdict, the refusal of a new trial was not error.

(Syllabus by the Court.)

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Action by R. S. Oliver against the Seaboard Air Line Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

E. A. Hawkins, for plaintiff in error. Jas. Taylor, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(125 Ga. 230)

FAIRCLOTH v. WEBB.

(Supreme Court of Georgia. March 28, 1906.)

1. AGRICULTURE—FARM LABORERS—LIENS.

A farm laborer who is hired to cultivate a growing crop, and who performs in person the services required of him, may assert not only a special lien on the product of his labor (Civ. Code 1895, § 2793; McElmurray v. Turner, 12 S. E. 359, 86 Ga. 215), but also a general lien upon all other property belonging to his employer. Civ. Code 1895, § 2792.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Agriculture, § 21.]

2. SAME—CLAIM FOR LIEN—IMMATURE CROPS—LEVY.

As the claim of lien may be made at any time within one year after the laborer is entitled to payment for his services (Civ. Code 1895, § 2816), an execution issued on August 31st upon an affidavit filed by him to enforce his special lien upon the crop, as well as to assert his general lien, is not open to attack because it commands the levying officer to realize the sum claimed to be due as wages by levy and sale of any of the goods and chattels of the employer, "and especially of the crops" upon

which the special lien is claimed, which at the time are immature and therefore not subject to lawful seizure. The process is not to be deemed void merely because it cannot be immediately enforced by levy upon the growing crops (Civ. Code 1895, § 5425), but is to be construed as authorizing and directing the levying officer to execute it when, and not before, a legal levy can be made thereunder.

3. SAME—RETURN OF OFFICER.

Though the return of the officer may show upon it face an unlawful attempt to make immediate seizure of the immature crops, which would render the levy thereon void (Scott v. Russell, 72 Ga. 35), yet this fact affords no reason for treating his return as a nullity, when it appears therefrom that he also levied the execution on other property of the employer, including a mule, 650 pounds of seed cotton, and a stack of fodder. As to the property thus lawfully seized, the laborer would be entitled to enforce his general lien, if he obtained judgment against his employer upon the trial of the issue raised by the counter affidavit interposed by the latter in resistance to the former's claim of lien for wages due and unpaid.

4. SAME—AFFIDAVIT—EVIDENCE.

When the laborer makes affidavit that he worked for wages of "\$14 per month, from 1st day of January, 1903, to May 19, 1903, inclusive of supplies and guano and all debts for the year 1903 on said crop," he is not entitled to recover the amount of wages claimed or assert his lien on proof that he was a "cropper," and that the services performed by him were rendered under a contract whereby he was to furnish the labor and half the guano, and according to the terms of which the crop raised was, at the end of the year, to be equally divided between him and the owner of the land on which it was grown. In every case the probata must correspond with the allegata (Central R. Co. v. Tucker, 4 S. E. 5, 79 Ga. 128); and especially is this true when a lien is sought to be enforced under a statute which is in derogation of the common law (Mabry v. Judkins, 66 Ga. 732).

5. SAME—PERFORMANCE OF CONTRACT.

In order to establish his lien, it is incumbent upon the laborer to show that he complied with and performed the contract declared on (Tanley v. Lampkin, 39 S. E. 473, 113 Ga. 1007), and that he made demand for payment after his wages became due. Milam v. Solomon, 68 Ga. 55. He cannot successfully rely upon proof of an award by arbitrators fixing the amount due him when the contract was abandoned.

6. SAME—EVIDENCE.

In no view of the evidence was the plaintiff in this case entitled to prevail, and the court below erred in overruling the certiorari sued out by the defendant to set aside the verdict of the jury returned in the justice's court.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by J. W. Webb against Sid Faircloth. Judgment for plaintiff. Defendant brings error. Reversed.

J. J. Forehand and C. E. Hay, for plaintiff in error. Park & Payton, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concur.

(59 W. Va. 658)

CLEAVENGER et al. v. STURM et al.
(Supreme Court of Appeals of West Virginia.
April 24, 1906.)

1. SPECIFIC PERFORMANCE—EXECUTORY CONTRACT—FRAUD.

An executory contract for the sale of land will not be specifically enforced in favor of a vendor, who has made material fraudulent misrepresentations upon which the vendee relied in making the contract.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 160.]

2. SAME — CANCELLATION OF CONTRACTS — FRAUD.

Equity will rescind such contract, where such relief is asked by the purchaser.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 425.]

3. SAME—MISREPRESENTATIONS.

Misrepresentations, though in a slight degree, of material facts, relied upon by the vendee, will defeat specific performance in favor of the vendor.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 160-164.]

4. SAME.

A court of equity will not specifically enforce an executory contract, when it appears to be unfair, tainted with fraud, or induced by misrepresentations.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 160-171.]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by S. A. Cleavenger and others against B. A. Sturm and others. Decree for plaintiffs, and defendant Sturm appeals. Decree reversed, and contract rescinded.

Dent & Dent, for appellant. Samuel V. Woods, for appellees.

SANDERS, J. On the 15th day of December, 1902, a contract was entered into between Samuel A. Cleavenger and B. A. Sturm, whereby the former agreed to sell and convey to the latter 122 acres of land, with the exception of the coal underlying same which had been sold, and which was stated to be 27 or 28 acres lying in Barbour county, for the sum of \$8,075. At the time the contract was entered into, Sturm paid \$100 on the cash payment. On the 17th day of December following, Cleavenger made and tendered Sturm a deed conveying to him the property, which Sturm refused to accept, and at the January rules, 1903, S. A. Cleavenger and Mary Cleavenger, his mother, filed their bill in the circuit court of Barbour county against Sturm and one Allen Moats, to compel specific execution of the contract, which is as follows: "Dec. 15, 1902. Article of agreement between S. A. Cleavenger of the first part and B. A. Sturm of the second part witnesseth, for and in consideration of eight thousand and seventy-five dollars (\$8,075.00) the party of the first part agrees to sell and convey the said tract of land that he now owns to the party of the second part under a general warranty except the coal that has been sold, about twenty-seven or eight acres,

further money in trust, which is held by the mother of the party of the first part and in case she does not sign her right away to the party of the second part the party of the second part is to leave in bank what would be considered her third interest in said land and the above tract contains 122 acres & the 5½ acres of land that the party of the first part has rented of his mother and is to rent it to the party of the second part just as he has it and when it comes into his possession is to convey it to the party of the second part at the same price per acre and the cash payment is to be twenty hundred or more at the discretion of the party of the second part and the residue in six and eighteen months at six per cent. interest from date of deed. Possession is to begin on or before the 15th day of March, 1903." After setting up in the bill the agreement, and the fact of making and tendering the deed, and Sturm's refusal to accept same, the plaintiffs claimed that, in the negotiations for the purchase of the land, Sturm stated that it was a joint purchase for the benefit of himself and Allen Moats, his father-in-law, and further represented that Moats was to sign the notes for the deferred payments, and that his name should have been signed to the contract, and that he would thereafter sign the same. To the bill Sturm and Moats filed their separate answers, the latter denying that he had any connection whatever with the contract, or that he had ever authorized Sturm to represent that he would purchase the land, and further denying that he authorized Sturm to sign his name to any contract for the purchase of the land mentioned, or to any notes which might be given for the purchase price thereof. In the answer filed by Sturm, it is claimed that, as an inducement for him to enter into the contract, Cleavenger represented that there were at least 20 acres of the Pittsburg seam of coal on said land which had never been sold, and that in addition the land was underlaid with the Freeport seam of coal, and that upon an examination of the deed conveying the coal it would be found that the matter was as stated, when, as found by Sturm on examination made after the signing of the contract of purchase, there had been conveyed by said deed all of the Pittsburg seam of coal and all of the Freeport seam underlying the Pittsburg seam, and that the deed conveying the coal also contained the following provision: "It is expressly agreed and understood that the parties of the first part further grant unto the party of the second part the right of ingress and egress under, over and through said tract of land for the purpose of exploring, excavating, mining and removing said coal with all the rights of drainage, air shafts, ventilation, and to go under and through said land for the purpose of removing other coal that may be owned and mined by the said party of the second part, or its successors and assigns from other tracts of

land that may be operated and mined by him or them, and the said party of the second part is released from all damage that may accrue to the surface of said land by reason of the removal of the said coal from under the same, and all other usual mining rights and privileges are hereby granted that may be required in the opinion of the party of the second part to carry on said mining operations and remove the coal aforesaid, but it is expressly understood that the right to bore for oil and gas is reserved by the parties of the first part, provided always that it shall not interfere with or cause damage or annoyance to the second party in its coal operations."

It is claimed that Cleavenger said nothing in regard to these mining privileges and provisions of the deed when the contract was entered into. Sturm also denied that he had ever represented that Moats was interested in the purchase in question, and prayed for a rescission of the contract, and a decree against Cleavenger for the cash payment. That the contract for the sale and conveyance was entered into and that Sturm paid \$100 cash is not questioned, and inasmuch as the court below decreed only against Sturm, and not against Moats, and there being no cross-assignment of error, the contention that Moats was interested in the purchase is eliminated from the case. The specific performance of the contract is resisted, and the rescission thereof asked, on the ground that the plaintiff Samuel A. Cleavenger made certain misrepresentations, whereby the defendant Sturm was induced to sign the contract of purchase. It is charged that he represented to the defendant that there remained unsold upon the tract of land 20 or 25 acres of the Pittsburg vein of coal, and that the entire tract of land was underlaid with the Freeport vein of coal, none of which had been sold, and also that by the terms of the contract it was represented that in making the sale of the 40 acres of coal underlying the land, only such mining rights and privileges were given as were necessarily implied by the grant, when, as a matter of fact, all of the Pittsburg coal, and 40 acres of the Freeport vein, had been sold and conveyed, and the mining rights and privileges granted by the deed conveying the 40 acres of coal were greater than those which necessarily, by implication, would have followed the grant. It appears that Cleavenger, on the 19th day of June, 1899, conveyed to James Irwin all the coal underlying 40 acres of this tract of land, while the contract sought to be enforced represents that the coal had been sold under about 27 or 28 acres thereof. There is no representation by the terms of the contract as to the Pittsburg vein of coal, and the representations relied upon as to this coal are verbal statements claimed to have been made by Cleavenger before the contract of purchase was signed. The evidence as to what Clea-

venger said in this regard is very conflicting and uncertain, but assuming that it shows what the defendant claims it does, still it would be insufficient to defeat specific performance, much less ground for rescission. These representations were matters of opinion. It is clear, from the evidence, that Cleavenger did not know, as a matter of fact, that there were 20 or 25 acres of the Pittsburg coal which had not been sold. He took Sturm upon this tract of Land, showed him the outcrop of the coal, and pointed out the boundaries of the coal which had been sold. Sturm's opportunities for knowing whether or not 20 or 25 acres of the Pittsburg vein of coal remained unsold were as good as those of Cleavenger. He had the same information Cleavenger had, and was bound to know at the time of these statements that Cleavenger was giving them purely as a matter of opinion. "Where the representation consists of general commendations, or mere expressions of opinion, hope, expectation, and the like, and where it relates to matters which, from their nature, situation, or time, cannot be supposed to be within the knowledge or under the power of the party making the statement, the party to whom it is made is not justified in relying upon it and assuming it to be true; he is bound to make inquiry and examination for himself so as to ascertain the truth; and, in the absence of evidence, it will be presumed that he has done so, and acted upon the result of his own inquiry and examination." Pom. Eq. Jur. (3d Ed.) § 891. This being so, the defendant cannot be relieved from the contract upon this ground.

But the representations as to the Freeport vein of coal are different. The contract itself represents that the coal under about 27 or 28 acres of this tract of land had been sold, when, as a matter of fact, the plaintiff had sold and conveyed to Irwin 40 acres, making a difference of 12 or 13 acres. This provision of the contract is a representation upon the part of Cleavenger that only 27 or 28 acres of this coal had been sold, which, at the time, he knew was untrue, because of his previous conveyance to Irwin. Having by the terms of his contract made this representation, which at the time he knew to be untrue, he cannot now be heard in a court of equity to demand specific performance of that contract, if these representations were material, and relied upon by the defendant, and he induced thereby to sign the contract. The evidence as to whether or not Cleavenger represented that his entire tract of land was underlaid with the Freeport vein of coal is somewhat conflicting, but the evidence that such representation was made clearly preponderates. The verbal testimony showing that Cleavenger represented that none of the Freeport vein of coal under this tract of land had been sold is sufficiently combatted by the terms of the contract itself, and by the statements which Cleavenger made, that he

supposed that the deed conveyed all of the coal under the land which had been sold. But it clearly appears that the entire tract is underlaid with the Freeport vein, and this being so, it is immaterial as to whether or not Cleavenger made verbal statements or representations as to this fact, because by the terms of his contract he sold to Sturm all the coal underlying the land, except as to the 27 or 28 acres which had been sold, when, as a matter of fact, the entire tract is underlaid with coal, and he having sold and conveyed 40 acres instead of 28 acres, which at the time of making the contract with Sturm he knew, and knowing, represented otherwise, would be a fraudulent misrepresentation. Furthermore, the provision of the contract reciting that 27 or 28 acres of coal had been conveyed, without referring to the mining rights and privileges contained in the deed of conveyance, was a representation that only such mining rights were granted by implication as were necessary for the removal of the coal. The defendant had the right to assume that this was so, and if, at the time of the contract, the plaintiff knew that he had conveyed away this property, and that in the deed of conveyance he had granted mining rights and privileges which did not impliedly follow the grant, it was his duty to make such facts known. The mining privileges which were granted in the deed to Irwin for the 40 acres of coal are broad, and authorize the doing of many things which would not have been authorized, and which could not have been done under a deed granting only the coal, with the necessary mining rights and privileges. A court of equity, where a false representation has been made as to a material matter, which has been relied upon by the purchaser, and he thereby induced to purchase, will not enforce specifically the contract, but will rescind it, if asked to do so. "A false representation of quantity of land, not relied on by the purchaser, and not operating to induce him to purchase, will give him no relief for deficiency; but when such false representation is proven, presumably it does so operate, unless it otherwise appear." *Cork v. Cook*, 56 W. Va. 51, 48 S. E. 757.

It is claimed, however, that Cleavenger invited Sturm to examine the record. It is shown that Sturm did not do so, but relied upon the representations of Cleavenger, which he had the right to do. It is true, he could have examined the record and ascertained the facts for himself, but not having done so, and relied upon the statements of his vendor, the latter cannot complain that he did not examine the record, but is bound by the representations which he made. Judge Brannon, delivering the opinion of the court in *Cork v. Cook*, supra, says: "I will not assert that if the complaining party simply have equal means to ascertain, he must make inquiry; but where a representation has been made, especially a known false one, it lies not

in the mouth of the maker to say to the other that he should have made inquiry for himself, because he had right to rely on the representation." *Kerr on Fraud*, 79; *Hull v. Fields*, 78 Va. 607; *Wilson v. Carpenter's Adm'r*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824. "It may be laid down as a general proposition that where the statements are of the first kind, and especially where they are concerning matters which, from their nature or situation, may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely on them; he is justified in relying on them, and in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself. It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word; if he claims that the other party was not misled, he is bound to show clearly that such party did know the real facts; the burden is on him of removing the presumption that such party relied and acted upon his statements." *Pom. Eq. Jur. (3d Ed.)* § 891; *Hull v. Fields*, supra; *Linhart v. Foreman's Adm'r*, 77 Va. 540; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, 13, 14, et seq.; *Gammill v. Johnson*, 47 Ark. 335, 1 S. W. 610; *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Dillman v. Nadlehofer*, 119 Ill. 567, 7 N. E. 88. And again, the same author says, in section 895: "Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere existence of opportunities for examination, or of sources of information, is not sufficient, even though, by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact. If one party—a vendor, for example—claims that the invalidating effects of his misrepresentations are obviated, and that the purchaser was not misled by them, either because they were concerning patent defects in the subject-matter, or because he was from the outset acquainted with the real facts, or because he had made inquiry, and had thereby ascertained the truth, the foregoing qualification plainly applies; it is plainly incumbent on the vendor to prove the alleged knowledge of the purchaser by clear and positive evidence, and not to leave it a matter of mere inference or implication; an opportunity or means of obtaining the knowledge is not enough."

We must not confound the principles which are to be applied where there is fraud or misrepresentation with those applicable to that class of cases where there is no fraud or misrepresentation, but where the vendor is unable to perform his contract in its entirety, 'because of a deficiency in the quantity or quality of the estate, or because of defect in his title or interest. In such cases equity may decree specific performance, with compensation or abatement for the deficiency or defect, if the vendor can substantially perform his contract. *Newman v. Kay*, 57 W. Va. 98, 49 S. E. 928, 68 L. R. A. 908; *Thompson v. Jackson*, 3 Rand. 504, 15 Am Dec. 721; 13 Ves. 73; *Pomeroy's Eq. Jur. (Remedies)* § 831. Where, however, there is fraud or a misrepresentation which is material, and upon which the defendant relies in entering into the contract, a court of equity will not enforce the contract, but will rescind it. *Oil Co. v. Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Thompson v. Tod*, 1 Pet. C. C. 380, Fed. Cas. No. 13,978; *Boynton v. Hazelboom*, 96 Mass. 107, 92 Am. Dec. 738; *Miller v. Chetwood et al.*, 2 N. J. Ch. 199. "An executory contract for the sale of land will not be specifically enforced where the written memorial describes the tract as containing 130 acres, when in fact it contained but 105 acres; the deficiency being supplied by the vendor by a subsequent purchase of 27 acres adjoining, but not within the boundaries of the tract as sold. The law will not compel a vendee either to pay for land he did not buy, or to accept a conveyance of 105 acres when he bought 130 acres." *Snedaker v. Moore*, 63 Ky. 542. *Pomeroy*, in his work on Equity Jurisprudence, classifies fraudulent misrepresentations under six different heads. The first is where a party makes a statement which is untrue, and has at the time an actual positive knowledge of its untruth, and the necessary resulting intent to deceive—the scienter at law. This is treated, in some respects, as the highest form of fraud, and is the classification which applies to the facts of this case. Here the representations, by the terms of the contract, were that only 27 or 28 acres of the coal had been sold, whereas, in truth and in fact, 40 acres had been sold and conveyed. This is a positive statement upon the part of the vendor, which at the time he knew to be untrue, having previously conveyed the same away. Also, by the terms of the contract, only the mining rights and privileges such as by law are incidental to and follow the grant of the coal are represented to have passed by the deed, whereas additional privileges were conveyed thereby. To call for specific performance, "the contract must be free from any fraud, misrepresentation even though not fraudulent, mistake, or illegality." *Pom. Eq. Jur.* § 1405.

To entitle one to specific performance it must appear that he who seeks such relief, as a condition precedent thereto, has done

or offered to do, and is ready, able, and willing to do and perform all the material and essential acts required of him by the stipulations of his agreement, and unless he shows his willingness and ability to fulfill the contract upon his part, a court of equity will not require the other party to perform. Here it appears that Cleavenger is unable to perform the contract. Having conveyed away 40 acres of coal, while his contract represented that he had conveyed only 27 or 28 acres, and also having conveyed away mining privileges, and it not being within his power to perform, equity and good conscience will not require of the defendant a performance on his part. "The maxim 'he who seeks equity must do equity' is uniformly applicable in actions for specific performance. This rule, it has been said, requires of the plaintiff that he do all that is in his power to fulfill his part of the contract which he is seeking to enforce, according to its terms. He must do his full duty or the court will not regard his prayer." 26 Am. & Eng. Ency. Law (2d Ed.) 44. *Boone v. Missouri Iron Co.*, 17 How. (U. S.) 340, 15 L. Ed. 171; *Colson v. Thompson*, 2 Wheat. (U. S.) 336, 4 L. Ed. 253; *Morgan v. Morgan*, 2 Wheat. (U. S.) 290, 4 L. Ed. 242; *Harvie v. Banks*, 1 Rand. 408; *Cohn v. Mitchell*, 115 Ill. 124, 3 N. E. 420; *Wiengaertner v. Pabst*, 115 Ill. 412, 5 N. E. 385. However, the representations made must have been relied upon by the purchaser, and in concluding whether or not this is so, we must look to the character of the representations, and to all the facts and circumstances surrounding the case. These representations go to the very substance of the contract, and, from the whole case, we conclude that they were relied upon by Sturm in entering into it.

Then, again, not only must this be so, but the representations must be material. But where fraudulent misrepresentations are shown to have been made, and where they have been acted upon by the purchaser and he induced thereby to sign the contract, it will be sufficient to refuse performance and to rescind the contract, if the prejudice is only slight. "The court, however, does not inquire with any care into the extent of the prejudice; it is sufficient if the party who has been misled is very slightly prejudiced, if the amount is at all appreciable." *Pomeroy's Contracts (Specific Performance)* § 227. And the same author says, in section 228: "If a representation, upon which an agreement has been entered into, is not only untrue but fraudulent, or if it contains any element of knowledge or intention, it forms a complete defense to the enforcement of the whole contract. The party who made it will not be allowed, against the objection of the other party, to waive the particular part of the contract to which the false statement relates, or with which it is concerned, and to obtain a specific performance of the remainder. * * * A representation, as we have

seen, may prevent the specific enforcement of an agreement by a court of equity, although it was not intentionally false, although the party making it was innocent of any deception, and believed his statement to be true." *Viscount Clermont v. Tasburgh*, 1 J. & W. 112; *Cadman v. Horner*, 18 Ves. Jr. 9: "Misrepresentation, though in a slight degree, is an objection to specific performance." *Pomeroy's Eq. Jur.* § 898, in treating of the materiality of the representation, says: "If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable." *Smith v. Kay*, 7 H. L. Cas. 750.

For the foregoing reasons, we reverse the decree of the circuit court, rescind the contract, and give decree in favor of Sturm for the cash payment made by him, with interest.

(59 W. Va. 669)

CLARK v. BEARD.

(Supreme Court of Appeals of West Virginia.
April 24, 1908.)

1. TENANCY IN COMMON—OUSTER OF CO-TENANT—PAYMENT OF TAXES.

The payment of taxes by one co-tenant on the land owned in common does not of itself constitute an ouster of another co-tenant.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 81, 50.]

2. SAME—ADVERSE POSSESSION—COMMENCEMENT.

The statute of limitations does not begin to run in favor of one co-tenant of land in possession, against another co-tenant thereof, until actual ouster by the former, or some other act or acts on his part amounting to a total denial of the right of the latter, and until notice or knowledge of the act or acts relied on as an ouster is brought home to him.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 43, 49.]

3. SAME.

The notice or knowledge required must be either actual, or the act or acts relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the disseised co-tenant on inquiry which, if diligently pursued, will lead to notice or knowledge in fact.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, § 49.]

4. EJECTMENT—CO-TENANCY—VERDICT—FORM.

If the evidence on the trial of an action of ejectment shows that the plaintiff is entitled to hold a part, share, or interest (less than the whole) of or in the land sued for, and that the defendant is entitled to hold a part, share, or interest (less than the whole) of or in said land, the verdict should specify and describe the part, share, or interest which each of the parties is entitled to hold.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 335.]

(Syllabus by the Court.)

Error from Circuit Court, Pocahontas County.

Action by Preston S. Clark against Emma C. Beard. There was judgment for defend-

ant, and plaintiff brings error. Reversed and remanded.

Andrew Price, L. M. McClinton, and Henry Gilmer, for plaintiff in error. R. S. Turk and F. R. Hill, for defendant in error.

COX, J. Sheldon Clark, owning a large quantity of land in Pocahontas county, by deed dated the 29th of August, 1868, conveyed a part of his land to his sons Preston and Peter, reserving one-half interest in all the "stone coal" in parcels of the land so conveyed, with certain privileges as to the use thereof. By deed dated the same day, Sheldon Clark conveyed another part of his land to his son Sherman; and it is claimed that by this deed he also conveyed to Sherman the one-half interest in the "stone coal" reserved in the deed to Preston and Peter. In 1872, Peter died, and a controversy arose between his widow and his father, Sheldon, as to who was entitled to Peter's interest in the land so conveyed to Preston and Peter. This controversy was settled by the widow conveying whatever interest she had to the father. It is claimed that after this conveyance there was a partition of the land so conveyed to Preston and Peter, between Preston and Sheldon, the owner of the interest formerly held by Peter. Afterwards, Preston conveyed to others certain parts of the land which he claimed had been so partitioned to him. Sherman died in 1901. The third clause of his will is as follows: "I give to my daughter, Emma C. Beard, all my land of all descriptions to have it during her lifetime giving to her the privilege to deed it to her children during her lifetime as she may think best not taking in consideration quantity and quality and if she leaves no will directing how to divide it among her children at her death, I then direct M. L. Beard, if living at her death to divide the land among her children not taking in consideration quantity and quality and his division shall be legal under this will." At September rules, 1904, Preston Clark filed his declaration in this action of ejectment against Emma C. Beard, describing and claiming all the land so conveyed by Sheldon to Preston and Peter Clark, less the part which he claimed had been partitioned to Sheldon and by his will devised to certain persons therein named, and less the parts conveyed by Preston to others. There was a plea of not guilty, a trial by jury, and a general verdict for the defendant in this language: "We, the jury, find for the defendant." Plaintiff moved to set aside the verdict, which motion was overruled, and judgment entered dismissing the action, and plaintiff excepted. A writ of error was allowed to the judgment, upon petition of the plaintiff. The plaintiff makes three assignments of error, the first and second of which relate to instructions to the jury, given and

refused. These instructions will hereafter be referred to by their numbers.

Complaint is made of the refusal of the court to give No. 1 for plaintiff, which is as follows: "The court instructs the jury that the deed of August 29, 1868, from Sheldon Clark to Sherman H. Clark, under which defendant claims, does not grant to said Sherman Clark any interest in the coal in or under the lands described in the plaintiff's declaration." This instruction raises the question of the sufficiency of the deed from Sheldon to Sherman Clark to pass any interest in the coal in the land claimed by the declaration. It is urged that the description in this deed is insufficient to pass to Sherman Clark the one-half interest in the coal reserved in the deed from Sheldon to Preston and Peter Clark. This deed to Sherman, after describing and conveying certain land upon the waters of Cherry and Hills Creek north of a designated line, and certain land on Robins Fork of Spring Creek south and east of a designated line, contains the following additional clause: "(the different tracts lying on Spring Creek and Cherry are as follows: 1,000, 100, 45, 230, 392, 206, 72, and the lines above given is the division line in said surveys). Also, I convey to said Sherman H. Clark one-half interest in all the stone coal that is upon the different tracts just given, lying on Spring Creek and Cherry, west and north of the division line heretofore given," etc. It is obvious that the words "different tracts" in this clause relate to the tracts last before mentioned. The conveyance of the interest in coal was additional to the grant of the other lands specifically described in the previous part of the deed. We must give to the deed a reasonable construction. The conveyance of land without limitation, reservation, or exception, includes the coal in place under it, if owned by the grantor. There was no necessity for adding a clause conveying an interest in the coal in the land conveyed absolutely by the deed. We think that it was the intention of the additional clause to pass a one-half interest in the coal in the land included in the tracts mentioned, west and north of the designated division line or lines. It is also claimed that because this clause uses the word "convey" instead of "grant" in relation to the one-half interest in coal, it is insufficient. The word "convey" is sufficient to pass an estate in land. *Chapman v. Charter*, 46 W. Va. 769, 34 S. E. 768. There was no error in refusing this instruction.

Complaint is made because instructions Nos. 1, 2, 3, and 4, offered by defendant in error, were given. The plaintiff in error claims the one-half interest in the coal conveyed by the deed from Sheldon to Sherman Clark, to the extent that the coal is in the land for which he sues, by ouster and adverse possession against his co-tenant, Sherman Clark, and against his devisee or devisees. We will consider Nos. 1 and 3 to-

gether. They are as follows: "No. 1. The court instructs the jury that a tenant in common may oust his co-tenant and hold in severalty, but a silent possession, unaccompanied by any action amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession. "No. 3. The court further instructs the jury that the plaintiff, Preston S. Clark, and Sherman H. Clark, deceased, were joint tenants in the coal underlying the lands in the declaration mentioned, and became so by virtue of the conveyance from their father, Sheldon Clark, introduced as evidence in this case; and that in order for the plaintiff, Preston S. Clark, to oust the said Sherman H. Clark or his devisees as to said coal right, there must be an actual ouster by the said Preston S. Clark of his co-tenant, Sherman H. Clark, or his devisees, and a giving of notice to his said co-tenant, Sherman H. Clark, or his devisees, that his possession was adverse at least for a period of 10 years prior to the institution of this suit, and, if the jury believe there was no such ouster and notice, then they must find for the defendant, Emma C. Beard." The defendant had a right to instructions propounding the law covering her theory of the case, based upon the evidence before the jury. In considering the language of these instructions, it is well to keep in view certain principles applicable. "Ouster," in a legal sense, is the wrongful dispossession or exclusion from real property of a party entitled to the possession thereof. The statute of limitations does not begin to run in favor of one co-tenant of land in possession, against another co-tenant thereof, until actual ouster by the former, or some other act or acts on his part amounting to a total denial of the right of the latter, and until notice or knowledge of the act or acts relied on as an ouster is brought home to him. *Bogges v. Meredith*, 16 W. Va. 1; *Cooley v. Porter*, 22 W. Va. 123; *Fry v. Payne*, 82 Va. 759, 1 S. E. 197; Section 15, c. 90, Code 1890. The notice or knowledge required must be either actual, or the act or acts relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the dissatisfied co-tenant on inquiry which, if diligently pursued, will lead to notice or knowledge in fact. *Cooley v. Porter*, supra. Knowledge is the equivalent of notice. Thus we see that either actual notice, or notice arising from the open and notorious character of acts, may avail. No. 1 asserts a very old principle of law. It was announced by Chief Justice Marshall in the opinion of the Supreme Court of the United States in *McClung v. Ross*, 5 Wheat. 116, 5 L. Ed. 46, and, so far as we are aware, its soundness has never since been questioned. This principle was carried into point 3 of the syllabus of our case of *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102. The essence of this principle is that the silent possession of one co-tenant, without either

ouster or notice, is not adverse to the other co-tenant. We cannot say that this instruction was inapplicable to the case, in view of the evidence and of the theory advanced by the defendant, and, being correct in principle, there was no error in giving it. No. 3 was evidently intended to apply to this case the principle stated in No. 1. Instead of using the words "ouster or giving of notice," No. 3 used the words "actual ouster * * * and a giving of notice." The jury might reasonably conclude from the language of No. 3 that the only notice which could avail the plaintiff would be actual notice given by him of an ouster, and that notice or knowledge arising from the character of acts, however open and notorious, could not be considered in determining the rights of the parties. No. 3 was in this respect calculated to mislead the jury, and, in the form offered, should have been refused. We have not deemed it necessary to discuss the question when and under what circumstances a presumption of disseisin or ouster of one co-tenant by another, after great lapse of time, is warranted, as no such question was presented by the instructions mentioned. On this subject see *Purcell v. Wilson*, 4 Grat. (Va.) 16; *Stonestreet v. Doyle*, 75 Va. 379, 40 Am. Rep. 731; *Zeller's Lessee v. Eckert et al.*, 4 How. (U. S.) 239, 11 L. Ed. 979.

No. 2, for defendant, in effect instructed the jury that the payment of taxes by one co-tenant does not operate as an ouster of the other co-tenant. The payment of taxes by one co-tenant, on the land owned in common, does not of itself constitute an ouster of the other co-tenant. *Lagorio et al. v. Dozier*, 91 Va. 492, 22 S. E. 239. The silent payment of taxes by one co-tenant—that is, payment not under adverse and exclusive claim to the land, and without notice or knowledge of such claim being brought home to the other co-tenant, is perfectly consistent with the cotenancy. It has been frequently held that a purchase by one co-tenant, at a sale for delinquent taxes, of the land owned in common, inures to the benefit of the other co-tenant. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557. There was no error in giving this instruction.

No. 4, for defendant in error, is as follows: "The jury is further instructed that if they believe the plaintiff, Preston S. Clark, recognized or admitted any right in Sherman H. Clark, deceased, or his devisees, to the coal underlying the land mentioned in the declaration, within 10 years prior to the institution of this suit, then said Preston S. Clark is estopped from now denying said right to said coal." The only recognition or admission claimed in this case was verbal. The proposition announced in this instruction is erroneous, unless it be qualified. If the recognition or admission mentioned in the instruction was made by plaintiff after he had acquired good title to the one-half interest in the

coal in controversy, by such ouster and adverse possession, and such notice or knowledge as was necessary for that purpose, then such recognition or admission would be ineffectual to divest the plaintiff of his title and to reinvest it in his former co-tenant or his devisees. Parol disclaimers cannot affect a vested title, in the face of the statute of frauds. *High's Heirs v. Pancake*, 42 W. Va. 607, 26 S. E. 536; *Wade v. McDougle* (W. Va.) 52 S. E. 1026. No. 4 did not, by its terms, purport to limit its effect to a time when plaintiff did not have good title. In substance, it directed the jury that the plaintiff would be estopped if he made the admission or recognition within 10 years before the suit, regardless of whether he then had good title or not. This instruction, in the language offered, should have been refused.

The third assignment of error is that the court refused to set aside the verdict and award the plaintiff a new trial. By the declaration, the plaintiff described and claimed certain land absolutely. There was no disclaimer by the defendant, but a plea of not guilty, and the general verdict for defendant and judgment thereon. The evidence discloses that the only real controversy in the case was in relation to the one-half interest in the coal under the land claimed by the declaration. The plaintiff's right and title to the land sued for, other than the one-half interest in the coal, was uncontroverted and unquestioned by the evidence. The plaintiff did not locate and identify the land described and claimed in the declaration. This requirement seems to have been tacitly waived by the conduct of the parties in limiting the trial, both by their evidence and instructions, to the controversy in relation to the coal. They seem to have waived all matters of form, and of substance as well, except as to the controversy in relation to the coal. What is the effect of this general verdict for defendant and judgment thereon? Are they, if allowed to stand, conclusive between the parties as to all the land for which plaintiff sued? Is the verdict sustained by the evidence? The defendant should have disclaimed as to all the land for which plaintiff sued, except the one-half interest in the coal; but she did not. Under these circumstances, a general verdict for defendant and judgment thereon are conclusive between the parties as to the right of possession to all the land sued for, if allowed to stand, unless, perhaps, the plaintiff could, in the future, show the fact that the controversy in this case was limited to the one-half interest in the coal. The case of *Wilson v. Braden*, 48 W. Va. 193, 36 S. E. 367, is similar in this respect to this case. There the plaintiff sued for 2,500 acres of land, and the defendant Braden claimed 50 acres and the defendant Deem 250 acres thereof. There was no disclaimer, and no controversy as to the residue of the land. There was a general verdict for defendants.

This court set aside that verdict. In *Low v. Settle*, 22 W. Va. 387, the defendant claimed, and the jury found for defendant, a specified part of the land sued for, and found nothing as to the residue of the land. That verdict also was set aside by this court. The verdict in the case at bar, for the defendant generally, relates to all the land for which the plaintiff sued, and in this respect is unwarranted by the evidence, or by any actual claim of the defendant in this case. It must be set aside as erroneous. *Wilson v. Braden*, supra; *Low v. Settle*, supra; *M'Arthur v. Porter*, 6 Pet. (U. S.) 205, 8 L. Ed. 371; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317; *Slocum v. Comp-ton*, 93 Va. 374, 25 S. E. 3.

Where the evidence, upon the trial of an action of ejectment, shows that the plaintiff is entitled to hold a part, share, or interest (less than the whole) of or in the land sued for, and that the defendant is entitled to hold a part, share, or interest (less than the whole) of or in the same land, the verdict should specify and describe the part, share, or interest which each is entitled to hold. *Wilson v. Braden*, supra; *Callis v. Kemp*, 11 Grat. 84; *Gregory v. Jackson*, 6 Munf. 25. The statement just made must not be taken as any expression of opinion by this court that the evidence introduced upon the former trial would justify a verdict in part for plaintiff and in part for defendant. We express no opinion as to the sufficiency of the evidence to sustain either the plaintiff or defendant as to the controversy in relation to the one-half interest in the coal.

There has been a mistrial, and the case must be remanded for another trial. If there shall be no disclaimer, and no waiver of the requirement that the plaintiff must locate and show title to the identical land for which he sued, he will not, under the law, be relieved from so doing. *Logan's Heirs v. Ward* (W. Va.) 52 S. E. 398; *Wade v. McDougle*, supra; *Pennington v. Underwood* (W. Va.) 53 S. E. 465; *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531.

The judgment complained of is reversed, the verdict set aside, a new trial awarded, and the case remanded, to be further proceeded with according to law.

(59 W. Va. 633)

CASTO et al. v. BAKER et al.

(Supreme Court of Appeals of West Virginia.
April 24, 1906.)

1. DEED—CONSTRUCTION—INTENT OF PARTIES—EVIDENCE.

In construing a deed in which there is a latent ambiguity as to a boundary line, occasioned by disagreement between monuments and marked lines, on the one hand, and magnetic courses, on the other, therein specified, as matter of description, the intention of the parties, which is the controlling factor in the problem, is to be ascertained from the facts and circumstances attending the execution of the deeds, and the situation and conduct of the parties, and, as a rule of law, they are presumed to have been in-

fluenced and controlled by facts of which they had knowledge rather than by things of which they knew not.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 231, 239.]

2. APPEAL—REVIEW—VERDICT.

A verdict, clearly inconsistent with all the controlling facts in the case, none of which are in any way controverted, will be set aside, as being contrary to the law and the evidence.

(Syllabus by the Court.)

Error from Circuit Court, Mason County.

Action by Maria E. Casto and others against C. J. and G. W. Baker. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

W. R. Gunn and B. H. Blagg, for plaintiffs in error. John E. Beller and John W. English, for defendants in error.

POFFENBARGER, J. On a writ of error to a judgment of the circuit court of Mason county, in an action of ejectment, C. J. Baker and Geo. W. Baker make only one assignment of error, namely, the refusal of the court to grant them a new trial, on the ground that the verdict in favor of the plaintiff, Maria E. Casto, is contrary to the law and the evidence.

Strange as it may seem, there is no conflict whatever in the evidence. The testimony of all the witnesses is in perfect harmony and agreement, and the only question submitted to the jury was that of the intent of the grantor in the execution of three deeds. In the year 1878, Charles Baker, having four sons and a daughter, namely, W. H., J. M., C. J. and Geo. W. Baker, and Maria E. Casto, and owning a considerable quantity of land, divided it among his children, by executing deeds to them for the portions which he desired them to have. Accordingly, A. W. Bollins, a surveyor, came, at his request, and divided the land into parts, by survey, as directed by Charles Baker, and then prepared the deeds, which were immediately executed by Charles Baker and his wife. The lots so laid off for C. J. Baker, Geo. W. Baker, and Maria E. Casto, respectively, were coterminous, and a corner, common to the lots surveyed for C. J. and Geo. W. Baker, was in the eastern line of the lot surveyed for Maria E. Casto, the general course of which, though broken, is practically north and south. Where the grantor fixed that line, by the deeds to said three children, is the bone of contention. As the calls of that line follow the first call in the description of the tract conveyed to Maria E. Casto, as found in her deed, it is necessary, in the interest of clearness, to quote here the description of the first line as well as that of the one in controversy. They read as follows: "Beginning at a stone pile in the run bottom, and thence down the run N. 86° E., about 6 poles, to a poplar near branch; thence N. 3, 43 poles, to small white oak, corner to G. W. Baker; thence N. 5° E., 17 poles, to a dogwood; thence N. 12° E., 6 poles, to a small dogwood; thence N. 42° E.,

17 poles, to a black oak on the brink of the hill." The descriptions in the deeds to C. J. and Geo. W. Baker, so far as they relate to this line, and the oak corner, are substantially in accord with the calls just quoted. Geo. W. Baker's deed calls for a large white oak as the corner instead of a small one, but calls for a small one also (on the Maria Casto line) four poles from the corner. C. J. Baker's deed makes the call "N. 5° E., 17 poles," read "N. 5° E., 13 poles," and the call "N. 12° E., 6 poles," read "N. 18° E., 6 poles 11 links." These discrepancies are very slight. The location of every monument called for on the line, as described by the deed, is known and uncontroverted, and, if the line be established according to them, the case is for the defendants. But, in attempting to apply the description as a whole, the courses called for do not correspond with those found in running the lines according to the monuments. If the monuments be ignored and the line established by the calls for courses and distances, the case is for the plaintiff. Only part of the line as described in the deed by monuments was actually surveyed and marked. None of the line, claimed by the plaintiff, was actually surveyed. This circumstance is accounted for by the witnesses in the following manner: The line, as actually run, began at the stone pile and ran straight to the G. W. Baker oak corner, and thence, following the calls given in the deed, to the black oak corner, on the brink of the hill. After all the surveying had been done, and before the deeds had been written, Charles Baker asked the surveyor if he could not, without a resurvey, drop down from the stone pile to the poplar, so as to give his daughter more of the top of the hill, between the poplar and the oak, for a building site. He replied that he could, and thereupon wrote the deeds, according to direction. If the calls for monuments are controlling, he changed the line only from the south end of it to the oak corner, and thereby gave her an additional triangle, bounded by lines drawn from the stone pile to the poplar, thence to the oak and thence back to the stone pile; but, if the calls for courses and distances are to prevail, he moved the whole line to the east about six poles, and thereby gave her an additional irregular parallelogram. Taking the latter view, the jury found for the plaintiff.

The question thus determined by the jury was one of intention, involved in the construction of the deed, a matter of law and fact combined, not one of pure fact. A latent ambiguity in the deed, discovered in the effort to apply it to its subject-matter, the land, and not apparent on its face, made it necessary to consider all the circumstances attending the execution of the deed, the situation of the parties and their conduct in the transaction of the business. The object of the departure from the survey, in the execution of the deeds, was to give Mrs. Casto more land

near the south end of her eastern line. The problem submitted to the surveyor was, whether he could accomplish that result, without further surveying. To aid him, it was suggested that he make the poplar the south terminus, instead of the stone pile. All knew where it was. Then his field notes disclosed the oak corner tree on the line surveyed. To that, he could determine the distance by calculation, or insert the distance between it and the stone pile, for it was approximately the same pile. The course of this new line from the poplar to the oak would differ from that of the old line, and the making of that change was probably the most difficult matter in the transaction. For some reason, he failed to make it. If he had made it, all the other courses would have agreed with the line, as indicated by the monuments. He did not know, and could not have known, what object would be the C. J. and Geo. W. Baker corner on the line, in lieu of the oak tree, nor at the northern terminus, instead of the black oak he had marked, if he moved the entire line over. He never went to these points to ascertain what the monuments would be, or to establish any. In point of fact, there was no white oak where the corner would have been and no tree at the end of the line. To have moved the whole line over, without further surveying, it would have been necessary to leave out calls for monuments, or put in calls for imaginary ones. He did neither, but put in those he had marked on the line surveyed. The description of the line, as he wrote it, and the parties all accepted it, under these circumstances, the grantor to execute the deeds, and the grantees to hold them as muniments of title, call for just such trees at these points as he had marked. They all knew what trees they were and where they stood. None of them, except the surveyor, knew anything about the courses, and he, by inadvertence, failed to discover the discrepancy. He himself could not have discovered it by looking at the deed alone. If it be supposed that he left the courses unchanged, by design, intending to shift the entire line east, it would not follow that the parties knew anything about it, for the reading of the deed would not have disclosed it. It is their intention, not his, that must control, and for which the jury were under a duty to inquire. In seeking their intention, it must be assumed that they were controlled by what they knew, rather than by things of which they had no knowledge, and it is highly improbable that they knew the line, if run according to the courses, would go about six rods east of all the monuments called for except the first one. All three of the deeds called for the white oak corner and two of them for the black oak corner, both of which natural objects were well known to all the parties. Moreover, the motive by which all parties were actuated in effecting this change of the plan of division, was to give Mrs.

Casto more land at the south end of the line in question. Nothing was said about increasing the area of her lot at the northern end of it. This is a very potent circumstance. The motive in any series of acts is all-pervading in its silent domination of the actors.

This analysis of the parol evidence illustrates the wisdom and justice of the well-settled rule, that marked lines and natural monuments control courses and distances. Its most frequent application is found in cases in which the subject-matter of the inquiry is the identification of a boundary line, but the element of intention enters more or less into every such case. Here, it is unusually prominent, for the reason that all the facts and circumstances, relating to the preparation, execution and delivery of the deeds are shown. Ordinarily, they do not so fully appear. The difference between this case and those in which the rule is generally applied, is one of degree, not of principle. The jury, in arriving at their verdict, wholly ignored this rule. They also returned a verdict clearly inconsistent with the overwhelming weight of practically all the facts disclosed by the evidence, none of which were in dispute. This, of itself, entitles the defendants to a new trial. *Chapman v. Liverpool, etc., Co.*, 57 W. Va. 395, 50 S. E. 601; *Davidson v. Railway Co.*, 41 W. Va. 407, 23 S. E. 593; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686.

For the reasons stated, the judgment will be reversed, the verdict set aside, a new trial allowed, and the case remanded.

(60 W. Va. 1)

R. M. SUTTON & CO. et al. v. CHRISTIE et al.

(Supreme Court of Appeals of West Virginia. April 24, 1906.)

FRAUDULENT CONVEYANCES — LIABILITIES OF PURCHASER.

In order to charge land with the grantor's debts conveyed in fraud of creditors by him to a purchaser for valuable consideration, it is indispensable that it be shown that such purchaser had notice of his grantor's fraudulent intent.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 518.]

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County.

Bill by R. M. Sutton & Co. and others against R. C. Christie and others. Decree for defendants, and complainants appeal. Affirmed.

Hale & Pendleton, Anderson & Easley, and C. W. Smith, for appellants. J. M. McGrath, for appellees.

BRANNON, J. R. M. Sutton & Co. and others filed a bill in equity in the circuit court of Mercer county against R. C. Christie and his wife, Lizzie P. Christie, and M. W. Christie and his wife, Ozello R. Christie, to set aside, as being made with intent to defraud the plaintiffs as creditors of R. C.

Christie, a deed of real estate in the town of Princeton, made by R. C. Christie to a trustee for the benefit of his wife, and a deed for the same property made by R. C. Christie and wife and her trustee to Ozello R. Christie. The bill of the plaintiffs was dismissed, and they appeal.

The property involved was conveyed by R. C. Christie to McNutt, trustee, for the benefit of Christie's wife. At that time Christie was not in debt. None of the debts attacking the deeds then existed; they were incurred by Christie afterwards. It is not shown that Christie was then in debt. He could, therefore, give his wife the property. She gives some evidence to show that she paid him valuable consideration; but it is not necessary to discuss that matter, for he had right to settle the property on her, he not being indebted. If he made the deed intending thereafter to become indebted and not pay, we might say this conveyance was fraudulent; but this is not proven, and this idea is repelled by the fact that he afterwards made and paid debts. But suppose the deeds were tainted with fraud. That does not show that the property can now be subjected in the hands of Ozello Christie. She proves clearly that she paid \$1,600 cash to Lizzie P. Christie for the property; that she had a large part of that sum in bank and put in a note for the balance, and borrowed it of the bank, and thus drew the money out of bank. It is incontestably proven that Ozello Christie paid a fair actual money consideration. She, therefore, cannot be affected, unless it could be proven that Lizzie P. Christie intended by conveyance to Ozello to defraud her husband's creditors, and that Ozello had notice of such intent. The letter of section 1, c. 74, Code 1899, making void transactions made with intent to defraud creditors, contains the provision that: "This section shall not affect the title of a purchaser for valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." The evidence does not fix fraudulent intent on Ozello Christie. Even if we could say that R. C. Christie and wife intended fraudulently to get the property out of her hands by conveyance to Ozello Christie, you must go further and fix on Ozello Christie's participation in that design, or knowledge on her part of her grantor's intent. The evidence does not show this. It is useless and improper to load judicial opinions and reports with mere detail of evidence. There is a large volume in this case. There are two reasons barring a decree against the property. First, I do not see that even if Lizzie P. Christie yet owned the property it could be subjected. Second, but if that be not so, evidence fails to fix any notice of fraud on Ozello Christie. It is suggested that there is error in not giving personal decrees against

R. C. Christie for the debts. The bill asks no such specific relief. No request was made for such decree under the general prayer. The bill being one only to affect the property, and, failing for that, it is not usual to render such decree; and I do not think the omission is error, unless it was asked and refused. We affirm the decree.

(60 W. Va. 3)

DEVANNEY v. HANSON et al.

(Supreme Court of Appeals of West Virginia. April 24, 1906.)

1. CITIZENS—WHO ARE—OF COUNTIES.

A county has no citizen in a legal sense.

2. SAME—PRESUMPTIONS.

A person residing in a state is presumed to be a citizen thereof.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Citizens, § 17.]

3. INTOXICATING LIQUORS — NUISANCES — ABATEMENT.

The word "citizen," as used in section 24, c. 36, p. 363, Acts 1905, means a resident of a county.

4. INTOXICATING LIQUORS—GRANT OF LICENSE.

By section 10, c. 36, p. 357, Acts 1905, a county court is prohibited from granting license to sell intoxicating drinks within two miles of an incorporated city, town, or village, without the consent of its council. A license granted without such consent is void, and sales under it violate the law.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 66.]

5. SAME—CONSENT TO LICENSE.

The written record of an order of a council of a city, town, or village granting its consent to a person to obtain license to sell intoxicating liquors, must be produced to show such consent, or its absence fairly accounted for.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 66.]

6. SAME—NUISANCE—INJUNCTION.

Equity has jurisdiction under section 24, c. 36, p. 357, Acts 1905, to enjoin a nuisance arising from sale of intoxicating drinks at a building contrary to law, and to enjoin the sale thereof, and to abate the public nuisance thus created.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 397.]

(Syllabus by the Court.)

Appeal from Circuit Court, Kanawha County.

Bill by James Devanney against Carl Hanson and others. Decree for defendants, and plaintiff appeals. Reversed.

Mollohan, McClintic & Mathews, for appellant. Carl Hanson and Walker, Lawrence & Co., pro se.

BRANNON, J. James Devanney filed a bill in equity in the circuit court of Kanawha county against Carl Hanson and Walker, Lawrence & Company, alleging that the village of Cannelton is not incorporated and lies in Kanawha county next to the Fayette county line; that about 500 feet from Cannelton is situated the incorporated town of Montgomery, in Fayette county; that there is situated in Kanawha county about one mile

below Cannelton and the particular house stated to be a house owned by Walker, Lawrence & Company, the incorporated town of Union Mines, in Kanawha county; that the county court of Kanawha county had granted license to Hanson to sell spirituous liquor at a house owned by Walker, Lawrence & Company in the village of Cannelton, and that Hanson was there selling liquor contrary to law. The bill alleged that the license from the county court was granted without a permit from the town of Union Mines; that whilst there was presented to the county court a paper purporting to show such permit for such license by the town of Union Mines, in fact it was not such. The bill exhibits a mere certificate purporting to be signed by E. S. Norton, mayor, and C. B. Whitlock, recorder, of the town of Union Mines, stating that the town council had given its consent to Hanson for obtaining such license. The bill averred that said Norton and Whitlock had never signed the paper, and exhibited affidavits by them denying their signatures thereto. The bill charges that a meeting of the council of Union Mines was claimed to have been held, and that it granted such permit, but that no certificate thereof was at the time given to Hanson, and that later at a full meeting of the council on the same day the permit was revoked and refused, and the bill charged that no such consent of council was ever made, that no such permit was granted by said council. The bill claimed that the authority given by the county court was void, and did not justify Hanson in carrying on his business as a retail liquor dealer. The bill prayed that Hanson be enjoined from exercising said license, and selling liquor at said building, and that said building be held a public nuisance and abated as such. A preliminary injunction was awarded which, upon demurrer and motion to dissolve, was dissolved, and the bill dismissed, and Devanney appeals.

One question discussed in the case is right to sue. Chapter 36, p. 350, Acts 1905, re-enacting chapter 32 of the Code of 1899, in section 24, provides that all houses, buildings and places where liquors are sold contrary to law, shall be held as common and public nuisances, "and courts of equity shall have jurisdiction by injunction to restrain and abate any such nuisance, upon bill filed by any citizen, or by the prosecuting attorney of any county or by any state officer, in the name of the state of West Virginia." Devanney's bill states that he is a citizen of Kanawha county. The answer calls for proof of this fact, but it admits that Devanney resides in that county. The statute requires that the individual suing be a citizen. What does that mean? There is no such thing as a citizen of any county. A person may be a citizen of a state or of the Union, because they are sovereign; but a county is a mere subdivision of a state with bodiless executing functions assigned to them by the sovereign in process of government, but they are not sovereign. To be a citizen one

must be "a member of an independent political society and as such subject to its law and entitled to its protection in the enjoyment of civil or private rights." 6 Am. & Eng. Enc. L. (2d Ed.) 15. "A citizen is one who, as a member of a nation or of the body politic of a sovereign state, owes allegiance to and may claim reciprocal protection from its government." 7 Cyc. 133. A county is not an independent political society. It makes no law save in subordination to the state under authority conferred by it. The word "citizen" as used in this statute means only a resident. The statute is intended to protect residents, no matter whether they be aliens or citizens, against illegal liquor selling. However, if that were not the case as Devanney resides in Kanawha county, in the absence of proof to the contrary, "every man is considered a citizen of the country in which he may reside." 7 Cyc. 147.

There are certain statutes involved in the case. Chapter 36, p. 350, Acts 1905, re-enacts chapter 32 of the Code of 1899, touching licenses. The new act in section 10, after providing for the granting of liquor license, contains a clause, "provided that no license shall be issued for the sale of intoxicating liquors within two miles of the limits of any incorporated city, town or village without the consent of the council thereof first be obtained." Section 33, c. 47, Code 1899, and section 9, c. 39, forbid the granting of a liquor license to be exercised within a mile of the corporate limits of a town. Section 20, c. 36, p. 362, Acts 1905, reads thus: "The granting of a license to any person to carry on any business for which a license is required, under any of the provisions of this chapter, shall not be construed to authorize him to carry on said business, unless he shall have complied with all the provisions of law requiring him to make any payment, obtain any certificate or permit, or to do any act as a condition of carrying on any such business." The section just quoted makes a license obtained without permission of a town affected by it of no avail. A license cannot be granted at a place within two miles of a town by the latest act. Even without this section the general law would say that a failure to obtain the town's consent would render the license abortive. The sale of liquor is regarded as an evil. The prerequisites to obtain the license are regarded material, like a condition precedent, and surely the consent of a town having right to refuse consent is a most material prerequisite. Without it there is no license under our law, and it gives no protection. Black on Intoxicating Liquors, § 137. A question discussed in this case is whether the town of Montgomery being in Fayette county and the license granted in Kanawha, the limit of two miles applies to Montgomery. We do not discuss that question, because the bill does not allege that there was no permit from the town of Montgomery. The answer filed in the case

does admit that there was not, but that cannot supply the omission in the bill, especially on a demurrer and a motion to dissolve.

The bill does aver that the council of the town of Union Mines never gave its consent for said license. The answer alleges that a permit was granted by the council of Union Mines and delivered to Whitlock, a member of the council, who failed to deliver it to the county court or any one else, but destroyed the same; that the council rescinded his action granting the permit; that while the council resolved to grant a permit, no written permit was issued; that later it was again voted to grant a permit and Whitlock delivered the certificate filed with the bill to Hanson, and that on it the county court acted in granting license. Now, the bill averring that no such permit was given, and Hanson relying upon the permit, and it being a prerequisite to the granting of a valid license under the law, the statute prohibiting the license without such permit, and it being Hanson's muniment of title or right, the burden rests upon him to show a permit valid by law. The statute requiring town permit is not directory, but prohibitory of license without it. Section 25, c. 47, of the Code of 1899, says: "The council shall cause to be kept, in a well bound book, an accurate record of all its proceedings, by-laws, acts, orders and resolutions." Hanson does not state that the book shows any such action by the council. He does not file an order of the council. All there is touching the action of the council is a mere certificate purporting to be signed by the mayor and recorder that a permit was granted. That is no evidence. If genuine, that is only their opinion of the effect of the action of the council; it is only their declaration. It cannot prove the action of the council. *Roe v. Town*, 45 W. Va. 785, 32 S. E. 224; *Phares v. State*, 3 W. Va. 567, 100 Am. Dec. 777. He should have presented a copy of the actual order of the council from the repository containing the primary and best evidence of the action of the council, or shown some excuse for not so doing. For what does the statute provide for the recordation of proceedings of such an important public body as the council of a city or town? Its acts must be proven by its records. 2 Smith on Municipal Corporations, § 1699; 3 Elliot on Evidence, § 118; *Town v. Miller*, 46 W. Va. 834, 32 S. E. 1017. Oral evidence not admissible to prove council acts, unless the absence of the record is satisfactorily explained. 17 Cyc. 506; *Phares v. State*, 3 W. Va. 567, 100 Am. Dec. 777; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Childrey v. Huntington*, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 318. But in fact Hanson has not only not adduced the record of the council, but has given us no admissible evidence at all. Therefore, we must say that this license was granted without the consent of the town of Union Mines, and is void.

Counsel for Hanson challenges equity

jurisdiction. As the statute declares all houses where intoxicating liquors are sold contrary to law, common nuisances, and thus puts upon them that stamp, equity would have jurisdiction to restrain and abate them under a very old chancery jurisdiction, as I think the authorities cited by me in my opinion in the case of *Hartley v. Henretta*, 35 W. Va. at page 239, 18 S. E. at page 380, will show. To the numerous cases there cited for equity jurisdiction, under the general principles of equity jurisprudence, without aid from any statute, I will add 9 Am. & Eng. Dec. in Eq. 455; *Ex parte Keeler* (S. C.) 23 S. E. at page 867, 55 Am. St. Rep. at page 790; *Hart v. Mayor*, 24 Am. Dec. 165; *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 198, 44 Am. St. Rep. 446. But, however that may be, since the decision of the *Henretta* Case the statute giving equity jurisdiction above quoted has been enacted greatly changing as to jurisdiction section 18 of the Code, chapter 32. Under the new statute equity has unquestionable jurisdiction to enjoin and abate the nuisance declared by it. Counsel for Hanson says that there is a remedy at law by revocation of the license or by certiorari to the action of the county court; but there is nothing in this, because there is the statute pointedly conferring equity jurisdiction. Counsel also says that *Devanney* does not show a personal injury, that he must wait till he is damaged. But the answer is that the law in such case presumes such injury or damage as will enable the resident to maintain a suit. The law of the statute gives him that right without showing any individual injury. He acts for himself as one of the public.

Our conclusion is to reverse the decree, overrule the motion to dissolve the injunction and also the demurrer, and reinstate the injunction, and remand the cause to the circuit court.

(59 W. Va. 418)

WOODS v. KING et al.

(Supreme Court of Appeals of West Virginia.
April 17, 1906.)

ERROR, WRIT OF—BILL OF EXCEPTIONS—EVIDENCE—RECORD.

A bill of exceptions, relied on to make the evidence a part of the record in an action at law, must incorporate, or have annexed to it, the evidence, or contain a sufficient description or other means of identification of such evidence. Otherwise, the bill is insufficient to make the evidence a part of it or of the record. (Syllabus by the Court.)

Error to Circuit Court, Randolph County.

Action by Samuel Woods against Susan G. Elder and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. F. Strader, Marbury & Gosnell, and W. E. Chilton, for plaintiff in error. C. W. Dalley and W. B. Maxwell, for defendants in error.

COX, J. Susan G. Elder, Sophy Stonnard, and William Voss complain of a judgment rendered against them by the circuit court of Randolph county in an action of ejectment instituted by Samuel Woods.

All the assignments of error involve a consideration of the evidence introduced upon the trial in the court below. The bill of exceptions relied on to make the evidence a part of the record is a skeleton bill, designated as "No 1." The original bill was brought here by writ of certiorari. The parenthetical direction to the clerk therein contained is as follows: "(Here insert all the oral and written testimony introduced.)" The evidence directed to be inserted was not incorporated in or annexed to the bill. The bill furnishes no description of, or means of identifying, the evidence directed to be therein inserted, other than the parenthetical direction above quoted; and the parenthetical direction furnishes no means of identifying the evidence. The bill is therefore insufficient to make the evidence a part of it, or a part of the record. For this reason we cannot pass upon the assignments of error involving a consideration of the evidence, but must affirm the judgment. The principles upon which this decision rests have been so often stated that it is unnecessary to repeat them. See *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909; *Tracy's Adm'r v. Carver Coal Co.*, 57 W. Va. 587, 50 S. E. 825; *Dudley v. Barrett*, 53 W. Va. —, 52 S. E. 100; *Railway Co. v. Joyce*, 58 W. Va. —, 52 S. E. 498; *Parr v. Currence*, 58 W. Va. —, 52 S. E. 496.

After the writ of error was allowed in this action, certain affidavits and a certificate of the clerk of the lower court, relating to the time of transcribing the evidence and to the usual practice in that court as to skeleton bills of exceptions and other matters were filed in the lower court and brought here with the return to the writ of certiorari. These do not aid us upon the question presented. The record imports verity, and must stand or fall without the assistance of the affidavits and certificate. *Sweeney v. Baker*, 18 W. Va. 202, 31 Am. Rep. 757; *Koontz v. Koontz*, 47 W. Va. 31, 34 S. E. 752; *Bowyer v. Chestnut*, 4 Leigh (Va.) 1. If the affidavits and certificate could be considered they contain no sufficient matter to change this decision.

We affirm the judgment.

(125 Ga. 109)

SEARCY v. WALKER et al.(Supreme Court of Georgia. March 24, 1906.)
ERROR, WRIT OF—FAILURE TO SERVE—DISMISSAL.

Searcy, as receiver, brought suit against Mrs. Walker, as executrix of J. A. A. West. Pending the suit defendant died. Plaintiff then moved to make parties defendant certain named persons, denominated "the residuary legatees of the estate of West," who were alleged to be in possession of all of his property. The court refused to grant the motion, and at the instance of such persons, and in pursuance of an order previously passed putting plaintiff on terms as to the making of a party defendant, dismissed plaintiff's petition, because no party defendant had been made in pursuance of the order. Plaintiff sued out a writ of error, excepting to the ruling of the court above indicated; and one of the counsel who moved to dismiss the case acknowledged service of the bill of exceptions as "Atty. for estate of J. A. A. West." *Held*, that the writ of error must be dismissed for want of service.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2113.]

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action by W. E. H. Searcy against W. L. Walker and others. From a judgment dismissing the petition, plaintiff brings error. Dismissed.

Henry O. Farr, for plaintiff in error. Foster & Butler, for defendants in error.

FISH, C. J. Writ of error dismissed. All the Justices concur, except BECK, J., disqualified.

(125 Ga. 107)

BOWDEN et al. v. BOWDEN et al.

(Supreme Court of Georgia. March 24, 1906.)

1. APPEAL—EXCLUSION OF EVIDENCE—REVIEW.

"In order for the exclusion of oral testimony to be considered as a ground for a new trial, it must appear that a pertinent question was asked, and that the court ruled out the answer, and that a statement was made to the court at the time, showing what the answer would be; and that such testimony was material and would have benefited the complaining party." *Griffin v. Henderson*, 43 S. E. 712, 117 Ga. 382, (2).

2. SAME—OBJECTIONS TO EVIDENCE.

Grounds of a motion for new trial complaining of the admission of testimony over objection should show what objection was urged at the time of the admission of the evidence, or they will not be considered.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1258.]

3. SAME—OBJECTIONS TO VERDICT.

Exceptions that the verdict is contrary to the charge, or to a specified portion of it, are superfluous, such objections being covered by the general ground that the verdict is contrary to law.

4. TRIAL—NONSUIT.

The testimony introduced by the plaintiffs authorized a finding by the jury in their favor, and there was no error in refusing to grant a nonsuit.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 360.]

5. APPEAL—OBJECTIONS WAIVED.

Grounds of a motion for a new trial not urged nor referred to in the brief of counsel for the plaintiff in error, will be treated as abandoned.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3093.]

(Syllabus by the Court.)

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by John M. Bowden and others, executors of John C. Bowden, against B. H. Bowden and Queen Bowden. Judgment for plaintiffs, and defendants bring error. Affirmed.

Hill & Culpepper, for plaintiffs in error. McLaughlin & Jones and W. R. Jones, for defendants in error.

BECK, J. To a suit for land brought by John M. Bowden and others, as executors of the estate of John C. Bowden, deceased, the defendants, B. H. Bowden and Queen Bowden, his wife, pleaded, that they were joint owners of the property sued for, by virtue of a gift from the plaintiffs' testate, in consideration for services rendered the deceased during his lifetime; that they were put in possession of the place by said John C. Bowden, having made valuable improvements thereon, and have given the land in for taxes and paid the same, as well as exercised "acts of ownership" over it against John C. Bowden and against the whole world, all of which was known and recognized by and acquiesced in by John C. Bowden in his lifetime." By way of amendment to the defendants' plea, B. H. Bowden disclaimed all title to the place, averring the sole owner thereof to be his wife, to whom he alleged the land was given by the deceased in consideration of services rendered by her alone. Subsequently the plea was again amended by having the last amendment stricken and averring that the land was owned jointly by the defendants, as set forth in the original plea. When the case came on to be tried, the jury rendered a verdict for the plaintiffs, and the defendants made a motion for a new trial, upon the general grounds, and because of certain errors alleged to have been committed by the court. A new trial was denied, and the defendants excepted.

1. The first and second grounds of the amended motion ascribe error to the court in refusing to allow one of the defendants to answer certain questions propounded to him by defendant's counsel, but it does not appear that a statement was made to the court at the time showing what the answers would be, or what answers were expected, hence, under the ruling enunciated in the case of *Griffin v. Henderson*, 117 Ga. 382, 43 S. E. 712, which has been repeatedly adhered to by this court, these grounds cannot be considered.

2. The fifth and seventh grounds complain of the admission of certain evidence over the objection of the defendants, but as it is not shown what objections, if any, were urged

at the time the evidence was admitted, this court cannot consider these assignments of error. *Wilson v. Huguenin*, 117 Ga. 546, 43 S. E. 857; *Atlantic & Birmingham R. Co. v. Rabinowitz*, 120 Ga. 864, 48 S. E. 326 (2).

3. The sixth ground alleges that the verdict was contrary to a specified charge of the court. It has been so often and consistently ruled by this court that an objection on the ground that the verdict is contrary to the charge of the court is no more than a complaint that the verdict is contrary to law, and is therefore superfluous where there is a motion for a new trial upon the general grounds, that we deem it entirely unnecessary to cite authority therefor.

4. The testimony introduced by the plaintiffs, if believed by the jury, authorized a finding in their favor, and the court did not err in overruling the motion made by defendants' counsel, that a nonsuit be awarded.

5. The other grounds of the motion were either expressly abandoned, or, not having been urged or referred to in the brief of counsel for plaintiffs in error, will be treated as abandoned. *Tarver v. State*, 123 Ga. 494, 51 S. E. 501.

Judgment affirmed. All the Justices concur.

(125 Ga. 106)

WILLINGHAM v. MATTOX.

(Supreme Court of Georgia. March 24, 1906.)

PARENT AND CHILD—CUSTODY OF CHILD.

It appearing that the trial judge did not abuse his discretion in awarding the child to the respondent in this habeas corpus proceeding, his judgment will not be interfered with by this court.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, §§ 21, 22.]

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Profit, Judge.

Application of Lit Willingham for writ of habeas corpus against N. M. Mattox. From an order denying the writ, petitioner brings error. Affirmed.

Lit Willingham brought habeas corpus proceedings, in an effort to secure the custody and control of Viola Willingham, a minor, against Mattox, alleging that he (Willingham) is the child's father. It appears, from the evidence, that the child was born several years after the plaintiff and his wife (Viola's mother) had separated, and a short time after Lit had filed his libel for divorce. The evidence is conflicting upon nearly all points. The plaintiff testified that he is the child's father, that although he was not living with its mother for some time previous to the child's birth, he had access to her and begat the child; that he had given its mother money and provisions with which to support the child, and had only allowed the mother to keep it as an accommodation to her. The defendant introduced testimony to the effect that the plaintiff had denied on several oc-

casions that he was the father of the child; that he had relinquished all claim he might have to it and abandoned it. The child, who is 14 years old, testified that the plaintiff had never given her a cent in her whole life, except when her mother died, when he gave her 25 cents to help defray her mother's funeral expenses, and that she prefers to remain where she is, in the custody of Mattox, than to live with the plaintiff. The defendant swore that the child's mother had, just prior to her death, consigned the child into his keeping until she becomes of age or marries. There was testimony to the effect that each claimant was a fit and proper person to have the control of the child. The judge awarded her to the custody of Mattox, and Willingham excepted.

Jos. N. Worley, for plaintiff in error. Sam. L. Olive, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(125 Ga. 102)

THOMPSON v. THOMPSON.

(Supreme Court of Georgia. March 24, 1906.)

RECEIVER—APPOINTMENT—GROUNDS.

Where husband and wife occupied a house as a home at the time that he filed a petition against her for a decree declaring the property to be his, and, after she had been served with an order granted in the case temporarily restraining her from renting or otherwise changing the status of the property, she, during the temporary absence of her husband, rented the premises to another, the judge did not abuse his discretion in appointing, upon the prayer of the husband, at an interlocutory hearing, a receiver for the property, upon condition that the plaintiff give bond, as usual in such cases, to indemnify the defendant, the evidence as to the ownership of the property being in conflict; and this is true, though it appeared that the defendant was solvent.

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by W. C. Thompson against M. C. Thompson. From an order appointing a receiver, defendant brings error. Affirmed.

A. H. Cox, C. P. Thompson, and J. D. Kilpatrick, for plaintiff in error. J. F. Rogers, F. C. Foster, and J. E. McClelland, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(125 Ga. 101)

JACKSON v. STATE.

(Supreme Court of Georgia. March 24, 1906.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

On the trial of one charged with assault with intent to murder, after the court had fully and correctly charged the jury as to the law of that offense, including an instruction that a specific intent to kill is a necessary ingredient thereof and that the existence of this intent is not to be presumed, but the jury are to determine

from the evidence whether it has been proved, the accused was not hurt by the following charge: "I instruct you, further, that under the rules I have already given you, and shall hereafter give you, that if you believe in this case that the defendant was guilty of making an assault with intent to murder, with a weapon likely to produce death, upon the person of [the child alleged to have been assaulted], and you believe that if she had killed him it would have been murder under the circumstances, if you believe beyond a reasonable doubt that it would have been murder if she had killed [the child] the person she is charged with making an assault upon, then you would be authorized to find the defendant guilty of an assault with intent to murder."

2. INFANTS—RESPONSIBILITY FOR CRIME.

After giving, at the request of counsel for the accused, the following charge: "A prisoner under the age of 10 is incapable of committing any criminal offense; a person under the ages of 10 and 14 years cannot be lawfully convicted of a crime or misdemeanor unless it appears from the evidence that she was *capax doli*, and the burden of proof that she was so rested upon the state;" it was not error to instruct the jury, in connection therewith, that in order for an infant to be held incapable of committing crime, it must appear that the infant is under 10 years of age; and when the party is shown to be between the ages of 10 and 14 years, the burden is on the state to show that such party knows the distinction between good and evil.

3. CRIMINAL LAW—INSTRUCTIONS—HARMLESS ERROR.

While the definition of "preponderance of evidence," and the rules by which it may be determined where it lies, were not aptly adjusted to the trial of a criminal case, the accused was not injured, when the only evidence introduced was in behalf of the state, and the court instructed the jury that the evidence must show the guilt of the accused beyond a reasonable doubt, before a conviction would be authorized.

4. HOMICIDE—ASSAULT WITH INTENT TO KILL.

There was evidence to warrant the verdict, and the judge did not abuse his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Rosa Jackson was convicted of assault with intent to murder, and brings error. Affirmed.

Jno. R. Cooper, for plaintiff in error. B. D. Graham, Sol. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(125 Ga. 198)

BORUM v. SWIFT & CO.

(Supreme Court of Georgia. March 28, 1906.)

FRAUDS, STATUTE OF—SALE—CONTRACT—AMBIGUITY.

Where, on the trial of an action for the breach of a written agreement for the sale and delivery of a given number of pounds of "ribs," of the value, at the agreed price, of more than \$50, the evidence showed that the term "ribs" is ambiguous, even to dealers in the general class of goods to which the alleged contract referred—there being several distinct kinds of "ribs" known to the trade—and that the plaintiff understood, from a parol agreement with the defendant, that the "ribs" referred to in the writing were of a particular kind and of a given average weight, the writing did not suffi-

ciently identify its subject-matter nor contain the entire agreement, as required by the statute of frauds, and therefore the plaintiff could not recover.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 237.]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by D. M. Borum against Swift & Co. Judgment for defendant, and both parties bring error. Affirmed on main bill of exceptions, and cross-bill dismissed.

This was an action by D. M. Borum against Swift & Co. for the breach of an alleged contract for the sale and delivery of meat. The petition made the following allegations: On December 27, 1902, Swift & Co. sent a telegram to Borum, which was as follows: "Sorry cannot confirm sale one hundred fifty thousand pounds ribs eight seven-eighths c. a. f. best can do 8.95 c. a. f., January delivery ten points covering charge one half cent margin after January immediate acceptance wire." Borum immediately accepted this offer by telephone. He subsequently ordered Swift & Company to ship the meat, in accordance with the contract, in January, 1903, which Swift & Co. declined to do. The market price of the meat, at the time and place of delivery, was 9.7 cents per pound, making a difference between the market value and the contract price of \$1.10, for which the plaintiff sought to recover. The defendant filed certain demurrers, which were overruled, and it excepted *pendente lite*. The defendant, among other things, pleaded the statute of frauds. When the case came on for trial, it was, by agreement, submitted to the trial judge for determination, without the intervention of a jury. The plaintiff introduced in evidence the telegram set out in his declaration, and testified that he accepted the offer therein made, over the telephone. He also testified as to the meaning of the telegram, according to mercantile custom and usage. He further testified, that he was a dealer in meat and had been engaged in that business about 20 years; that there are different kinds of ribs known to the trade. "I call smoked ribs, smoked bacon. There are bacon ribbed sides and bacon clear sides, bacon under clears, etc. There is only one kind of dry salt ribs. It is owing to the cut that gives it a different meaning. There is one known as hard ribs, all the backbone is on one side of the side; rough ribs are the backbone split open right down the middle, half the backbone on one side and half on the other, and in short ribs it is the ribs with the side on it, without either part of the backbone. What I was dealing with him [the agent of Swift Company] was for the dry salt ribs, which was the backbone split open. It was not dry hard salt ribs that I was dealing for, but dry salt rough ribs. I understood that I had bought from him dry rough salt ribs, meaning salt meat. Of course,

it didn't come out of a cow. It was hog ribs, dry salt hog ribs, 40 to 45 pounds. I was not buying beef ribs; hog ribs, but not cured. * * * The weight was understood, an average of 40 to 45 pounds. I told him over the telephone what sort of meat, dry salt ribs with split backbone. I told him that, and every time on both deals. I didn't want anything else. That was in reply to the telegram, both of them." He further testified that he ordered 75,000 pounds shipped on January 23, 1903, that Swift & Co. refused to make the shipment, and that the market value of dry salt rough ribs at the time and place of delivery was 9.7 cents per pound. The plaintiff also introduced in evidence the interrogatories of an agent of Swift & Company, sued out by the defendant, wherein the witness testified that he had general supervision over the provision branch houses of Swift & Company in December, 1902, and that on December 27, 1902, he "booked" D. M. Borum, on the order of Purcival, another agent of Swift & Co., and the one who sent the telegram to Borum, "150,000 pounds dry salt hard short ribs at \$8.95." The defendant introduced no evidence. The court rendered a judgment in favor of the defendant, to which the plaintiff excepted. The defendant filed a cross-bill of exceptions, in which it assigned error upon the exceptions pendente lite to the overruling of its demurrers.

Hardeman & Jones, for plaintiff in error.
Shipp & Sheppard, for defendant in error.

FISH, C. J. (after stating the facts). The agreement for the breach of which this suit was brought was for the sale of merchandise of the value of more than \$50; and, under the statute of frauds, to be enforceable, it had to be in writing. Civ. Code 1895, § 2693 (7). As no provision is made for oral evidence as to part of the terms, omitted from the writing, it must, in general, set forth with sufficient certainty the essentials of the agreement. Of course, a subject-matter is one of the essentials to a valid contract, and it is necessary that it be set forth with such certainty that it can be identified without resorting to oral evidence of the intention of the parties to supplement the terms of the writing as to what the subject-matter is. "Technical accuracy of description is not necessary; but as the entire contract must be proved by the writing, the description must be such as to specify the subject-matter, so that one familiar with such subject-matter can identify it, without further evidence of the intention of the parties direct." 2 Page on Contracts, §§ 696, 699, 700. That the subject-matter must be clearly identified in the writing, see *Smith v. Jones*, 66 Ga. 338, 42 Am. Rep. 72; *North v. Mendel*, 73 Ga. 404, 54 Am. Rep. 879; *Douglass v. Bunn*, 110 Ga. 159, 35 S. E. 339. In *Stewart & Son v. Cook*, 118 Ga. 541, 45 S. E. 398, the contract provided for the delivery of a certain number of "bales" of cotton, and the evidence showed

that the term "bales" was ambiguous and denoted more than one weight, and that the parties had a specified agreement as to what weight was meant. The writing was held to be insufficient to meet the requirements of the statute of frauds, as it affirmatively appeared that the contract was partly in writing and partly in parol, and the terms of the statute were not met. It seems to be uniformly held that an agreement within the statute of frauds can not be enforced unless the writing or writings, identify with certainty the terms of sale and the subject-matter. 1 Reed on St. Frauds, § 408; Browne on St. Frauds, § 385, and cases cited by these authors. The term "ribs," used in the telegram, is manifestly ambiguous to the general reader, and, according to the testimony of the plaintiff himself, this term, unaccompanied by descriptive adjectives, is also ambiguous to those dealing in the general class of merchandises to which the alleged contract referred. He testified that there are several kinds of "ribs," which he enumerated, known to the trade. And in order to show the kind and character of meat to which the written offer of the defendant, which he testified he accepted over the phone, referred, he had to resort to parol evidence, and to resort to it not for the purpose of showing that the term "ribs" had a definite meaning to dealers in meats, but for the purpose of showing what the particular subject-matter of the agreement was, not as expressed in the writing, but as expressed by the parties in parol. It appears, from his testimony, that the term "ribs" has no definite or specific meaning even among dealers in meat; and when Borum testifies that he was contracting for dry salt rough ribs, of an average weight of 40 to 45 pounds, it is clear that the telegram did not contain all the terms of the contract; which brings the case clearly within the ruling made in *Stewart & Son v. Cook*, supra. In that case it was said: "The law requires that the contract of sale shall be in writing (Civ. Code 1895, § 2693, par. 7.); by which it of course means the entire contract, with all stipulations and provisions which have been assented to by the parties at the time of the sale. Where some of the terms are in writing and others in parol, the requirements of the statute are not met."

The plaintiff offered to introduce in evidence various letters and telegrams, which passed between the agent of the defendant who sent the telegram to Borum, and the agent of the defendant having general supervision of the defendant's provision branch houses, some of which letters and telegrams referred to the transaction in question, while others referred to previous negotiations between the parties, from which no agreement was claimed to have resulted. They were all excluded by the court, and their exclusion is complained of in the bill of exceptions. "All that is required [by the statute of frauds] is written evidence of the agreement, and

therefore the memorandum may consist of letters written by the party to be charged to his own agent, or to other third persons. The memorandum may even consist of entries made by the party to be charged on his or his agent's books; and entries in the records of a corporation may prove a contract by it." Clark on Contracts, p. 83, and cit. While this is well settled, yet, as there can be no contract without the assent of both parties, the party relying upon the memorandum to show the terms of the contract must show that he assented to those terms. It is not necessary to show that he assented in writing, but it is obviously necessary for him to show that he did assent. An examination of the letters and telegrams excluded by the court shows that where "ribs" are referred to at all, it is as "dry salt hard short ribs," which, according to the testimony of the plaintiff, were not the kind that he agreed to purchase from the defendant. So the excluded evidence, if it had been admitted, would not have tended to prove the contract as the plaintiff claimed it to be. For, although the written evidence admitted and some of the written evidence excluded, when construed together, might have been sufficient to meet the requirements of the statute of frauds, if the proof had shown that the terms of a contract, as expressed in these writings, had been accepted or assented to by the plaintiff, yet as they would not have shown the contract to which the plaintiff testified and upon which he relied, the exclusion of this evidence was not harmful to the plaintiff. He could not recover because the defendant had failed to comply with an offer, the terms of which were deducible from the telegram admitted in evidence and some of the memoranda excluded from the evidence, when, according to his testimony, he did not accept this offer, but a different one.

Our conclusion is that the telegram introduced in evidence did not contain the entire contract upon which the plaintiff relied, and, therefore, did not meet the requirements of the statute of frauds; that an action would not lie for a breach of the contract; and that the court did not err in finding for the defendant.

Judgment affirmed on main bill of exceptions. Cross-bill dismissed. All the Justices concur.

(125 Ga. 219)

CENTRAL OF GEORGIA RY. CO. v. SHIVERS et al.

(Supreme Court of Georgia. March 28, 1906.)
MECHANICS' LIENS—PROPERTY SUBJECT.

A railway company leased a parcel of land to one for 20 years, upon a consideration that the lessee would erect thereon a building to be used as a warehouse only, and that all goods received by the lessee should be routed over its line of road. The building was to be the property of the lessee, removable by him at the expiration of the lease. The lessee purchased from a materialman articles needed in the erec-

tion of the building, and failed to pay for the same. The materialman filed a claim of lien against the lessee and the railway company, claiming a lien upon the building and the land. *Held*, that a petition filed against the lessee and the railway company, for the purpose of foreclosing the lien and subjecting the land and the building to the payment of the debt for materials furnished, set forth no cause of action against the railway company, and should have been dismissed as to it, on demurrer.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanic's Liens, § 80.]

(Syllabus by the Court.)

Error from City Court of Americus; Z. A. Littlejohn, Judge.

Action by J. W. Shivers and others against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Shivers brought suit against Ansley and the Central of Georgia Railway Company and alleged: Petitioner, as a materialman, furnished material for the erection of a warehouse, amounting to \$1,216.59, to Ansley, who, as a tenant of the railway company, was erecting the warehouse on land owned by it, and furnished further material, in the same transaction, amounting to \$53.47. Petitioner filed his claims of lien against the railway company as required by the statute, and brought suit to foreclose the same within 12 months from the date of recording his liens. The railway company had leased the land upon which the warehouse was erected to Ansley for 20 years, in consideration of Ansley's erecting the warehouse, using the land for no other purpose, and routing his freight by the railway company's line of road. No rent was to be paid for the property. At the expiration of the lease, Ansley was to have the privilege of removing all improvements erected thereon by him. He obligated himself not to sublet the premises. Upon his failure to carry out any stipulations of the lease the railway company might enter upon the property after 30 days' notice. The railway company demurred to the petition, on the ground that it set forth no cause of action. The demurrer was overruled, and the railway company excepted.

Wm. D. Kiddoo, for plaintiff in error. W. P. Wallis and W. A. Dodson, for defendants in error.

COBB, P. J. (after stating the foregoing facts). Civ. Code, § 2801, par. 2, as amended by the act of 1899, provides: "When work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other person than the owner, then and in that case the lien given by this section shall attach upon the real estate improved, as against such true owner, for the amount of the work done, or material furnished, unless such true owner shows that such lien has been waived in writing, or produces the

sworn statement of the contractor, or other person, at whose instance the work was done or material was furnished, that the agreed price or reasonable value thereof has been paid; provided, that in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made." Van Epps' Code Supp. § 6176. In construing the words "or some other person," this court, in the case of Pittsburgh Plate Glass Co. v. Peters Land Co., 123 Ga. 726, 51 S. E. 725, said: "Thus interpreting the statute, it would mean that a materialman who furnished material for the improvement of real estate to one who occupied the legal relation of contractor, or one who had some contractual relation with the true owner in connection with the improvements to be made, would have a lien, and that no one else would. The word contractor is not to be construed in its technical sense, which would embrace any person who had any contract of any character, but is to be given its limited, colloquial sense, meaning a person engaged in the business of making contracts for the improvement of real estate, and the other persons referred to in the statute embrace that class who may furnish material for the improvement of real estate but may not be engaged in a business commonly known as the business of a contractor." In the present case a materialman claims a lien for material furnished for the improvement of real estate at the direction of a tenant. A tenant does not come within the meaning of the phrase "contractor, or some other person," as above construed. It is true that the instrument under which Ansley became a tenant specifically provides for the erection of the warehouse, into the erection of which the materials of the plaintiff went. But this instrument cannot put Ansley in the relation of a contractor to the railway company. The warehouse is to be erected by him, and becomes his individual property, removable at the expiration of his lease. The railway company neither expressly nor by implication assumes any liability for the erection of the warehouse, and there is nothing which can be construed as a contract between it and Ansley under which Ansley is erecting the warehouse at the railway company's expense, save that the erection of it by Ansley is a consideration for the railway company's leasing to him the premises.

It seems to be the purpose of the statute to charge the owner of real estate with a lien for material furnished only when there was a specific contract for the improvements made, either made by the owner or assented to by him. And here there is no contract of any character. The statute provides that "in no event shall the aggregate amount of liens claimed exceed the contract price of the improvements made." There could be no limit

upon the true owner's liability for material furnished, unless the material was furnished under some contract to which he was a party expressly or by implication. In *Stevens v. Georgia Land Co.*, 122 Ga. 317, 50 S. E. 100, it was held that in order for the materialman to make out a prima facie case against the true owner, it is incumbent upon him to show that the amount for which he asserts a lien comes within the contract price agreed upon between the contractor and the owner of the property. In *Rowell v. Harris*, 121 Ga. 240, 48 S. E. 948, it was said: "The money as it becomes due is charged with a lien as against the contractor in favor of the subcontractor, material men, and laborers. On the other hand the land is charged with a lien as against the owner for the purpose of securing the payment of the contract price, and creating the fund out of which the subcontractors and laborers may be paid. * * * But if nothing becomes due to the contractor, there is nothing caught. There is no fund out of which those employed by him are to be paid. * * * The materialmen and laborers stand in his [contractor's] shoes, and recover out of what is due him. That failing, they have no claim against the landowner." There need be no contract between the materialmen and the true owner, but there must be a contract for material with a person who has contracted with the true owner for the erection of the improvements. A contract is necessary to fix the liability of the owner, and establish a privity between him and the materialman. A stranger may not order work done upon real estate and thus charge the true owner. Neither may a tenant, unless there is some relation existing between him and his landlord other than that of lessor and lessee. In the case of *Repperd v. Morrison*, 120 Ga. 28, 47 S. E. 554, it was held that a landlord will not become liable for improvements made at the direction of the tenant, unless he expressly or impliedly consents to the contract under which the improvements are made. The railway company consented that a building might be erected on its land, but it never gave its consent to any contract for its erection or the furnishing of materials to be placed therein. It is by no means clear in the present case that the instrument under which Ansley entered was a lease. It may be that it was no more than a mere license. It is not necessary, under the view we have taken of the case, to determine the exact character of this instrument; and we have treated it as a lease, for the purpose of this case. The petition set forth no cause of action against the railway company, and the demurrer should have been sustained.

Judgment reversed. All the Justices concur.

(73 S. C. 403)

GREEN v. SCRUGGS et al.

(Supreme Court of South Carolina. March 8, 1906.)

CHattel Mortgages—Credits on Debt.

Where a mortgagee takes part of the mortgaged property without selling the same as authorized by Civ. Code 1902, § 3004, the mortgagor has a right to treat it as the mortgagee's property, and is entitled to credit on the mortgage debt to the proportion in value that the property taken bears to the entire property mortgaged.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 302-304.]

Appeal from Common Pleas Circuit Court of Cherokee County; Townsend, Judge.

Action by T. A. Green against George D. Scruggs and M. J. Hicks. From an order of the circuit court, reversing a judgment of the magistrate, plaintiff appeals. Reversed.

R. K. Carson and W. S. Hall, Jr., for appellants. Butler & Osborne, for respondent.

WOODS, J. This action was brought by T. A. Green in a magistrate's court to recover \$48.58, on alleged unpaid balance on a promissory note dated August 16, 1901. When the note was given it was secured by chattel mortgage on a buggy, a wagon, and a set of harness. The mortgage provided upon default this property might be sold at public auction for cash on five days' notice, the proceeds of sale to be applied to the debt and the cost and expenses of collection, and the surplus, if any, paid to the mortgagors. The buggy was seized, and, at a sale made as required by the mortgage, brought \$2.50. The harness was seized, but never sold or accounted for. The wagon was not taken from the defendants. The magistrate held if the mortgagee had seized the entire property and had converted it to his own use without a sale, as provided by the contract, this would have operated as a satisfaction of the entire debt; but as the mortgagee had so converted the harness only and had duly advertised and sold the buggy, there should be a credit on the mortgage debt to the extent and in the proportion that the value of the property converted bore to the value of the property sold, and gave judgment accordingly for \$19.65 and \$6 costs. Subsequently, the magistrate granted a new trial on the ground that he should have allowed the credit in the proportion that the value of the property converted bore to the value of the whole property mortgaged, including the wagon. On appeal the circuit court held that the seizure and conversion of the harness, though only a portion of the mortgaged property, without sale as provided by the contract, operated as a satisfaction of the entire debt.

It is remarkable that so little authority can be found on the precise point in issue. Our statute provides: "When any personal property under pledge, mortgage or hypothe-

cation is to be sold for the purpose of satisfying the loan or debt secured by such pledge, mortgage or hypothecation, the pledgee, mortgagee or person holding the instrument showing the hypothecation shall advertise the time and place of said sale by posting a notice thereof, in writing, at least (15) fifteen days before such sale in three (3) public places in the county in which such personal property may be found, one of which shall be the courthouse door, or shall publish the same at least two weeks in a newspaper published in his county, unless the person making such pledge, mortgage or hypothecation, or his legal representative, shall consent, or shall have consented, to a sale in some other mode or at some other notice, such consent to be expressed in writing." Civ. Code 1902, § 3004. But for this statute, and the force given to it by the court in the cases hereafter mentioned, we should regard the case of *Moody v. Haselden*, 1 S. C. 129, conclusive of the question. In that case, the debt being secured by a mortgage on land and slaves, the mortgagee seized the slaves, but returned them to the mortgagor, taking from him a bond for their forthcoming on sales day in March, 1862; and they remained in the hands of the mortgagor uncalled for until lost by emancipation. It was not held that the seizure of the mortgaged property operated as a satisfaction of the mortgage, though the action of foreclosure was between the assignee of the mortgage and the purchaser of the land from the mortgagor, but that the purchaser of the land had an equity to require the value of the slaves at the time of the seizure to be applied as a credit on the mortgage, and the lien of the mortgage on the land reduced to that extent.

In 1879, long after this case arose and was decided, the statute, which is quoted above in its amended form, was enacted, regulating the sale of chattels by mortgagees. In construing this statute, it was said in *Bank v. Holman*, 31 S. C. 161, 169, 9 S. E. 824, that if a mortgagee converts the property to his own use, "he is still liable to account to the mortgagor for any excess in its value over and above the mortgage debt; and if such value is less than the mortgage debt, he forfeits or waives all claims against the mortgagor for any deficiency, by reason of his illegal conduct in dealing with property entrusted to him for a specific purpose and to be dealt with in the manner prescribed by law. So if the mortgagor undertakes to sell in any other way than that prescribed, he thereby converts the property to his own use, and the same consequences follow." It is true, the case was decided on other grounds, but the language above quoted was the expression of the views of Associate Justice McIver, in which Chief Justice Simpson concurred, and is, therefore, entitled to the greatest consideration. In that case, however, it is important to observe the discussion was limited to the effect of a seizure

and conversion without a statutory sale of the entire mortgaged property; and the conclusion reached by the court is strengthened by the application of this other well-established principle; if the mortgagee acquires the entire mortgaged property by private sale to him, in the absence of special circumstances not involved here, his acquisition of the title operates as a satisfaction of the mortgage. So if the mortgagee converts the entire property illegally, the mortgagor may elect to regard him as having acquired the title, and claim from him the same benefit he would have been entitled to if the title had been rightfully acquired, that is, the extinguishment of the mortgage. It has never been held, however, that the purchase of a portion of the mortgaged property by the mortgagee operates further than an extinguishment of the mortgage to the extent of the proportion in value that the portion purchased by the mortgagee bears to the entire property mortgaged. *Hull v. Young*, 29 S. C. 64, 6 S. E. 938.

The most advantageous position that can be taken by the mortgagors in this case is that the mortgagee seized and converted to his own use the harness, and that they now elect not to assert their statutory right to have the harness sold, at public auction, but to treat it as mortgagee's property, though wrongfully acquired, and recognize his title. To this state of facts the doctrine stated in *Hull v. Young*, supra, which is entirely consistent with the views expressed by the court in *Bank v. Holman*, supra, is applicable; and the result is that the mortgagor was entitled to credit for the harness on the mortgage debt to the extent of the proportion in value that the harness bore to the entire property mortgaged.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded by that court to the magistrate's court for the new trial ordered by him.

(73 S. C. 396)

WILSON v. COX et al.

(Supreme Court of South Carolina. March 1, 1906.)

MANDAMUS—WHEN GRANTED.

Mandamus will not lie to compel dispenser of a certain county to open and operate a dispensary where, in order to do so, the court would be compelled to set aside an election already held at which the vote was in favor of no dispensary.

Petition by J. S. Wilson for a writ of mandamus against J. El. Cox and others. Dismissed.

W. Boyd Evans, for petitioner. J. P. Carey, opposed.

GARY, A. J. This was an application to Mr. Chief Justice Pope, and by consent heard by this court in the exercise of its original jurisdiction, for a writ of mandamus requiring the respondents, who were the mem-

bers of the county boards of control, and the dispenser of Pickens county, to open and operate the dispensary at Pickens. The petition alleges that the respondents, on the 19th of June, 1905, unlawfully closed the said dispensary, and refused to open and operate the same. That there is no other dispensary in said town and county, and by said illegal action, the petitioner and other citizens are deprived of their right and privilege to purchase alcoholic liquors at said dispensary. The petition does not set forth the facts which render the closing of the dispensary illegal. A rule was issued requiring the respondents to show cause why the prayer of the petition should not be granted. They made a return setting forth the various proceedings which resulted in an election against the dispensary and the closing of the same. The relator filed a reply to the return, alleging numerous grounds of illegality in the election, and that the statute commonly known as the "Brice Act" was unconstitutional. The last mentioned ground was, however, abandoned. A special referee took the testimony, and reported his findings of fact as to the several steps in the said election, which, at least in the main, showed that it was valid.

The first question for consideration is whether proceedings by mandamus are the appropriate remedy. The office of the writ of mandamus is thus well expressed by Mr. Justice White, in the case of *International Cont. Co. v. Lamont*, 155 U. S. 303-308, 15 Sup. Ct. 97, 98, 39 L. Ed. 160: "It is elementary law that mandamus will only lie to enforce a ministerial duty, as contradistinguished from a duty which is only discretionary. * * * Moreover, the obligation must be both peremptory and plainly defined. The law must not only authorize the act (*Commonwealth v. Boutwell*, 13 Wall. [U. S.] 528, 20 L. Ed. 631), but it must require the act to be done. 'A mandamus will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do' (*Reeside v. Walker*, 11 How. [U. S.] 272, 13 L. Ed. 693. See, also, *Secretary v. McGarrahan*, 9 Wall. [U. S.] 298, 19 L. Ed. 579) and the duty must be 'clear and indisputable' (*Knox County Commissioners v. Aspinwall*, 24 How. [U. S.] 376, 16 L. Ed. 735)." This language is quoted with approval in *Lord v. Bates*, 48 S. C. 95, 28 S. E. 213.

Before the court could issue the writ of mandamus, it would be necessary for it to declare the election null and void by reason of the various acts of alleged illegality. It cannot be successfully contended that the duty of the respondents is ministerial, or clear and undisputable, when the law forbids the operation of the dispensary unless the election should be set aside.

The judgment dismissing the petition has already been filed.

WOODS, J. (concurring). I concur in the view that the election could not be adjudged invalid and set aside in a mandamus proceeding. But aside from that, the election was valid, and the petition would have to be denied on the merits. The only objection relied on by the petitioner was that the supervisor appointed the managers and performed all other duties as to this election, which under the law should have been performed by the commissioners of election, and that the managers, therefore, acted without authority.

The act under which the election was held provides that upon the petition therein mentioned being filed with the county supervisor, "he shall order an election submitting the question of 'Dispensary' or 'No Dispensary' to the qualified voters of such county, which shall be conducted as other special elections." 24 St. at Large, p. 486. The reasonable interpretation to be given to this clause of the statute of 1904 is that the special election therein provided for should be conducted as other special elections, provision for the conduct of which was made by the law of force at the time the statute was enacted. The only statutory provisions for holding special elections in force when this statute was enacted are to be found in chapter 10, art. 1, of the Civil Code of 1902. It is therein provided that "all general or special elections held pursuant to the Constitution of the state shall be regulated and conducted according to the rules, principles and provisions herein prescribed." It is subsequently enacted in the same chapter that the commissioners of election shall appoint managers, and perform the other duties relating to the conduct of an election here undertaken and performed by the supervisor. In this respect, therefore, the election was plainly not conducted according to law. But it was conducted by managers who were de facto officers acting in good faith, believing the law required of them and the supervisor the duties they respectively undertook to perform; and the election was in all respects fair. In appointing the managers and performing other duties which the law assigns to the commissioners of election, the supervisor also acted under the mistaken belief that these duties devolved upon him. The petitioner does not allege he did not have notice before the election of these errors; on the contrary, full publicity was given to all these facts by the advertisement of the election. The question to be passed on by the electors was hotly contested and fully canvassed, and there was no objection to the regularity of the election until after the result was announced. In these circumstances it is too late for those who relied on winning the election to attack its validity because one officer performed the duties of others, with full knowledge of the voters and others interested, no objection whatever being interposed until after the trouble and expense of the election had been

incurred, and the result ascertained. The election was valid because fairly conducted by de facto officers. *Donaldson v. Townsend*, 1 McMul. (S. C.) 495; *McCrary on Elections*, § 251; *Cooley's Const. Limitations*, 778; *People v. Cook* (N. Y.) 59 Am. Dec. 451.

(73 S. C. 293)

Ex parte SAVINGS BANK OF ROCK HILL.

WHITE v. COMMERCIAL & FARMERS' BANK OF ROCK HILL.

(Supreme Court of South Carolina. March 1, 1906.)

1. BANKS AND BANKING—VOLUNTARY LIQUIDATION—ASSETS—LIEN OF CREDITORS.

An incorporated bank went into liquidation, being solvent, and turned over its assets to another incorporated bank to pay the creditors and stockholders. Before the liabilities of the liquidating bank were paid, the purchasing bank became insolvent. *Held*, that a creditor of the liquidating bank has a prior lien over the assets in the possession of the receiver of the purchasing bank belonging to the liquidating bank as against the creditors of the purchasing bank.

2. APPEAL—OBJECTIONS NOT RAISED BELOW.

Where the question of limitations was not passed upon below, it cannot be considered on appeal.

Appeal from Common Pleas Circuit Court of York County; Gage, Judge.

Action by A. H. White against Commercial & Farmers' Bank of Rock Hill. The Savings Bank of Rock Hill filed a petition praying that the assets of the bank be applied to the claim on which suit was brought against the stockholders of such savings bank. From the decree the petitioner appeals. Reversed.

Wm. J. Cherry, for petitioner. Wither-
spoon & Spencer and Thos. F. McDow, for respondents.

GARY, A. J. This is a petition on the part of two stockholders of the Savings Bank of Rock Hill, praying that certain assets formerly belonging to said bank be applied to the extinguishment of the claim upon which suit was brought against them by a creditor of the bank.

The facts are as follows: In 1898, the Savings Bank of Rock Hill decided to go into liquidation. At that time it was in a sound financial condition, with assets sufficient to pay all outstanding liabilities, and \$133 on each share of stock. Sufficient assets of the bank were turned over to the National Bank of Rock Hill, to pay the stockholders of the Savings Bank 80 per cent. upon their shares of stock. These stockholders and those of the National Bank combined and formed the National Union Bank of Rock Hill. Subsequently, the remaining assets of the Savings Bank, amounting to about \$67,000, were sold to the Commercial & Farmers' Bank, with the understanding that it would pay to the stockholders of the Savings Bank \$53 per share, and also, the outstanding liabilities of the latter bank, which assets were

sufficient for that purpose. The transfer of the assets was made in good faith. The Commercial & Farmers' Bank was then solvent, and all stockholders and creditors who presented their claims were promptly paid. One of the outstanding obligations of the Savings Bank, at the time its remaining assets were transferred to the Commercial & Farmers' Bank, was a certificate of deposit for \$1,000, issued by the Savings Bank to A. A. McDonough, who was a nonresident and died outside the state. His certificate of deposit was not presented by his legal representative until the Commercial & Farmers' Bank had become insolvent and gone into the hands of a receiver. Among the assets of the Savings Bank transferred or sold to the Commercial & Farmers' Bank, were a note and mortgage on a tract of land, for several thousand dollars, executed by J. Edgar Poag. The mortgage was foreclosed, and the land conveyed to the said receiver, who, as such, is now in possession thereof. The administrator of McDonough's estate recovered judgment against the Savings Bank in 1903; execution was issued, and after a return of nulla bona, he commenced action against the petitioners.

The administrator proved said claim, against the Commercial & Farmers' Bank, after it became insolvent, without the assertion of a lien on the proceeds arising from the sale of the Poag property, and has received a dividend from that bank, amounting to \$361.83. The special referee finds that the administrator did not thereby waive any of his rights in the premises. The special referee recommended that the prayer of the petition be granted, and based his conclusion on the principles stated in 10 Enc. p. 1367d. On hearing the exceptions to the report of the special referee, his honor, the circuit judge, filed a decree, in which he stated that he concurred with the special referee in all his conclusions except that in which he held that the creditor of the Savings Bank has a priority over the creditors of the Commercial & Farmers' Bank to be paid out of the Poag mortgage. This, then, is the vital question in the case, and involves the construction of the agreement under which the Commercial & Farmers' Bank came into possession of the said assets. The only fact which the special referee found as to the terms of the contract are, "that the remaining assets of the Savings Bank, amounting, according to the statement submitted before me, to \$67,000, were then sold to the Commercial & Farmers' Bank, another new bank just organized and commencing business, with the understanding that the Commercial & Farmers' Bank would pay to the stockholders of the Savings Bank \$53 per share, and also pay the outstanding liabilities of the Savings Bank."

1. It will be well, at the outset, to determine the relation which the Savings Bank sustained to its assets and creditors. In the case of *Railroad Co. v. Howard*, 7 Wall. (U. S.) 392, 406, 19 L. Ed. 117, the doctrine is

thus announced: "Equity regards the property of a corporation, as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it, into whosoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profits, until all the debts of the corporation are paid. * * * If the fund has been distributed among the stockholders, or passed into the hands of other than bona fide creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts. * * * Creditors are preferred to stockholders, on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporate body, are regarded as sustaining in that respect the same relation to the former as that sustained by the corporation." These principles are recognized in the case of *Dabney v. Bank*, 3 S. C. 124. It is thus made apparent that the assets, while in the hands of the Savings Bank, were a trust fund for the payment of its creditors. Our interpretation of the contract is, that although it was the intention of the parties to vest the legal title to the assets in the Commercial & Farmers' Bank, it was, nevertheless, likewise intended that the last mentioned bank should assume the same relation to the assets and creditors that was imposed on the Savings Bank. In other words, that the Commercial & Farmers' Bank was substituted in the place of the Savings Bank, with all its rights, and with all the incidental burdens, relative to said assets and creditors. The Commercial & Farmers' Bank came into possession of the assets, knowing that they were impressed with a trust. It entered into an agreement to discharge all the duties that rested upon the Savings Bank as a trustee, in so far as they affected the rights of its creditors. Having undertaking to discharge the duties of a trustee, it must be regarded as a trustee. One of the duties which it must be held to have assumed, under the terms of the agreement, was to administer the trust estate which came into its possession, in such a manner that the trust would be carried into effect and not defeated. There was no intention to deprive the creditors of their right to subject the assets to the payment of their claims, as long as the assets remained in the hands of the substituted trustee. Furthermore, when the assets were disposed of, the Savings Bank did not receive the consideration in money, which would have become an asset out of which its creditors could have been paid; but the consideration was a promise on the part of the Commercial & Farmers' Bank which it did not wholly fulfill. The

administrator of McDonnough's estate, therefore, stands upon higher ground than the creditors of the Commercial & Farmers' Bank, as to the proceeds arising from the foreclosure of the mortgage executed by Poag.

2. The respondents gave notice that they would ask that the judgment of the circuit court be affirmed, upon the additional ground that the statute of limitations should have been sustained. The circuit judge in his decree says: "This conclusion renders it unnecessary to consider the plea of the statute of limitations sought to be set up by the defendants, and which I would allow to be made if necessary to the protection of the defendants." This court cannot consider the statute of limitations, as the circuit court has not made a ruling thereon. All questions relating to the statute of limitations will be left open for determination, when the case is remanded. We must not be understood as intimating any opinion whatever, upon the questions left open.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for the sole purpose mentioned in the opinion.

(141 N. C. 161)

HARWOOD et al. v. SHOE et al.

(Supreme Court of North Carolina. April 17, 1906.)

DEEDS — NONPERFORMANCE OF COVENANT OF GRANTEE—EXCUSE.

The prospective heirs of a grantor in a deed containing a covenant binding the grantee to support her, compelled him to leave the premises and by force prevented him from carrying out his obligations. *Held*, that the heirs on the death of the grantor could not insist on a forfeiture of the conveyance on account of the grantee's nonperformance of his covenant.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 520.]

Appeal from Superior Court, Stanly County; Long, Judge.

Action by Howell Harwood and others against John F. Shoe and others. From a judgment granting insufficient relief, plaintiffs appeal. Affirmed.

Partition proceeding. Defendant Shoe, having pleaded sole seisin as to 50 acres, the case was tried. These are the issues submitted to the jury: "(1) Did Susan Harwood, at the time of the execution of the deed of December 20, 1893, have sufficient mental capacity to execute the same? Ans. Yes. (2) Was the execution of the said deed procured by fraud and undue influence of the defendant John Shoe, as alleged in the complaint? Ans. No. (3) Did the defendant John Shoe perform the covenant of maintenance of Susan Harwood, as provided in the deed? Ans. No. (4) If he failed in any particular as to the said contract of maintenance of Susan Harwood, was such failure due to the acts or conduct of the plaintiffs? Ans. Yes.

(5) Is John Shoe the owner in fee and entitled to the 50 acres of land described in the answer? Ans. Yes. (6) Are the plaintiffs and defendants tenants in common of all the lands described in the petition except the 50 acres? Ans. Yes."

Adams, Jerome & Armfield and J. Milton Brown, for appellants. R. L. Smith, for appellees.

BROWN, J. The learned counsel for plaintiffs contended that they are entitled, upon the issues as answered, to a judgment for plaintiffs, and in his argument stated that he wished to rest his whole case upon that exception to the ruling of the court below.

The jury found in answer to the fourth issue, that the defendants' failure to carry out his contract of maintenance of Susan Harwood was due to the acts and conduct of the plaintiffs. But the plaintiffs say that they were strangers to the contract, and that therefore they are not to be held responsible for the nonperformance of the contract by defendant Shoe. It is a general rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party. If this action were being prosecuted by Susan Harwood to set aside the deed on account of the nonperformance of his obligation by defendant, this rule of law would apply although the defendant was prevented by a third person, without Susan Harwood's consent, from performing his contract. But the plaintiffs are the heirs at law of Susan Harwood and inherited the land from her. They had a personal and pecuniary interest, during her lifetime, in a failure by defendant to comply with his agreement. If he failed, the conveyance could be avoided and they would get the land at her death. The defendant offered evidence tending to prove that during Susan Harwood's life the plaintiffs compelled defendant to leave the land, and by force prevented him from carrying out his obligation to her. The jury accepted defendant's version of the facts.

To permit plaintiffs to recover the land now upon the ground contended for by them and in the face of such a finding by the jury would be to permit them to take advantage of their own wrong. It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance. This rule applies with especial fitness where the party is impelled by personal interest, as in this case. *Young v. Hunter*, 6 N. Y. 207; *Buffkin v. Baird*, 73 N. C. 283; *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751; *Navigation Co. v. Wilcox*, 52 N. C. 481, 78 Am. Dec. 260. It would be against good morals, as well as

law, to allow plaintiffs to profit by their wrongful acts, although they were not parties to the contract. "*Nemo ex suo delicto meliorem suam conditionem facere potest.*"

A careful examination of the record discloses no error.

(141 N. C. 134)

DAVIS v. DURHAM TRACTION CO.

(Supreme Court of North Carolina. April 17, 1906.)

1. STREET RAILROADS—COLLISIONS—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence in an action against a street railroad company for injuries received by a traveler in a collision with a car examined, and held, that the question of his contributory negligence was for the jury.

2. TRIAL—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

Where there was no evidence that plaintiff lingered on the track; an instruction authorizing a verdict for the company on the traveler's failure to turn off the track when called on by a servant of the company was properly refused; there being no evidence that the traveler was injured by failing to turn off the track.

3. STREET RAILROADS—OPERATION OF CARS—CARE REQUIRED.

Where a street car is moving at a lawful rate of speed, and a traveler comes on the track, the company is required to use ordinary care, giving the signals, lowering the speed, and stopping the car, if reasonably necessary, and where the car is properly equipped and the equipments are used with reasonable promptness, the company will not be liable for an injury sustained, but where the car is moving at an excessive rate of speed, and by reason thereof the signals cannot be given or the appliances used by the exercise of ordinary care, the company will be liable for an injury, because it has, by the excessive speed, brought about a condition which it cannot control.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 195-200.]

4. SAME—INJURY TO TRAVELER IN COLLISION WITH CAR—EVIDENCE—INSTRUCTIONS.

Where, in an action against a street railroad company for injuries to a traveler in a collision with a car, the evidence showed that the car was run at an excessive rate of speed, a requested instruction declaring that the company, on the traveler suddenly driving his wagon across the track, was only required to use ordinary care to avoid injuring him, was properly modified by adding: "and the car was not running at an excessive rate of speed."

5. SAME—NEGLIGENCE—EXCESSIVE SPEED.

The running of a street car at a rate of speed in excess of that fixed by a municipal ordinance is evidence of negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 201.]

6. SAME—OBLIGATION OF TRAVELER AND STREET CAR ON STREET.

A traveler and a street car have in common the right to use the street, but, as the car must run on the track or not at all, the traveler must change his course and use the unoccupied portions of the street and thereby give way to the car to prevent a collision, and the servants operating the car must move it at a reasonably safe speed, and equip the car with signals and means of controlling it.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 193.]

7. SAME—INJURY TO TRAVELER IN COLLISION WITH STREET CAR—CONTRIBUTORY NEGLIGENCE.

Where a motorman in charge of a car sounded the gong, or where the car approaching a traveler made sufficient noise to be heard by him before he attempted to cross the track, and notwithstanding either the sounding of the gong or the noise of the car, he undertook to cross the track when the car was so close that a collision could not, by the exercise of reasonable care, be avoided by the company, he was guilty of contributory negligence, precluding a recovery.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 204, 207, 208.]

Appeal from Superior Court, Durham County; Shaw, Judge.

Action by J. N. Davis against the Durham Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff sues to recover damages for injuries sustained by reason of alleged negligence on part of defendant's agents in managing its electric railway cars on the public streets of the city of Durham. Defendant denies that its agents were negligent, and for further defense alleges that plaintiff, by his own negligence, contributed to his injury, etc. Usual and appropriate issues were submitted to the jury. Plaintiff testified that, on the day of the accident, he was driving along one of the streets of Durham in a wagon; that he met two ladies driving a horse and buggy; that he turned to the right to cross the track; not sufficient room on right side for both, or, at least, the ladies did not turn out—he pulled his reins, turned across the road and looked back towards town, saw no car in sight close to him, and started to cross the track. That he could see only about 75 yards; neither saw nor heard any car. He was sitting in front of the wagon. When he first saw the car it was 6 or 8 feet away, and by the time he turned his head it struck the rear end of the wagon. He thought the speed of the car was "not under" 40 miles an hour. Before crossing the track he looked back 70 or 75 yards and could not see any car. There was evidence on behalf of defendant tending to show that the car was not running faster than 14 miles miles an hour, the ordinance rate of speed. There was also evidence tending to corroborate the plaintiff's statement that the car was running at an excessive rate of speed. James Parrish, for plaintiff, testified that he saw accident. Saw two ladies in a buggy; two or three vehicles in the street; saw plaintiff had time to cross the track; car was about 20 or 25 yards from him. When he turned to cross the track the car was running from 20 to 25 miles an hour; it did not slacken its speed. Mr. Seeman, for defendant, testified that when plaintiff was about 25 or 30 feet ahead of car, he deliberately turned across the track. Saw him as he drew his lines. He did not observe the car coming. Near center of track plaintiff looked and saw the car, and about

that time it struck him. Witness was on car. Motorman cut off the power and put on brakes. Does not know whether signal was given. It was not a street crossing. The motorman testified that he saw plaintiff driving along the car track. When first saw him he was 30 or 40 steps off. When within 10 or 12 steps from him plaintiff turned horse's head across the track. Plaintiff was so near the car that did not have time to stop it—was drifting downgrade. Put on brakes and sounded gong 20 steps from him. Had not started across the track then. Brakes were in good condition. Can hear the gong 75 steps. Running between 10 and 15 miles an hour. The conductor testified that he was at front of car when it struck the wagon. Plaintiff was traveling beside the track—plenty of room for car to pass without touching his wagon. Car ran 3 lengths before it stopped—was running about 10 miles an hour—plaintiff going from 4 to 6 miles an hour. There was other testimony tending to sustain both plaintiff and defendant's witnesses.

Defendant requested his honor to charge the jury that if they believed the entire evidence they should answer the second issue "Yes," and to his honor's refusal, duly excepted. Defendant submitted a series of instructions which his honor declined, and, in lieu thereof, after fully stating the contentions of the parties, instructed the jury: (1) The travelling public has the right to the reasonable use of the streets of the city of Durham, and the street cars operated on said streets not to be run at a rate of speed that will endanger those making such use of the streets. (2) The citizen has the same privilege to use the street for travelling that the street railway company has for running its cars on the streets. The franchise to operate its cars on the public streets of the city of Durham does not give the defendant the right to the exclusive use of the street or any part thereof, and does not excuse it from the obligation to exercise due and proper care to avoid injuring persons who have a right to use the streets. (3) It would not, as a matter of law, be negligence on the part of the plaintiff to attempt to drive across the track of the defendant if he looked back immediately before driving across the track and saw no car within 75 yards. (4) It is not negligence per se for a citizen to be anywhere upon such tracks (railway or streets). So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. Defendant duly excepted. His honor further charged the jury that if they found that the car was running at a higher rate of speed than that prescribed by the ordinance of the

city they should consider such fact as evidence upon the first issue. That if the defendant was operating its car at the time of the accident at a rate of speed not in excess of that prescribed, and if the motorman, upon discovering plaintiff crossing the track, applied brakes to his car which were in good condition, and was unable to stop it, they should answer the first issue "No." That if the plaintiff undertook to cross the track when the car was so close to him that it could not be stopped in time to avoid the accident, if not running more than the rate prescribed, the jury will answer the first issue "No." That if they found that the motorman sounded the gong or that the car made sufficient noise to be heard by the plaintiff before attempting to cross the track, and, notwithstanding either the sound of the gong or the noise of the car, plaintiff undertook to cross the track when so close that a collision could not be avoided by the exercise of reasonable care on the part of the defendant, they will answer the second issue "Yes." That while a person in a vehicle has the same right to the reasonable use of the street that the car has, still the car is compelled to move on its track, and for this reason it is the duty of the plaintiff to get out of the way of the car and to keep a reasonable lookout when going upon the track, and, if he fails to do so and is injured in consequence by such car at a time and under circumstances when, by the exercise of ordinary care on the part of the agents or servants, they could not avoid the injury, he would be guilty of contributory negligence. The jury found the issues in favor of the plaintiff, assessing his damages at \$750. Defendant moved for new trial. Motion denied. Defendant excepted. Judgment and appeal.

Manning & Foushee, for appellant. Winston & Bryant, for appellee.

CONNOR, J. (after stating the case). His honor could not, upon the entire evidence, have properly given the first instruction asked. The testimony upon which defendant relied to sustain the defense of contributory negligence was conflicting, and certainly, upon any hypothesis, different inferences may have been drawn. The instruction prayed, which was substantially a demurrer to the entire evidence, presupposes that, in the view most favorable to the plaintiff, contributory negligence was established as a conclusion of law. The exception to the refusal to so instruct the jury was not pressed in this court.

The second exception is pointed to his honor's refusal to give the sixth instruction prayed: "It is the duty of a driver of a private vehicle, while on the track, not only to turn off when called upon by a servant of the company, but to listen to whatever signal there may be of an approaching car,

and he should also look behind from time to time so that he may, if a car be near, turn off and allow it to pass without hindrance or any slackening of ordinary speed, and, if he fails to observe this precaution, he does so at his own risk." There is no valid objection to the legal proposition involved in the instruction, but we think that, in so far as there was evidence bearing upon it, his honor so instructed the jury. The plaintiff was not injured by failing to "turn off" the track after he saw or could, by the exercise of ordinary care, have seen the approaching car, but by attempting to cross the track. There is no suggestion that he lingered upon the track. The defendant's witness says that he was trying to cross at the rate of 4 to 6 miles an hour. It must be conceded that if one be walking along, or crossing, a track, it is not only his duty to turn off when signaled, but to keep a lookout—look and listen for the approach of a car. The track itself is notice that a car may at any moment approach. We are speaking only of street railways in this connection. The plaintiff says that before trying to cross he did look, and could see 75 yards; that he saw no car and heard no signal until the car was within 6 or 8 feet of him. That he did not have time then to get off the track. There was evidence that one witness on the car saw plaintiff enter upon the track when the car was not more than 25 or 30 yards away from him; he is corroborated in that respect. His honor correctly submitted the question to the jury. There is no positive evidence that he did, in fact, see the car or hear the signal. There was evidence from which the jury may have so found, but it was their province to pass upon the question. The theory of the plaintiff is that he did not see the car or hear the signal until, at the high speed which he fixes, it was impossible to get off or for the car to be stopped. The defendant, denying the excessive speed, insists that he either did see, or by the exercise of ordinary care could have seen, the car approaching, and that in either view he was guilty of negligence, in going upon the track, which contributed to his injury.

The third exception is directed to the measure of defendant's duty upon the theory that plaintiff "suddenly and unexpectedly drove his wagon across the track," in which view of the case it is insisted that defendant was only required to use ordinary care to avoid injuring him. The instruction is correct and should have been given but for the omission of the element of excessive speed which runs through the entire case. It is undoubtedly true that if a car is moving at a lawful—that is, not an excessive, speed—and a person enters upon the track, the defendant is required to use ordinary care, give the signals, lower the speed, and, if it appear reasonably necessary, stop the car. If the car is properly equipped and the

equipment used with reasonable promptness and care, the defendant will not be liable for an injury sustained. If, however, the car is moving at an excessive speed—that is, a speed in excess of that prescribed by the city ordinance—and by reason of such excessive speed the signals cannot be given or the appliances used by the exercise of ordinary care, the defendant will be liable for an injury, and this for the reason that it has, by the excessive speed, brought about a condition which it cannot control. It was therefore proper for his honor to modify the instruction by inserting the words "and the car was not running faster than 14 miles an hour." This gave the defendant the benefit of the principle invoked, unless the jury found that the speed was excessive. This court has held, in accordance with many others, that speed in excess of that prescribed by the ordinance is at least evidence of negligence, and his honor so instructed the jury. *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730. It may be that under unusual conditions, such as a crowded street or passing a funeral or other procession or other conditions liable to occur in a city, the ordinance speed would be excessive. Certainly, beyond that prescribed, it is always evidence of negligence, and, under other than usual conditions, the standard of duty in regard to speed would be that of the ideal prudent man.

The fourth exception is directed to the instruction given: "It is not negligence per se for a citizen to be on the track. So long as the right of a common user of tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their part, may not at the moment be able to get out of the way of a passing car." If this instruction was not materially modified, we do not think that it could be sustained. Assuming that with certain modifications, which were explained to the jury, plaintiff and defendant had in common the right to use the street, it cannot be that while both are in the enjoyment of such right, the duty is imposed upon either to exercise such watchful care as will prevent accidents or injuries, etc. No one is legally liable for an accident or, what is equal thereto, an accidental injury. If the injury is the result of negligence, it is not an accident. It often happens that while two or more persons are in the exercise of common rights or the discharge of lawfully imposed duties, an injury is sustained which cannot be traced to an omission or breach of any duty or avoided by the exercise of the degree of care required. Such injuries are said to be accidental. The law has no means of tracing them to any breach of duty, and therefore holds no one liable. The usual rule applied to the relative rights and duties of persons enjoying a common right is ordinary care, as railway companies and persons

using a public crossing. Each must exercise that degree of care which is used by prudent men, under similar circumstances. That being the standard, the question, except in certain well-defined cases, is for the jury to find the facts and apply it. When it is said that the citizen and the street car have a common right to use the highway, regard is had to the elementary law that two objects cannot at the same time occupy the same space. It is therefore necessary to formulate such rules based upon common sense and experience as will enable them both to enjoy their common right without undue influence with each other. The car must run on the track or not at all; the citizen on foot or in a vehicle may change his course easily and promptly, using unoccupied portions of the street—hence, as his honor correctly said to the jury, he must give way to the car to prevent a collision. This being so, the duty is imposed upon the managers of the car to move at a reasonably safe speed, the maximum of which in Durham is by ordinance fixed at 14 miles an hour; to equip the car with signals and means of controlling it, bringing it to a stop when necessary; and, as prescribed by statute in this state, to use a fender. In view of these principles his honor said to the jury that if they found that plaintiff suddenly drove across the track in front of the car, and that thereupon the employes of defendant, when they saw his danger, did all that they reasonably could do to stop the car and avoid the injury, the defendant would not be guilty of negligence, and they would answer the first issue "No." He gave the defendant the benefit of the same principle in his instruction upon the second issue in regard to contributory negligence. "If the jury shall find from the evidence that the defendant's motorman sounded the gong or that the defendant's car approaching the plaintiff made sufficient noise to be heard by the plaintiff before he attempted to cross the track, and, notwithstanding either the sounding of the gong or the noise of the car, the plaintiff undertook to cross said railway track when the car was very close to him and so close that a collision with the plaintiff's wagon could not, by the exercise of reasonable care, be avoided by defendant, then the jury will answer the second issue "Yes." This was equivalent to saying to the jury that, if they found defendant's evidence to be true, they should find the issue accordingly. The general principles applicable to such cases were well considered in an opinion by Mr. Justice Douglas in *Moore v. Street Ry. Co.*, 128 N. C. 455, 39 S. E. 57. His honor's instructions are sustained by the law as announced in that case. The testimony was conflicting, and the jury adopted plaintiff's version of the transaction.

We find no reversible error in the record. It is so adjudged.

No error.

(141 N. C. 97)

FREEMAN v. FREEMAN et al.

(Supreme Court of North Carolina. April 10, 1906.)

1. WILLS—CONSTRUCTION—GENERAL RULES—INTENTION OF TESTATOR.

The rule that, when the language used by a testator is doubtful, the court inclines to the construction which will make the title to property disposed of by the will in remainder vested rather than contingent, does not interfere with the primary rule of construction requiring the court to ascertain and effectuate the intention of the testator, as gathered from the language of the will, giving to nontechnical words their ordinary meaning.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1461, 1462.]

2. SAME.

The fact that a testator was illiterate, unable to write his name, and the fact that his will was written by one not learned in the law, do not take the case out of the rule that the court must ascertain the intention of the testator by reference to the language used in the will, unless it is so doubtful as to render it necessary to resort to extrinsic evidence.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 953.]

3. SAME — GIFT IN REMAINDER — CONTINGENT OR VESTED.

Testator gave to his wife the sole use of his estate for life, and provided that at her death two daughters and a son should have specified property before the other children should receive anything, and declared that his estate at the death of the wife should be sold and the proceeds equally divided "between all my children that appears personally and claims their part, and this will shall disinherit all of said children that applies through an agent." Held a gift only to the children living at the time fixed for the sale and distribution of the estate.

Appeal from Superior Court, Durham County; Shaw, Judge.

Action by N. C. Freeman, executor of Ewell Freeman, deceased, against Rachel H. Freeman and others, for the construction of the will of the testator. From a decree construing the will, certain defendants appeal. Affirmed.

This is an action by the plaintiff, as executor of Ewell Freeman, asking for a construction of the will of his testator, who died in the county of Wake in 1880, leaving a last will and testament, the material parts of which are as follows: "(3) That my wife, Elizabeth G. Freeman, shall have the sole use of my real and personal estate as long as she may live. At her death Mary Frances, Nancy A. and Rufus W. Freeman shall have one bed, bedstead, and clothing, one cow and calf each, before the remainder of my children are entitled to anything. (4) That the real and personal property, at the death of my wife, Elizabeth Freeman, shall be sold to the highest bidder (grave-yard excepted), and the proceeds equally divided between all my children that appears personally and claims their part, and this will shall disinherit all of said children that applies through an agent." At the time of the death of the said testator he left surviving eight children, three

of whom have since died, leaving surviving a number of children. One daughter, Nancy, who intermarried with Sidney King, died leaving no children. His son, Spencer Freeman, resides in Georgia. One son, Rufus W. Freeman, left the state, several years before his father's death, unmarried, and under circumstances which displeased him. He has not been heard from since. Mary died without issue. That there are now surviving, of the children of said testator, plaintiff, N. C. Freeman, and defendants Spencer Freeman and Rachel. His honor being of the opinion that upon a proper construction of the will, only the children of the testator, who were living at the death of his widow, were entitled to share in the proceeds of the property, rendered judgment accordingly, from which the defendants, grandchildren and Sidney King, surviving husband of Nancy, appealed.

Winston & Bryant, for appellants. Manning & Foushee, for appellee.

CONNOR, J. (after stating the case). We fully concur with counsel for appellants that when the language used by a testator is doubtful, the court inclines to that construction which will make the title to property left in remainder vested, rather than contingent. The authorities cited in the brief amply sustained the position. 2 Fearn, Rem. 200; Gardner on Wills, 499. This rule is not permitted, however, to interfere with the primary rule of construction which requires the court, in all cases, to ascertain and effectuate the intention of the testator, as gathered from the language used, if possible. The court will ascertain such intention by giving to nontechnical words their ordinary and popular meaning, assuming that the testator used them in that sense in which they are generally used and understood. It is sometimes said by way of illustrating this principle: "The intention must be found within the four corners of the instrument." To this general rule there is one exception. "Where the will is such as to call for construction, the court, with a view to securing a proper construction, puts itself, as far as may be, in the position of the testator, that it may see things from his point of view. To this end, evidence regarding all relevant facts and circumstances surrounding the testator at the time of executing the will is admissible." Gardner on Wills, 385. "The rule itself is always subservient to the intention of the testator; and, therefore, if upon construing the whole will, it clearly appears that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators, if the legatee dies before the period of payment. * * * For if the testator thinks proper to say distinctly that his legatees general or residuary, shall not be entitled to the property unless they live to receive it,

there is no law against such intention if clearly expressed." 2 Williams on Executors, 520, 521.

In the light of these elementary principles we are of the opinion that the testator has clearly expressed his intention in regard to the disposition of his estate. We concur with the appellant that, if he had concluded item 4 with the words "all my children," they would have taken a vested remainder; but we may not discard, as without meaning, the words immediately following, "that appears personally and claims their part." The meaning and import of this language, in its ordinary acceptation, is too plain to admit of doubt. Those of his children are to take who shall "appear," that is, who are living at the time fixed for the sale and distribution. The language following is evidently used to make clear, if need be, his purpose to "disinherit all of said children that applies through an agent." We find no such uncertainty in the meaning of the language used as to permit us to go beyond "the four corners" of the will for aid. It is suggested that he was displeased with his son Rufus, who had left home many years before the execution of the will, under circumstances casting disgrace upon himself and family, and that it was his purpose, in using the language, to either disinherit, or require him, as a prodigal, to return home and claim in his own person his part. To adopt this view for the purpose of finding an intention not otherwise seen in the language used, would be exceedingly hazardous. In item 3, he gives Rufus W., together with two of his daughters, certain personal property, attaching no condition to the gift. Attention is called to the fact that the testator is illiterate, unable to write his name, that the will was not written by one learned in the law, and that in such cases the court is moved to search out his real intention. These facts do not take the case out of the rule that we would ascertain the intention by reference to the language used, unless it is so doubtful as to render it necessary to resort to extrinsic evidence.

The conclusion at which we have arrived renders it unnecessary to discuss the claim of defendant Sidney King to the share which would have vested in his wife, if she had lived to "appear personally and claim her part." The cases in this court are reviewed, in the well-considered opinion of Sheppard, C. J., in Whitesides v. Cooper, 115 N. C. 570, 20 S. E. 295. For the reasons and upon the principles clearly set forth in that case, we are of the opinion that only those who come within the terms of the devise, at the death of the life tenant, are entitled to share in the proceeds of the land. It is probable the direction that the land, together with the personalty given the widow, be sold at her death and the proceeds divided, worked an equitable conversion from the death of the testator, in which event the interest of the deceased children leaving issue, if not contingent, pass-

ed to their personal representative, and they should have been made parties. *Benbow v. Moore*, 114 N. C. 263, 19 S. E. 156. In view of the disposition which we have made of the appeal, the question is not material.

The judgment must be affirmed.

(141 N. C. 84)

RAY v. ABERDEEN & R. R. CO.

(Supreme Court of North Carolina. April 10, 1906.)

1. CARRIERS—INJURIES TO PASSENGER—QUESTION FOR JURY.

In an action for injuries to a passenger, who was run into by a train while making his way from the point where he had alighted to the station, *held*, that the question whether the passenger was guilty of contributory negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1402.]

2. SAME—STATION GROUNDS.

It was negligence to back a train into a railroad yard, where passengers were rightfully moving about, without warning and without having any one in a position to observe the condition of the tracks and to signal the engineer or caution others in case of impending peril.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1142, 1155, 1156.]

3. RAILROADS—INJURIES TO PERSONS ON TRACK.

Where one was rightfully upon a railroad track or sufficiently near it to threaten his safety, and was negligent and so brought into a position of peril, if the railroad by taking a proper precaution and keeping a proper lookout, could have discovered the peril in time to have averted the injury but failed to do so, it is responsible.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1324, 1325.]

Appeal from Superior Court, Scotland County; Ferguson, Judge.

Action by J. C. Ray against the Aberdeen & Rockfish Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

There was allegation and evidence tending to show that on or about December 26, 1900, the plaintiff was a passenger on defendant's train going to Aberdeen, N. C. About a half mile from Aberdeen the train was run onto a Y and backed in towards the depot, and at a point about 200 yards from the depot the train was stopped, and on a call from the conductor, "All off for Aberdeen!" the plaintiff and other passengers alighted, getting off at the rear end of the train. At this point there was no depot or waiting room, and the defendant's track was some 30 feet from the track of the Seaboard Air Line Railroad. The track on which the defendant's train was then placed, and in the direction in which the same had been backing and towards the depot, inclines gradually towards the track of the Seaboard road, and the two tracks join some distance above the depot. It seems that this depot is used by both roads, but this is not clear from the statement of the case on appeal. A few moments after getting off the train, the plain-

tiff went down the road towards the depot, walking between the tracks of the two roads, and at a point near where the two roads joined, and where they were three or four feet apart, a train on the Seaboard track came, meeting the plaintiff, and being called to by some one on the Seaboard engine to jump for his life, the plaintiff, in the effort to avert injury by the Seaboard train, sprang onto the track of the defendant's road and was struck and seriously injured by the defendant's train, which had backed down the road towards the depot, and in the same direction in which the plaintiff had been walking. No bell was rung or signal given by the train of the defendant which caused the injury, and no one was on the car or elsewhere to keep a lookout and warn a person or signal the engineer of danger, and the noise and smoke of the train on the Seaboard road was such that the plaintiff could not well note what was going on. At the close of the testimony, on motion of the defendant, the court dismissed the action as on judgment of nonsuit, and the plaintiff excepted and appealed.

J. A. Lockhart, E. H. Gibson, and W. H. Cox, for appellant. U. L. Spence, for appellee.

HOKE, J. (after stating the case). Upon the foregoing facts the court is of opinion there was error in directing a nonsuit, and the plaintiff is entitled to have his cause submitted to a jury under proper instructions. It was a negligent act to back a train into a railroad yard where persons, passengers or others, were accustomed to stand or move about, either as of right or in the discharge of some duty, or by permission of the company, without warning of any kind and without having some one in a position to observe the condition of the track and signal the engineer or caution others in case of impending peril, and if such an act was the proximate cause of the plaintiff's injury the issue as to the defendant's negligence should be answered against the company. This was in effect held in *Purnell's Case*, 122 N. C. 832, 29 S. E. 953; *Smith's Case*, 132 N. C. 819, 44 S. E. 663; *Lassiter's Case*, 133 N. C. 244, 45 S. E. 570. There was evidence tending to show that the defendant's train was backed in the yard where passengers had just alighted, in the direction in which some of them would likely go, without warning of any kind and without having any one to note whether the way was clear. If these facts are established and it is further shown, as the proximate consequence of such negligent act, that the plaintiff was injured as alleged, the cause of action on the issue as to the defendant's negligence comes clearly within the principle of the above decisions. And on the conduct of the plaintiff, the effect of which is usually determined on an issue as to contributory negligence, we think the question must be submitted to a jury.

In *Sherrill's Case*, 140 N. C. 252, 52 S. E.

340, the court held that while one rightfully, or by permission, as stated, on or dangerously near a railroad track, is required to look and listen, this obligation may be so qualified by facts and attendant circumstances as to require that the question of contributory negligence should be submitted to the jury, and so we hold here. While the plaintiff is required to be alert and attentive, we think that the approach of the other train, and the noise, steam, and smoke attending it, and the fact that he had just alighted from the defendant's train, which he had just left standing in the yard behind him, and the other attendant facts and circumstances, so qualify his obligation that the jury should determine under a proper charge whether the plaintiff was guilty of contributory negligence in stepping suddenly in the way of the defendant's train, or in having negligently placed himself in a position where the emergency was brought upon him. In 1 Fetter on Carriers of Passengers, § 136, it is said: "So where a passenger is carried beyond a station and into the switching yard, and is struck by an engine on the way out of the yard, it is for the jury to determine whether she, with such knowledge as she possessed of the peril of the place and with the presumption she was entitled to indulge as to the degree of care which the defendant's employees would exercise for her protection, was herself guilty of negligence which proximately contributed to her injury."

The facts in this case are not unlike those in *Hempenshall v. Railroad*, 82 Hun, 285, 31 N. Y. Supp. 479, where it was held that the question of contributory negligence was for the jury. See, also, *Tubbs v. Railroad*, 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320. If negligence on the part of the defendant is established and the jury should also find that the plaintiff was guilty of contributory negligence, on the ground that he was negligent in going into a dangerous position without being properly attentive to his own safety, the facts seem to require the submission of a third issue involving the question whether the defendant, in this instance, negligently failed to avail itself of the last clear chance of avoiding the injury. The authorities are to the effect that if the plaintiff is at the time rightfully upon the track, or sufficiently near it to threaten his safety, and is negligent, and so brought into a position of peril, if the defendant company by taking a proper precaution and keeping a proper lookout could have discovered the peril in time to have averted the injury by the exercise of proper diligence, and negligently fails to do it, the defendant would still be responsible, though the plaintiff also may have been negligent in the first instance. *Lassiter's Case*, supra; *Reid's Case*, 140 N. C. 146, 52 S. E. 307; *Balto*, etc., Ry. Co. v. *Cooney*, 87 Md. 261, 39 Atl. 859. There was error in directing a nonsuit and a new trial is awarded.

New trial.

(141 N. C. 91)

JOHNSON v. JOHNSON.

(Supreme Court of North Carolina. April 10, 1906.)

1. MARRIAGE—JUDGMENT ANNULING MARRIAGE—AUTHORITY TO SET ASIDE BY CONSENT.

A judgment annulling a marriage, in a suit praying for the annulment thereof on the ground that plaintiff was at the time incapable of entering into such a contract, cannot be set aside by consent of the parties.

2. SAME—SETTING ASIDE JUDGMENT—PROCEEDINGS—NOTICE.

Where either party to a suit praying for the annulment of a marriage, desires to move to set aside a judgment of annulment, it must be done in adversary proceeding after due notice served on the other party, and notice to counsel of record in the original action is not sufficient.

3. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—ACTING FOR ADVERSE PARTIES.

On the hearing of a motion to set aside a judgment, annulling a marriage rendered in a suit praying for the annulment thereof on the ground that plaintiff was incapable of entering into such contract, the respective parties must appear by their individual counsel, and the same counsel cannot represent both parties.

4. MARRIAGE—ANNULMENT—JUDGMENT—SETTING ASIDE—PARTIES.

The counsel in the original action for the annulment of a marriage are not proper or necessary parties to a proceeding to set aside the judgment annulling the marriage.

Appeal from Superior Court, Chatham County; Ferguson, Judge.

Action by Adella V. Johnson against W. Mangum Johnson. From an order denying a motion by plaintiff and defendant jointly to set aside a judgment in favor of plaintiff and annulling a marriage between the parties, plaintiff and defendant appeal. Dismissed.

N. Y. Gulley and R. H. Dixon, for appellant. H. A. London, R. H. Hayes, and W. B. Siler, for appellee.

BROWN, J. This action was brought to annul a marriage contract entered into between the plaintiff and the defendant on December 2, 1903, upon the ground that the plaintiff was at the time totally incapable to enter into such contract, and also to set aside a deed which the plaintiff had executed to the defendant. Both parties were represented by counsel, and the following issues were submitted to the jury: "(1) Was the plaintiff, at the time of her alleged marriage with the defendant totally incapable to make or enter into such contract for a proper, legal and binding marriage from want of will or understanding? Ans. Yes. (2) Was the plaintiff, at the time of the execution of her deed to the defendant incapable of executing a valid deed for want of reason and understanding? Ans. Yes. (3) What amount is the defendant entitled to recover by reason of his improvements upon the premises? Ans. \$75." The notice of the motion to set aside the judgment rendered was served on all the counsel who appeared respectively for the plaintiff and defendant at the trial. It is signed by N. Y. Gulley

and R. H. Dixon "attorneys for Adella V. Johnson and W. Mangum Johnson." The grounds of the motion are that the complaint is not properly verified so as to give the superior court jurisdiction as in an action for divorce, and that the cause was tried at the term to which the summons was returnable.

Reasons based upon principles of sound public policy compel us to dismiss this proceeding to set aside the judgment. We are of opinion that the same counsel cannot represent both parties to the action. In so holding, we mean no reflection whatever upon the reputable and eminent counsel, who have undertaken together to represent both parties in making the motion. They have argued strenuously before us that there are no conflicting interests, and that therefore they can properly represent both parties. We are compelled to differ from them. In *Moore v. Gidney*, 75 N. C. 34, the court says: "The law does not tolerate that the same counsel may appear upon both sides of an adversary proceeding even colorably, and in general will not permit a judgment so affected to stand, if made the subject of exception in due time by the parties injured thereby." To the same purport are the cases of *Gooch v. Peebles*, 105 N. C. 411, 11 S. E. 415, and *Molyneux v. Huey*, 81 N. C. 113. To permit both parties to be represented jointly by the same counsel upon this motion would be simply laying the foundation for future complaint, upon the part of the plaintiff or defendant, in case either should be dissatisfied with the action of the court if the judgment should be set aside. If the plaintiff was so feeble minded that she could not contract a valid marriage, how do we know that she is capable now to take legal action to set aside the judgment? The judgment rendered cannot be set aside by consent. If either party desires to move to set it aside, it must be done in an adversary proceeding after due notice served upon the other party. Notice to counsel of record in the original action is not sufficient. Upon the hearing of such motion, the respective parties must appear by their individual counsel. The counsel in the original action are not proper or necessary parties to a proceeding to set the judgment aside.

Proceeding dismissed.

CONNOR, J. (concurring). While I do not dissent from the disposition made of this appeal, I am of the opinion that we should

indicate, for the guidance of the parties, our opinion upon the questions raised upon the record and fully argued upon the hearing. The proceeding is anomalous; due regard for orderly procedure requires us to dismiss the motion to the end that the parties may proceed as they may be advised. This court held in *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692, in a well-considered opinion by Mr. Justice Shepherd, that an action to have a marriage declared void, because of a pre-existing disqualification to enter into the marriage relation, so far as the procedure is concerned, is an action for divorce, as shown by the authorities cited in the opinion. At common law no divorce a vinculo could be granted except for causes existing previous to the marriage which rendered the marriage unlawful ab initio. While it is true that our statute does not in terms include an action to annul a marriage on account of pre-existing obstacles with action for divorce a vinculo, I am of the opinion that in regard to the practice prescribed, the same procedure should be observed. Certainly the same policy upon which the jurisdictional affidavit is required in one should control the other. It will be observed that the parties, notwithstanding the admissions in the answer, submitted issues thus treating the allegations as denied—as in an action for divorce. If, as appears from the record, a serious doubt exists as to whether this action was prosecuted in accordance with the requirements of the statute, the parties are left in a deplorable condition. It would seem that if jurisdictional facts are not apparent upon the record, the proceeding would be void, so far as it affected the matrimonial relations of the parties and the court upon motion of either party would so decree. This court has uniformly held that the facts required to be set forth in the affidavit prescribed by section 1563 of the Revisal of 1905, are necessary to give the court jurisdiction. *Hopkins v. Hopkins*, 132 N. C. 22, 43 S. E. 508. It would seem that the same conclusions would follow when it is sought to have a marriage declared void for the causes set out in section 1560 of the Revisal. I concur in the opinion that an adversary proceeding should be instituted and prosecuted by one of the parties to the end that the other may be properly represented and the court may proceed in an orderly way.

WALKER, J., concurs in the concurring opinion.

(59 W. Va. 419)

HANLEY v. WEST VIRGINIA CENT. & P. RY. CO.

(Supreme Court of Appeals of West Virginia. April 17, 1906.)

1. DEATH—ACTION FOR DAMAGES—PLEADING—ADMISSIONS.

In an action under sections 5 and 6, c. 103, Code 1899, for damages for the death of a person caused by wrongful act, neglect or default, a plea to the merits of the action admits the representative character in which the plaintiff sues.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 74; vol. 22, Cent. Dig. Executors and Administrators, §§ 1813, 1855.]

2. PLEADING AND PROOF—VARIANCE.

In such action, a variance between the declaration and the proof, relating alone to the instrument by which a bodily injury was inflicted, is immaterial and should be disregarded, when the instrument alleged and the instrument proved are of the same general nature.

3. DEPOSITIONS—SEAL OF NOTARY.

A deposition of a witness who resides out of this state, taken out of this state in conformity with section 83, c. 130, Code 1899, in an action at law pending before a circuit court of this state, may be received, when properly certified under the hand of the notary public before whom it was taken, although not under his official seal, if otherwise proper.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 192-195.]

4. SAME—WITNESS OUT OF STATE.

A deposition of a witness taken out of this state, in an action at law pending in a circuit court of this state, may be read upon the trial of such action, if the deposition shows that the witness resided out of this state when it was taken and if otherwise proper, unless it appears that the witness is in this state when the deposition is offered.

5. DEATH—NEGLIGENCE—BURDEN OF PROOF—PRESUMPTIONS.

This action being founded upon negligence, the burden of proof is upon the plaintiff to show that the defendant has been negligent. Negligence will not be presumed alone from the explosion of a locomotive boiler, in use in lawful business upon the tracks of the defendant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 78; vol. 37, Cent. Dig. Negligence, §§ 218, 225.]

6. TRIAL—EVIDENCE—MOTION TO EXCLUDE.

Upon the consideration of a motion to exclude all of the plaintiff's evidence introduced upon the trial of an action, he is entitled to the benefit of all proper evidence so introduced, and to all legitimate inferences of fact which may be drawn therefrom.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 355, 374, 402.]

7. EVIDENCE—EXPERT TESTIMONY.

An expert witness may give an opinion, in a proper case, based upon his own knowledge of facts disclosed in his testimony, or he may give an opinion upon the facts shown in evidence, and assumed in a hypothetical question submitted to him.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2363, 2369.]

8. APPEAL—REVIEW—REVERSAL.

Where the circuit court on motion excluded all of the plaintiff's evidence, directed a verdict for defendant, and dismissed the action, and upon writ of error to the judgment it appears that material and proper evidence offered by plaintiff during the progress of the trial was improperly rejected to the plaintiff's prejudice, this court will reverse the judgment, set

aside the verdict, award a new trial, and remand the case.

(Syllabus by the Court.)

Error to Circuit Court, Randolph County.

Action by James Hanley, administrator, against the West Virginia Central & Pittsburgh Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

W. B. Maxwell and C. H. Scott, for plaintiff in error. C. W. Dalley, for defendant in error.

COX, J. This action of trespass on the case was instituted by James Hanley, administrator of Mrs. Catherine N. Rabbett, against the West Virginia Central & Pittsburgh Railway Company, in the circuit court of Randolph county. The plaintiff avers that he is entitled to recover \$10,000 damages for the death of Mrs. Rabbett, caused by the explosion of the boiler of a railroad locomotive in use by the defendant upon its tracks in the city of Elkins; and that by the explosion the boiler was rent asunder, and a large piece of the metal thereof hurled upon the residence of Mrs. Rabbett, crashing through it and striking her, inflicting severe and fatal injuries, from which she died. Plaintiff also avers that the explosion was produced by the defective and unsafe condition of the boiler, and by the mismanagement of the servants of the defendant. Upon trial before a jury, a motion to exclude all of the plaintiff's evidence and to direct a verdict for defendant was sustained, and the action dismissed. Upon petition of plaintiff, a writ of error was allowed to the judgment.

Defendant contends that plaintiff is barred of a recovery, regardless of his assignments of error, because he offered no evidence to show his due appointment and qualification as administrator. The authority for an action of this kind is found in sections 5 and 6, c. 103, Code 1899, which in part provide: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. Every such action shall be brought by and in the name of the personal representative of such deceased person," etc.

The plea entered in this action was not guilty. There was no plea of ne unques administrator. The question is: Does the plea to the merits admit the representative character in which the plaintiff sues? Some of

the early cases and authorities hold that, where an administrator or executor sues upon a cause of action arising in his own time; and not in the time of the decedent, a plea to the merits does not admit the representative character in which the plaintiff sues; and that the plaintiff, notwithstanding such plea, must make proof of such character. 2 Lomax, Executors, 612, 613; 2 Greenleaf, Ev. § 338. This early doctrine seems never to have had the assent of all the early cases. See *Watson v. King*, 4 Campb. 272, and *Loyd v. Finlayson*, 2 Esp. 564. It seems that necessity for proof of the representative character was never required after a plea to the merits, except where the cause of action arose in the time of the representative, and the representative might maintain the action in his own name without designating his representative character. *Denver, etc., Ry. Co. v. Woodward*, 4 Colo. 1. The tendency of the latest and best considered cases in America is to make no distinction between cases upon causes of action arising in the time of the decedent, and cases upon causes of action arising in the time of the representative, and to hold in all cases that a plea to the merits admits the representative character in which the plaintiff sues. 18 Cyc. 994-996, notes 64, 65. Whether this be the correct view or not, our case of *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033, lays down the rule, without limitation or qualification, that "where one sues as executor or administrator, or in other representative character, there need be no proof of his appointment or authority unless a plea denies it. A plea to the merits admits the right of the plaintiff to sue as he does." It is true, that case was upon a cause of action arising in the time of the decedent, but the rule mentioned seems to have been announced as general. The opinion in that case says that the plea *ne unques*, etc., is a plea in abatement. If that be true and applicable to all cases, then defendant's contention here must fail for want of such plea. It seems to us that the defendant's position cannot be maintained for the reason, also, that section 6, c. 103, Code 1899, provides that an action of this character may alone be brought by and in the name of the personal representative. He cannot maintain it in his own name, and no other person can maintain it. In such case, a plea to the merits, even under the early authorities referred to, admits the representative character in which the plaintiff sues. This exact question has been passed upon by many courts of last resort in this country; and universally, so far as we have examined, they hold that a plea to the merits in this kind of action admits the representative character in which the plaintiff sues. *Denver, etc., Ry. Co. v. Woodward*, supra; *Union Ry. & T. Co. v. Shacklet*, 119 Ill. 232, 10 N. E. 896; *Chicago & Alton Railroad Co. v. Smith*, 180 Ill. 458, 54 N. E. 825; *Louisville & Nashville Ry. Co. v. Trammell*, 93 Ala. 350, 9

South. 870; *Atchison, T. & S. F. Ry. Co. v. McFarland* (Kan. App.) 43 Pac. 788; *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 614; *Hodges v. Kimball et al.*, 91 Fed. 845, 34 C. C. A. 103. The last case mentioned arose under the Virginia statute, and was decided by the circuit court of appeals of the United States in 1899. The plea of not guilty in this action admits the character in which the plaintiff sues.

Defendant also contends that the plaintiff cannot recover because of a variance between the averments of the declaration and the proof. The exact point of variance claimed is this: The declaration avers that a large piece of metal of the exploded boiler struck Mrs. Rabbett, inflicting severe and fatal injuries, etc. Mrs. Boyd, the only witness on this point, says: "It was the timbers that struck Mrs. Rabbett. I can't remember very clearly. It was such a crash that I don't remember much about it, and at that time I was knocked down myself, and she was lying under the table." It will be observed that the alleged variance does not relate to the cause of the injury, or to the manner in which it was produced, but solely to the instrument with which it was inflicted. If the timbers from the house, loosened by the piece of boiler, instead of the piece of boiler, struck Mrs. Rabbett, still the primary cause of the injury is the same. It is contended that no connection is shown between the timbers which struck Mrs. Rabbett and the piece of boiler. There may be no direct evidence showing the connection, but circumstances and facts are shown from which the connection may legitimately be inferred; and the plaintiff, upon the motion to exclude his evidence, is entitled to the benefit of all legitimate inferences of fact which may be drawn from the evidence. It is shown that the piece of boiler, weighing about seven tons, crashed through the house of Mrs. Rabbett, partly destroying it and an adjacent house, also belonging to her; and that at the same time Mrs. Rabbett, sitting on a chair in her house, was struck by the timbers. What timbers? It seems to us that it would be legitimate for a jury to infer that the timbers which struck her were the timbers of the house, which was partially destroyed by the crashing through it of the piece of boiler. Upon the subject of variance we are cited to *Hawker v. B. & O. R. R. Co.*, 15 W. Va. 623, 36 Am. Rep. 825, and *Young v. W. Va. C. & P. Ry. Co.*, 42 W. Va. 112, 24 S. E. 615. Neither of these cases relate to a variance as to the instrument with which a bodily injury was inflicted. It is conceded by the brief of defendant that it was wholly unnecessary for the plaintiff to allege that either the piece of boiler or the timbers struck Mrs. Rabbett, and that the statement of the cause of action was sufficient, without averring the particular instrument which struck her. Having alleged the primary or main act of omission or commission causing

the injury, it was unnecessary for the plaintiff to aver the particular facts going to prove negligence. *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922. We have in the case at bar a variance alone as to the instrument. The averment is one which it was not essential to make, and which was not necessary to the statement of the cause of action. Under the general rule, such a variance is immaterial, and may be disregarded as surplusage. 1 Chitty, Pl. (11th Am. Ed.) 229; *Stevens v. Friedman*, 53 W. Va. 79, 44 S. E. 163. Mr. Hogg, in his Pl. & Forms, § 137, p. 111, says: "The rule respecting variance may be stated to be: that if the entire averment can be expunged without affecting the right to recover, it need not be proved; but if it can not thus be stricken from the declaration without getting rid of a part essential to the cause of action, then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover." It has been held from a very early date, even in criminal cases, that an averment descriptive of the instrument by which a bodily injury was inflicted need not be strictly proved, provided it is proved in substance. A variance in this respect was not considered fatal at common law, in cases where the instrument laid and the instrument proved were of the same nature and character. 22 Enc. Pl. & Pr. 684. In *People v. Colt*, 3 Hill (N. Y.) 432, it was held that an allegation of cutting with a hatchet and proof of shooting with a pistol are not variant. In *State v. Dame*, 11 N. H. 271, 35 Am. Dec. 495, it was held that an indictment for an assault with a basket knife is supported by evidence of an assault with a basket iron. In *Ryan v. State*, 52 Ind. 167, it was held that an allegation that an assault was committed by shooting and striking with a gun, and proof of beating with a stone are not variant. Other cases might be cited. See *Underhill*, Crim. Ev. § 314; 1 Whart. Crim. Law, 519. In this case, the instrument averred and the instrument proved are of like nature, and the variance is wholly immaterial and should be disregarded.

We will now consider the assignments of error made by the plaintiff. Plaintiff complains because the lower court sustained objections to numerous questions propounded to his witnesses. These questions are embodied in 12 several bills of exceptions. From these bills, it appears that the questions were not answered, and that no statement was made during the trial of what plaintiff expected to prove by the answers to these questions. When the bills of exceptions were signed by the judge in vacation, after the judgment was entered and the term adjourned, the plaintiff's attorney stated to the judge what he expected to prove by such answers, and his statement is incorporated in the bills. It also appears, by a separate bill of exceptions, that after the motion to exclude plain-

tiff's evidence and direct a verdict for defendant had been sustained, and before the jury had returned its verdict, the plaintiff moved the court to allow him to recall the witnesses to whom said questions had been propounded, for the purpose of taking their statements as to what they would have testified had the objections not been sustained, which motion to recall the witnesses was denied. No statement of what plaintiff expected to prove by the witnesses was made at the time of the motion to recall them. It is contended that the said questions, taken with the facts appearing, show that the questions were relevant to the issue and proper in form; that therefore the answers need not appear; and that the plaintiff need not disclose what he intended to prove by such answers. The questions objections to which were sustained are as follows: (1) "State what was the condition of this engine, prior to these repairs that rendered it necessary to make these repairs." (2) "State the condition of the stays and bolts in the piece of the boiler shell of engine No. 19, lying in the house of deceased, I mean soon after this accident. State whether you were able to determine whether or not the stays were recently broken, or whether they or some of them had been broken before the explosion." (3) "State whether you observed the number, location and condition of the bolts or parts of bolts that were in this part of the boiler shell, and if so what was the condition thereof." (4) "In your examination of the bolts and stay-bolts in the part of the jacket, or shell, that was in the house of Mrs. Rabbett, did you observe and can you state whether said bolts or stay-bolts were, or any of them were, recently broken by force of the explosion, or whether they had been previously broken; if so the condition and appearance of said bolts?" (5) "State whether or not any of those bolts, where they connected to the boiler shell, were broken off by you, and if so, state how you did it." (6) "State whether or not these exposed ends were bright, and bore the appearance of new metal exposed, or whether those ends were discolored, either by corrosion or any other cause." (7) "That afternoon [October 21, 1903], state to the jury whether that engine boiler (No. 19) was in ordinary good working order or not." (8) "State whether as conductor of the crew having engine No. 19 in charge, on the afternoon of said explosion, and a few minutes before the explosion, you notified the superintendent of the railroad shops of the defendant, that said engine and boiler was out of repair and refused to operate properly; and, if so, what was said or done by said superintendent?" (9) "If you examined or observed the condition of the stays and bolts, with which the jacket of said boiler had been fastened, and observed whether said bolts appeared to have been recently broken, or whether some of them bore the appearance of having been broken or severed prior to the

explosion of the boiler, please state how many and what the condition of the said bolts appeared to be." (10) "If you examined the metal of said boiler shell on the side that had been inside, next to the water space, and observed any defects, pits or decayed places therein, please state the nature and appearance of the same." (11) "Were you present at the premises of Mrs. Rabbett soon after the explosion of the boiler, in October, 1903, and examined and observed the condition of the boiler shell on said premises, as to whether said metal had any defects in the metal thereof, such as pits, rust holes, or other defects, please state about it?" (12) "If you made an examination of the stays and bolts that had been used in fastening the said shells of said boiler together, please state whether or not said bolts showed that they had all been recently broken, or whether some of them bore evidence of having been broken or destroyed prior to said explosion, and if so please state how many of said bolts appeared to have been broken, prior to said explosion, and what the indications and appearances were."

Question 1 was propounded to witness J. W. Poling, whose former occupation was boiler making and whose present occupation is plumbing. This witness worked on repairs to this particular locomotive. The repairs referred to were made three or four years before the witness testified, when he was an apprentice boy, and at a time when he could not be said to have possessed the expert knowledge necessary to qualify him to speak as to the condition of the locomotive. Questions 7 and 8 were propounded to a railroad yard conductor, who was not shown to have had any expert knowledge as to the nature and construction of a locomotive engine and boiler; and, while it was proper to prove by him what he did as conductor, having in control this locomotive and its crew, as indicated in question 8, it was not proper, without a showing of expert knowledge on his part, to prove by him whether or not the engine was in good working order. *McKelvey v. C. & O. Ry. Co.*, 35 W. Va. 500, 14 S. E. 261. The objections to questions 1 and 7 should have been sustained, even if the plaintiff had stated what he expected to prove by answers to them. The other questions mentioned relate to the condition and appearance of the piece of boiler at the residence of Mrs. Rabbett as to pits, rust holes, etc., and to the condition of the stays or bolts in such piece of boiler and their appearance as to recent breaks or otherwise. The plaintiff avers both a defective and mismanaged engine and boiler, that the engine and boiler were old and worn out, that the stays or bolts thereof were burned in two and broken, that the metal of the boiler was rotten and not sufficient to hold the bolts and rivets, and that the boiler was otherwise defective. The questions mentioned certainly were rel-

evant to the issue. *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

It is suggested that these questions were propounded to witnesses who were nonexperts as to the nature and construction of locomotive engines and boilers, and that answers to these questions would necessarily require expert knowledge in that regard on the part of the witness, under the rule of *McKelvey v. C. & O. Ry. Co.*, supra. We cannot say that answers to these questions would necessarily require such expert knowledge. The condition of a piece of metal as to rust holes, etc., and the appearance of stays or bolts as to recent break, are matters not of expert but common knowledge. It is common, and not expert, observation that recently broken metal presents a bright appearance, while an old break in metal presents a rusty or corroded appearance. The fact that the metal had once been in a boiler did not change its nature as metal, or prevent one from describing its condition and appearance in the particulars mentioned, without having expert knowledge as to the wonderful nature and construction of a locomotive engine and boiler. The fact that these questions were relevant and proper, did not relieve the plaintiff from stating to the court what he expected to prove by the answers, as the witnesses did not answer the questions. It may be said that some of our previous cases indicate that the relevancy of the question is sufficient; but this subject has been recently re-examined and reconsidered by this court in the case of *State v. Clifford*, 52 S. E. 987, in which Judge Poffenbarger delivered the opinion, reviewing the authorities, including our previous cases, and after full and careful consideration it was held that "refusal of the court to permit a witness to answer a question which by its own terms and subject-matter, taken in connection with facts and circumstances already in evidence, shows its relevancy and materiality, is not available as error on a motion for a new trial, if the expected answer of the witness was not disclosed to the court at the time of the ruling. An appellate court, in reviewing a judgment on a writ of error, cannot assume in such case that an answer favorable to the exceptor would have been given. So much of the decision in *Gunn v. R. R. Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842, as conflicts with this principle is disapproved." This principle applies with equal force to the motion to recall the witnesses, no statement being then made of what it was expected to prove by them if recalled. It seems almost unnecessary to notice the fact that the plaintiff's attorney, after the judgment was entered and the term ended, stated to the judge, when the bills of exceptions were signed, what he had expected to prove. This, of course, came too late. Under the circumstances appearing, no prejudicial error is shown in the action of the court in sustain-

ing said objections or in denying the motion to recall the witnesses.

The plaintiff complains of the rejection of the deposition of W. W. Ensign, taken in Pittsburg, Pa. This deposition appears in full by bill of exceptions. The court at first admitted the deposition, and afterwards, upon objections to the several questions and answers thereof, sustained the objections and rejected the deposition. The defendant made certain general objections to the reading of the whole deposition: First, that it is not under the seal of the notary before whom it was taken. As to this objection, section 33, c. 130, Code 1899, and *Bohn v. Zeigler*, 44 W. Va. 402, 29 S. E. 983, are in point. Said section 33 provides: "In any pending case the deposition of a witness, whether a party to the suit or not, may, without any commission, be taken in or out of this state by a justice or a notary public, or by a commissioner in chancery, or before any officer authorized to take depositions in the county or state where they may be taken, and if certified under his hand, may be received without proof of the signature of such certificate." We cannot hold, against the positive terms of this statute, that a deposition which meets the requirements thereof may not be received, if otherwise proper.

The second general objection to the deposition is that there was no affidavit that the witness resided out of this state, and that it does not appear from the deposition that the witness did or does now reside out of this state. The deposition shows that the witness resided out of the state when his deposition was taken, on the 14th of January, 1905. It was not claimed, and it did not appear, that the witness was in this state when the deposition was offered. If the deposition was otherwise proper this objection, as well as the general objection first mentioned, should have been overruled. See *Hoopes v. Devaughn et al.*, 43 W. Va. 447, 27 S. E. 251; *Abbott v. L'Hommiedieu*, 10 W. Va. 677; *Taylor v. Smith*, 10 Grat. (Va.) 557; *Pollard's Heirs v. Lively*, 2 Grat. (Va.) 216; *Nuckols' Adm'r v. Jones*, 8 Grat. (Va.) 267.

It is contended by defendant that the witness Ensign does not, by his evidence, show that he is an expert in relation to the nature and construction of locomotive engines and boilers, concerning which he testified. The evidence of this witness shows that he is a mechanical engineer of considerable experience, and when asked, "In the discharge of your duties have you ever had occasion to inspect or do any work on locomotive boilers, and are you acquainted with the mechanism of such boilers?" he replied, "Yea." This witness appears to be qualified as an expert, although he further says that he never inspected locomotive boilers. The weight to be given to his testimony was for the jury. 2 Elliott on Ev. §§ 1038, 1039, 1052; 17 Cyc. 89. An expert witness may give an opinion, in a proper case, based on his own knowledge

of facts disclosed in his testimony; or he may give his opinion upon facts shown in evidence, and assumed in a hypothetical question submitted to him. 2 Elliott on Ev. § 1116. This action is founded on negligence. It is the duty of the plaintiff to show affirmatively that the defendant has been negligent. Negligence will not be presumed alone from the fact that the boiler of the locomotive, in use in lawful business upon the tracks of the defendant, exploded. In this respect, the case is governed by *Veith v. Salt Co.*, supra. See, also, 3 Elliott on Railroads, § 1299; *Texas & Pac. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136.

We quote from the evidence of the plaintiff as follows: "I didn't notice the actual size of the bolts when new and gone in the construction of this boiler, but I did notice that they were broken off and half rotted in. * * * Q. Were there any considerable number, and, if so, about how many, of those bolts pulled out or broken out of this shell or jacket of the boiler that was there? A. There was a great many. Q. About how many of such bolts did you observe that were less in size than the uniform size at the place where they connected with the boiler shell? A. That I answered a minute ago. I said I didn't know exactly how many, but some of them were so that I could pull them off. Q. State, as near as you can, the extent, whether a third or a half or as near as you can state it, that such bolts were reduced in size below the uniform size. A. Well, all bolts that are in water— Q. Just answer the question. A. Where they were connected to the boiler they were reduced quite considerable and had a cast like iron corrodes around those bolts at that time." We also quote from the evidence of witness Bernard, who was a boiler maker, as follows: "Well, I understand that the bolt is in one whole piece that connects the two sheets together, and if that bolt is broken in any place between the two sheets it will corrode on the end, and that was the evidence I have and the only thing I seen that the bolts was corroded on the end."

It is claimed that, with this evidence admitted, it was improper to reject the whole deposition. That part of the deposition beginning with question 4 and including the answer to question 6, does not appear to relate to facts which the evidence previously admitted tended to prove, and the rejection of this part was not error to plaintiff's prejudice. This part of the deposition relates principally to the life of a locomotive, and to the time it may be used before it will be unfit for use or repair. No evidence was introduced showing the age of the locomotive in question. The part of the deposition beginning with question 7 and ending with the answer to question 15, should have been admitted, in view of the evidence previously admitted for the plaintiff. This part of the deposition related to the necessity of stays

or bolts, and to the effect of broken or defective stays or bolts upon the safety of the boiler, and to the ability of a boiler maker or inspector to detect a broken or destroyed bolt, and to other pertinent matters. The part of the deposition beginning with question 16 and ending with the answer to question 21 does not appear, upon consideration of the evidence admitted, to be relevant, and its rejection was not error. The part of the deposition beginning with question 1 and ending with the answer to question 3, relating to the age, residence and expert knowledge of the witness, should have been admitted.

The part of the deposition offered which should have been admitted was improperly rejected, to the plaintiff's prejudice; and for this error we must reverse the judgment complained of, set aside the verdict, award a new trial, and remand the cause for further proceedings according to law. As this case must be remanded for a new trial, we express no opinion as to the sufficiency of the evidence introduced upon the former trial to sustain the plaintiff's case.

(59 W. Va. 475)

STATE v. HAMMONS.

(Supreme Court of Appeals of West Virginia.
April 17, 1906.)

INTOXICATING LIQUORS — GIFT TO MINOR — EVIDENCE.

H. placed a bottle of whisky on a table and told F., the father of E., a minor under the age of 21 years, to take what he wanted of it, and if he allowed the boy E. to have any of the liquor, that he was welcome to it; the father said he could have it, and the boy took up the liquor and drank of it in the presence of his father. *Held*: No offense under section 16, c. 32, Code 1899.

(Syllabus by the Court.)

Error to Circuit Court, Webster County.

Samp Hammons was convicted of giving liquor to minors, and brings error. Reversed.

E. H. Morton and W. S. Wysong, for plaintiff in error. C. W. May, Atty. Gen., Frank Lively, and W. L. Wooddell, for the State.

BRANNON, J. An indictment against Samp Hammons for giving whisky to a minor was tried by the circuit court of Webster county, upon agreed facts, and a fine was imposed on Hammons. The agreement of facts states "that on the — day of February, 1904, defendant placed a bottle of whisky on a table in Webster county, and told Charley Farley, the father of Early Farley, a minor under the age of 21 years to take what he wanted of it, and if he allowed the boy Early, the minor aforesaid to have any of the liquor that he was welcome to it, and that the father said he could have it and the boy took up the liquor and drank of it, in the presence of the father of the minor."

Is the defendant guilty on these facts under Code 1899, c. 32, § 16, providing that "if any person (except a parent to his child or a guardian to his ward) whether he have a state license or not, give to any minor," etc.? I inclined to favor affirmance of the judgment; but as the question is close, and other members of the court are decided in opinion, I shall not attempt to vindicate my doubts. Whose gift was it of the liquor to the minor, Hammons' gift, or that of the boy's father? The state argues that the defendant suggested the gift, that it was his liquor, not the father's and that the father only consented, did not give. But the statute does not intend to punish where the father is present and consents. The defendant only furnished the liquor, virtually gave it to the father to give to the son. It was the father's gift, because he was present and consenting. But for the exception, the father would be guilty. If it were an offense in him, both would be guilty, whether we regard it as the gift of the one or the other; but as it is no offense in the father, and he being the giver, Hammons is not guilty as aider in an offense or as perpetrator. What Hammon did was with the consent of the father then present. We do not say that it would not be otherwise if the father had been absent, though consenting, as if he give an order to a saloon keeper to give or sell to his son for the son's use. That is not involved.

(59 W. Va. 464)

TROUGH v. TROUGH.

(Supreme Court of Appeals of West Virginia.
April 17, 1906.)

1. DIVORCE—BILL—DEMURRER.

A bill for divorce has two grounds or matters for relief. It charges adultery calling for absolute divorce, and desertion calling for decree of separation. The bill does not name a particeps in the adultery, or give time, place, and circumstance. If the bill be bad therefor, a demurrer, being general, is properly overruled.

2. SAME — ENFORCEMENT OF PAYMENT OF ALIMONY—STRIKING OUT DEPOSITIONS.

A court has no power to strike out and disregard depositions filed by a defendant in defense of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass final decree of divorce against him. Such decree is not due process of law.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 738.]

3. SAME—CONFESSIONS—ADMISSIBILITY.

Confessions of adultery made in the country cannot be given in evidence or considered in a suit for divorce for such offense.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 399-402.]

(Syllabus by the Court.)

Appeal from Circuit Court, Braxton County.

Bill by Virginia B. Trough against Richard L. Trough. Decree for plaintiff, and defendant appeals. Reversed.

Hall Bros., for appellant. Hines & Kelly, for appellee.

BRANNON, J. This is a suit by Virginia B. Trough versus Richard L. Trough for a divorce. The bill contains a charge of adultery and also desertion, though the desertion is not for a period to call for an absolute divorce from the bond of matrimony. The special prayer of the bill is for absolute divorce, which was granted, and the defendant appealed.

Demurrer. There is much argumentation upon a demurrer to the bill, based on the claim that the bill does not name the woman with whom the defendant committed adultery, nor does it give time, place, and circumstance, and thus wants legal certainty. We do not say whether or no a bill for divorce for this offense should contain the name of the particeps criminis or other matter of alleged defect of the bill, because the demurrer is general, and there are two grounds of divorce contained in the bill, one calling for full divorce, a vinculo matrimonii, the other a partial divorce, divorce of separation, a mensa et thoro. The demurrer does not separate these two causes of suit. It does not aim at the charges of adultery, and being general, it was properly overruled. We again say that where a bill contains two or more matters of suit, one good, one bad, the demurrer must be separate. This has always been law. *Miller v. Hare*, 43 W. Va. 647, 28 S. E. 722, 39 L. R. A. 491; *Gay v. Skeen*, 36 W. Va. 582, 15 S. E. 64. The bill contains a prayer for divorce absolute and for general relief, and a divorce of mere separation could be granted under the latter prayer. *Vance Shoe Co. v. Haight*, 41 W. Va. 276, 23 S. E. 553. Therefore, the demurrer was properly disregarded. Here a question arose in my mind. The decree being for absolute divorce for adultery, based thus on that part of the bill said to be defective, can that decree be sustained? Whilst proper to overrule the demurrer, because some relief may be granted, would a decree standing on the bad part of the bill be good on appeal, in view of the rule put in several cases, that where a bill contains some matter proper for relief, and some not good for relief, a general demurrer is not good, and should be overruled, as it should be aimed especially at the bad matter; but where the court gives relief justifiable only on the bad matter, it is reversible error? *Turner v. Stuart*, 51 W. Va. 493, 41 S. E. 924. But that says bad "matter," meaning the very substance of the facts on which the bill predicates the relief sought, bad matter not calling for any relief by law, not mere defective statement of matter which does call for relief. In this case the bill charges adultery, the alleged defect being in not naming a particeps and giving time, place, and circumstance—a mere defect of specification. That takes the case out of the rule just referred to. We find no error in disregarding the demurrer. It was not acted on

expressly, likely owing to inadvertence; but we must regard it as overruled.

An order was made requiring the defendant to pay \$50 for counsel fees and \$15 per month for support of the plaintiff and two children, and, he failing to pay, the court decreed that "none of the depositions taken by defendant be read or considered on the hearing of this case," and granted a decree of absolute divorce, giving the plaintiff custody of the three children, commanding defendant to surrender to the plaintiff the custody and control of a daughter who was with her father, enjoining forever the defendant from interfering with the plaintiff in the care, custody, and control of the children, decreeing that the plaintiff hold a tract of land and personal property consisting of household goods, cows, hogs, chickens, and other property claimed by the plaintiff in her bill, and decreeing costs against defendant. The defendant filed an answer denying all the allegations of the charges involved in the divorce, claiming the land and personal property. The defendant took numerous depositions. Had the court power to thus refuse the defendant the right of defense? For refusal of defense it was, since what avail the answer without proof under it? The case involved the dearest rights of the defendant, wife, marriage rights, children, property, personal character, rights of person and property. What had the payment of this money as temporary alimony to do with the merits of the controversy touching those all important and inestimable rights? Nothing. This action of the court is based on the idea that the defendant in failing to obey the order for payment was in contempt, and that courts have power to punish contempt, and to enforce their orders, necessarily so, and that they can refuse to allow a plaintiff to prosecute a suit for such disobedience, or refuse a party attacked to defend. There is authority for this proposition. 14 Cyc. 795, says that refusal of defense is rarely resorted to, but may be. 1 Ency. Pl. & Prac. 436, says a method to enforce payment "frequently resorted to" is dismissing the plaintiff's bill, or refusing to proceed with the trial, or striking the answer of the defendant from the files and proceeding with the case ex parte. These statements are guarded and hesitating. The reason of the matter, the weight of authority, are decidedly against the power to refuse one a defense when attacked. The late work, *Nelson on Divorce*, in section 861, says: "An order for temporary alimony may be enforced by execution, sequestration, or by proceedings in contempt. But during the suit the court has the power to enforce its orders by declaring the husband in contempt and refusing to proceed with the cause until its order is complied with. In some instances the courts have dismissed his petition for a failure to comply with its orders. It is error

to refuse a matter of right, such as a change of venue, until the temporary alimony is paid. It is doubtful if the court should refuse to enter a decree of divorce until the temporary alimony is paid. But in some instances this practice has been approved. In many instances the husband's answer has been stricken out for his disobedience of the orders of the court. But this is now considered against public policy; for it prevents that full investigation into the merits of the controversy which is necessary to protect the interest of the state." The last expression of Nelson is borne out by *Wass v. Wass*, 41 W. Va. 126, 23 S. E. 537, holding that the state is an implied party to divorce suits and the court must take care that divorces are not granted contrary to law and without good cause. Bishop on Mar., Div., & Sep. § 1095, says: "Taking away privileges in the cause is sometimes employed for enforcing payment. For example, in justifying circumstances, the court may strike out the defendant's answer, or dismiss the plaintiff's complaint, or refuse to proceed with the trial, unless or until its alimony order is obeyed. Possibly some of the cases under these heads have gone too far. The interests of the public, while not prejudiced by what delays the cause or ends it without a trial, will not permit a hearing with the channels of evidence obstructed. Therefore public policy forbids that a husband's refusal to pay temporary alimony should deprive him of the right to defend the suit." This is so because all law says that public policy looks with aversion on divorces. This principle that the public interest is involved so far that it is deemed a quasi party, is fully supported by a note in 30 Am. Dec. 545, and Bishop on Marriage, Divorce and Separation, § 480. Now, you suppress a defense to a divorce suit, and dissolve a marriage on the application of one party, and refuse a defense, and you overturn this public policy. No more effective process to further this result can be conceived. For myself, though not involved in the case, I question the right to dismiss a plaintiff's suit for such contempt, under the nature and structure of our government in America, and especially under our Bill of Rights in our Constitution, art. 3, § 17: "The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay." And does not this accord the right to defend when attacked "in person, property or reputation"?

But let us, on this grave question, look at further authority. In *Hovey v. Elliot*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, is a long, learned opinion for a unanimous court reviewing the law under English and American cases for more than a century touching the power of courts to punish contempt of a party in failing to pay money under an

order of court, arriving at the conclusion that a court cannot for this cause strike out an answer and take the bill for confessed; that it has not the power to summon a party to defend, and having obtained jurisdiction over him "refuse to allow the party to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt." The court held the decree void. In *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, where an answer has been stricken out to a libel of confiscation because the owner of the property was a confederate, the court said, referring to *McVeigh v. U. S.*, 11 Wall. (U. S.) 259, 20 L. Ed. 80, referring to an order striking out an answer, said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no locus standi in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, "Appear, and you shall be heard," and, when he has appeared, saying, "Your appearance shall not be recognized, and you shall not be heard." In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree

thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that wherever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. In *Underwood v. McVeigh*, 23 Grat. (Va.) 409, of a decree given after an answer was stricken out, the court said: "It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegation of fact, and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without the opportunity of defense. An examination of both sides of the question, and deliberation between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of social existence." In the four cases just cited the decrees were held void as not judicial sentences. The party had no day in court. It is not due process of law under state and federal Constitution. It is condemnation without notice. The party's case has been put out of court. No matter the character of his defense, no matter that he be in contempt, lasting final decree against him, involving in this case his most important rights in life, cannot be entered. It is void for want of due process. It violates that definition of due process of law given by Daniel Webster approved without dissent everywhere. "By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." Such action denies equal protection of the law. The law imposes no such heavy penalty for contempt. The right of defense is given to one man and denied to another for no cause involved in the merits. If there is any plain right as to judicial procedure I assert that it is a right to defend where attacked in person, character, or property. We recognize in both opinions in *Hebb v. County Court* that whilst a court might refuse affirmative action, action in favor of one in contempt, it could not deny one attacked right to defend. 48 W. Va. 279, 37 S. E. 676; 49 W. Va. 733, 37 S. E. 676. This distinction between plaintiff and defendant will be found in the opinion in *Hovey v. Elliot*, *supra*. To support the particular position that a defense cannot be denied to one failing to pay temporary alimony because in contempt, I cite *Foley v. Foley* (Cal.) 52 Pac. 122, 65 Am. St. Rep. 147, holding that an answer can-

not be stricken out, but the contempt may be punished otherwise; *Gordon v. Gordon* (Ill.) 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. Rep. 294; *Johnson v. Superior Court*, holding that one in such contempt cannot be denied process for witnesses; *Bailey v. Bailey* (Iowa) 23 N. W. 443, holding that it would be against public policy to deny a defense for such contempt; *Cason v. Cason*, 15 Ga. 405; *McMakin v. McMakin*, 63 Mo. App. 57, holding that contempt "does not authorize the striking of answer or refusal to admit evidence for him"; *Allen v. Allen*, 72 Iowa, 502, 34 N. W. 803, where the court said, "It will not do to hold that the marriage relation may be dissolved on the ground of defendant's inability to pay a sum for alimony, or because of his recusancy"; *Dwelly v. Dwelly*, 46 Me. 377; *Newhouse v. Newhouse*, 14 Or. 290, 12 Pac. 422. The *Century Digest* (volume 17, § 738) will show few cases to sustain such action. Outside New York, scarcely any. Its leading case, *Walker v. Walker*, 82 N. Y. 280, seems hesitating, and rests on the old arbitrary practice of English Chancery. But it is not sound English Law, as the Supreme Court holds in *Hovey v. Elliot*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, and as shown in *Gordon v. Gordon*, 141 Ill. 163, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. Rep. 294, citing *Haldine v. Eckford*, L. R. 7, 425, where the English court said: "Though the contempt of the defendants had been of the most flagrant kind, yet as what they asked was for the purpose of defending themselves, he had no jurisdiction to refuse the order." Other English cases are there cited. The Illinois court says the New York case is not looked upon with favor or followed. Some cases cited to the reverse do not support that reverse. *Casteel v. Casteel*, 38 Ark. 477, holds that the plaintiff's suit may be dismissed for refusal to pay wife's counsel fees. *Winter v. Superior Court* (Cal.) 11 Pac. 633, did not refuse defense, but refused to hear the case on the contemnor's motion, refused a favor asked by him. *Waters v. Waters*, 49 Mo. 385, only holds that a plaintiff's suit may be dismissed for failure to pay a wife money to carry on her defense. *Clark v. Clark*, 117 N. Y. 622, 22 N. E. 1127, does not touch the matter.

Another consideration not without force is that we have a statute prescribing how contempts shall be punished. It was passed in 1830 to restrain arbitrary action by courts. Code 1899, c. 147. I think it contemplates only fine and imprisonment. It curbs or lessens the common-law power of courts. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791. Just as it was held to be the sole mode of punishment in *Galland Case*, 44 Cal. 475, 13 Am. Rep. 167. But it is argued in answer to the point just discussed, that the striking out of the evidence is immaterial, as if all the evidence be considered the

same decree would have been made. How do we know what the circuit court would have thought? The evidence was voluminous and flatly contradictory in material respects—contradictory as to the criminal conduct and as to desertion and other matters. Now, first, a decree without a hearing of both sides is not a judicial decision. The case has never been passed on by the circuit court. The party had right to have the judgment of the circuit court on his evidence and cause before this court can consider the weight of the evidence. Had the decree on evidence on both sides been for the defendant, we could not reverse, unless this court would think it clearly wrong, because he would have the advantage of that decision, and occupy a different position from that which he now occupies. We cannot, in the first instance, be asked to pass on the evidence. This is an appeal court, and is not called on to act until the circuit court has done so. There must be a hearing of the whole case. There has not been. "The Supreme Court will not consider questions not yet acted on by the circuit court." *Kesler v. Lapham*, 46 W. Va. 294, 33 S. E. 289; *Armstrong v. Town*, 23 W. Va. 50. This case, as made up on both sides, has never been decided by the circuit court. But second, the decree is void under the high authorities above given. Can it be, with reason, said that where the whole of a defendant's case has been struck out, consisting of a volume of material evidence, that this court should perform the function of a court of original jurisdiction, treat the case as if heard on the whole evidence in the court below and review it on the evidence on both sides? When it is just as though the party was not before the court, and was decreed against "without a day in court"? Shall we not rather say the case has not been heard, the decree is not binding on the defendant, and remand the case that it may be heard on the evidence? On that evidence we indicate no opinion.

Considerable evidence of admissions in the country by the defendant of criminal conduct was given, which is assailed as incompetent. Can these admissions be considered? As it is deemed by law in the interest of society that marriage should not be dissolved on insufficient grounds, and cannot be dissolved by consent of parties, the common law held such admissions not effectual to sustain a ground for divorce, certainly not alone. 30 Am. Dec. 544; *Bishop on Marriage, Divorce, and Separation*, §§ 707, 730. The lowest grade of evidence in weight. *Nelson on Divorce*, § 781. "While not alone sufficient to warrant a decree, it is admissible in connection with other evidence, unless a statute forbids." 14 Cyc. 682. Does our statute law (Code 1899, c. 64, § 8) ban such evidence wholly? We think so. The Legis-

lature intended to render it incompetent. "Such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed, and whether the defendant answer or not, the cause shall be heard independently of the admissions of either party, in the pleadings or otherwise." Now, this prohibits the bill from being taken for true on default of the defendant to appear, thus making it different from other suits, and in accordance with the rule in divorce cases requires proof of the grounds of divorce. Next, it forbids a decree though the wrongful act be admitted solemnly in the answer. It must be proven. Now if an admission or confession in an answer is of no avail, why shall we say that one made in the country is? Can a decree be had thus by indirection when it cannot by an answer of confession? Plain intent and policy would thus be violated. The letter of the law is that the case shall be decided "independently of the admissions of either party in the pleadings or otherwise." What does this broad word "otherwise" mean? We must give it some effect, as it is sedately added. After saying default, silence shall not avail, but proof must be made; after saying, with special reference to admissions in the answer, that they shall count nothing, this word is added to say that no admission in the country, outside the pleading, shall count. One case in Virginia on this statute seems to hold otherwise. *Bailey v. Bailey*, 21 Grat. (Va.) 48. I have never been able to see with certainty what it means. Does it mean to say that admissions in letters only are competent? *Cralle v. Cralle*, 79 Va. 182, only goes to the effect that admissions may be used to defeat a divorce. *Latham v. Latham*, 30 Grat. (Va.) 807, only says that defendant is entitled to a denial in his answer—that the act never designed to eliminate that pleading so far as to refuse the benefit of its denial. *Hampton v. Hampton*, 87 Va. 148, 12 S. E. 340, overrules *Bailey v. Bailey* by holding under the statute that "evidence that the defendant admitted the charge [of adultery] and a letter from her purporting to admit it, are inadmissible." If this is not the purpose of the plain statute, what is it? Sometimes it operates to defeat justice; but it has a policy which the law has always held as to the marriage state. If wrong, the remedy is with the Legislature. Under another construction a party may obtain a divorce by his or her admission, or greatly aid by it in doing so. It would open the door to collusion between the parties; it would enable one party more easily to divorce himself.

The decree of the 8th day of December, 1903, is reversed, and the case remanded for further proceedings.

(59 W. Va. 476)

HEVENER v. HANNAH et al.

(Supreme Court of Appeals of West Virginia.
April 17, 1906.)

1. LIMITATION OF ACTIONS—DISMISSAL OF ACTION—SECOND ACTION—CLAIMS AGAINST ESTATE.

Executors bring a suit in equity to settle their accounts, setting up in their bill that Hevener claims a debt against their decedent, stating its nature, and denying it, and asking the court to adjudicate as to its validity. Hevener files an answer setting up his debt and asking a decree for it against the estate. The bill is dismissed for want of jurisdiction in equity. *Held*, Hevener is allowed one year after such dismissal to save a suit by him from the statute of limitations by force of section 19, c. 104, Code 1899.

2. SAME—SUITS IN EQUITY AND ACTIONS AT LAW.

Section 19, c. 104, Code 1899, applies to both suits in equity and actions at law.

3. SAME—ACTION PENDING—OBSTRUCTIONS.

The time of the pendency of such suit is to be excluded from computation under the statute of limitations in a new suit for the debt, because the former suit is an obstruction under section 18, c. 104, Code 1899.

(Syllabus by the Court.)

Appeal from Circuit Court, Pocahontas County.

Action by Uriah Hevener against Samuel B. Hannah and C. A. Lightner, executors. Decree for defendants, and plaintiff appeals. Reversed.

McWhorter & McWhorter, for appellant.
L. M. McClintic, for appellees.

BRANNON, J. Uriah Hevener claims a debt against the estate of Allen Galford. It is for contribution for executions paid by Hevener in which Galford was a co-surety. The executors of Galford filed a bill against the representatives of Galford setting up their rights under Galford's will, and bringing his assets before the court, and stating at large the facts touching the demand of Hevener, contesting it on certain grounds, asking the court to adjudicate as to the validity of Hevener's demand, and making Hevener a defendant. Hevener filed an answer setting up fully his demand against Galford's estate, and praying that it be decreed to him. The answer was treated as a cross-bill, and resisted by demurrer and answer filed by certain legatees under the will of Galford. The case came to this court and by its decree a demurrer to the bill was sustained, and the bill dismissed for want of equity jurisdiction without prejudice. *Hannah & Lightner v. Galford*, 55 W. Va. 160, 47 S. E. 359. Within one year after such dismissal, Hevener brought a chancery suit against Hannah and Lightner, executors of Galford, setting up his demand against Galford's estate, and asking a decree therefor. Hevener's bill was dismissed on demurrer, and he appealed.

The chief ground suggested to sustain the decree is that the demand of Hevener was barred by the statute of limitations when

the suit began. This involves the question whether Hevener's demand is saved from that statute by reason of the pendency of the first-named suit under section 19, c. 104, Code of 1899, giving one year for a new suit after dismissal or failure of a former suit in cases in it specified. It is claimed that that second suit, being a chancery suit, not an action at law, is not saved by that section. *Dawes v. New York etc.*, 96 Va. 733, is cited to sustain this position. It holds that the word "action" in this section is used in a technical sense, and applies to actions at law only, not to suits in equity. That case concedes that if the new suit is because of loss of papers it is saved, though in equity, though not in other cases. We are not disposed to concur in that decision where the new suit is for other reasons. It seems a technical construction to say that "action" as used in such remedial statute, made to save loss of rights, applies only to suits at common law, saving only where the dismissal is of such suit, not saving where a suit in equity is dismissed, though for like cause. Why the distinction? Where the reason or justice of it? The court regretted to be called on to make the decision. But on scrutiny it will appear that we are not called on to follow, or refuse to follow, that decision. The Virginia statute differs from ours. Our statute, after speaking of dismissals of actions for certain grounds, says, "or if there be occasion to bring a new suit by reason of the said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be pleaded in bar of an action." Notice the words "said cause." This word "said" refers to the action already spoken of, and I say that if the first suit be a chancery suit, as the second would for the same cause likely be, the second suit would be saved from limitation. And the word "cause" would cover a chancery suit. The Virginia court admits that the word "suit" in the section includes a chancery suit, and as our section contains that word "said" it is to be construed as contemplating a dismissed chancery suit. The Virginia section does not have the word "said" which ours has. We think this consideration would save the new suit, though the former one was in equity. But there is the language "if there be occasion to bring a new suit by reason of said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be plead in bar of an action," the further time shall be given, "notwithstanding the expiration of the time within which a new action or suit must have otherwise been brought." First, this allows a new "suit," which word covers any suit at all, wherever the old suit ended by reason of any cause not barring an action, which means action or suit. These words are not in the Virginia section. Second, it says notwithstanding the expiration of the time within which "a new action or suit must otherwise have been

brought." This covers both law action and equity suit, and both the words new "action" and "suit" are in the most material part of the section, that giving further time, showing intent to save any legal proceeding. Why give this remedial section, intended to save rights by giving new suit where a former one was lost for a cause not deciding the merits, so technical a construction, where both words "action" and "suit" are used, and deny one character or suit relief and grant it to another similarly situated?

It is objected that Hevener was not plaintiff in the former suit, did not move it, and therefore the statute does not save him. He was brought into court upon his demand by the executors for litigation of his debt. He acknowledged the suit by filing an answer seeking relief. Now, the equity or liberality of this statute is designed to give extended time for another suit in any case where the first suit involved the same cause of suit, and failing to give relief for any cause not a bar to another suit. No matter why the case failed of relief, unless by voluntary nonsuit. *Ketterman v. R. Co.*, 48 W. Va. 606, 37 S. E. 683; *Lawrance v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925. It was Hevener's suit as to his claim, as he, at the bidding of the executors, availed himself of their suit for relief, and it does not lie in their mouths to now deny that it was not Hevener's suit. If Hevener had brought a suit while that suit was pending it would have been dismissible under the law of another suit pending. Two suits would not be tolerated. *Hogg's Eq. Procedure*, § 289; 1 Cyc. 21; 1 Ency. Pl. & Prac. 750; *Foley v. Ruley*, 48 W. Va. 513, 27 S. E. 268. And may we not say that by their suit, thereby disabling Hevener from suing, the executors obstructed Hevener in the prosecution of a suit on his demand, within the meaning of Code 1899, c. 104, § 18? *Reynolds' Adm'r v. Gawthrop's Heirs*, 37 W. Va. 8, 16 S. E. 364; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795. This would exclude the time of the pendency of that suit.

The decree is reversed, the demurrer overruled, and the cause remanded to the circuit court for further proceedings there to be had.

(59 W. Va. 641)

BENTLY et al. v. ASH et al.

(Supreme Court of Appeals of West Virginia.
April 17, 1906.)

WILLS—CONSTRUCTION—DEVISEES.

H. K. made his will, devising his real estate share and share alike to his seven children, and relative to his devise to one of them, who had one child living at the date of the will as well as the date of testator's death, the following provision was made: "But the share that I will and bequeath to my daughter, Emmazetta Bently, late Emmazetta Knight, it is my express will and desire and I hereby give the same to her and her child or children, to be held by them free from the claim or claims of control of her husband, and the same shall be

held and enjoyed—the said Emmazetta Bently and her child or children, as her or their separate estate, and that the said Bently shall not have or exercise any control over the same directly or indirectly, in any manner whatever." Held, that not only the child living at the date of the will and at the time of testator's death, but all children born to E. thereafter, took each in fee equally under the will with E. the mother.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill by Lafayette Bently and others against Stephen J. Ash and others. Decree for plaintiffs and defendants appeal. Modified and affirmed.

Switzer & Wiatt, for appellants. Wyatt & Graham, for appellees.

MCWHORTER, P. Henry Knight of Cabell county made his will devising his real estate to his seven children share and share alike as near in quantity and value as the same could be divided; and as to his daughter Emmazetta, wife of William Bently, he made the following provision: "But the share that I will and bequeath to my daughter, Emmazetta Bently, late Emmazetta Knight, it is my express will and desire and I hereby give the same to her and her child or children, to be held by them free from the claim or claims of control of her said husband, and the same shall be held and enjoyed—the said Emmazetta Bently and her child or children, as her or their separate estate, and that the said Bently shall not have or exercise any control over the same directly or indirectly, in any manner whatever." A partition of the real estate was had and 114 acres of said land set apart to Emmazetta Bently as her one-seventh of the real estate, and on the 1st day of August, 1877, John B. Laidley, special commissioner appointed for that purpose in the partition suit, executed to said Emmazetta Bently (née Knight) a deed for the parcel of 114 acres of land so set apart to her. She entered into possession of said land after the conveyance to her by said special commissioner and she and her husband, William H. Bently, conveyed said land in small tracts to various parties. On the 20th day of May, 1903, Lafayette Bently, Della McDermitt (née Bently), Wilson Bently, William H. Bently, Albert Bently, Sarah M. Bently, Maggie Bently, Bonnie Lee Bently, Margarette Bently, and Billie Barlow Bently, infants who sued by their next friend William H. Bently, sued out their subpoena in chancery against Stephen J. Ash, W. J. Robinson, James W. Floyd, Wilson Floyd, J. D. Ash, William H. Harvey and William Clark, the holders of the several parcels of land under the conveyances so made by said Emmazetta Bently and W. H. Bently, her husband, and at the June rules, 1903, filed their bill of complaint against said parties named as defendants; alleging the making of the will by said Henry Knight, and the fact of the partition of the real estate left by him and

the setting apart of 114 acres thereof to Emmazetta Bently and the conveyance by her and her husband, W. H. Bently, of the said 114 acres in small parcels to various parties; alleging that the land set apart to said Emmazetta Bently, the mother of all the plaintiffs except W. H. Bently, her husband, was their land except one-eleventh, claiming the same under said will, that their mother was entitled to one-eleventh and the plaintiff W. H. Bently the husband of Emmazetta and the father of the other plaintiffs was the legal heir of the deceased child Naoma Bently; praying a construction of the will and that they might be declared the rightful devisees under the will of their proportionate part, and that the deeds mentioned in the bill purporting to convey the land set apart to Emmazetta and the plaintiffs might be canceled and held for naught so far as the same affected the interests of the plaintiffs, that the cause be referred to a commissioner to ascertain the value of rents, issues, and profits of said various tracts for the last five years and that their proportionate share thereof be decreed to them, and for general relief.

On July 25, 1903, the defendants all having been served with process and failing to appear, answer or plead to said bill, the same was taken for confessed as to all the defendants and being submitted to the court the court ascertained that the plaintiffs, the children of Emmazetta Bently, were equal devisees with their mother under the will of Henry Knight and that each was entitled to one-eleventh part of the real estate devised to the mother and held under said will and that the share of Naoma Bently, deceased, descended to her father, W. H. Bently, one of the plaintiffs to this suit; and it was further adjudged, ordered, and decreed that the deed from Laidley, commissioner, to Emmazetta Bently for the 114 acres be set aside and also that all the other deeds mentioned in the bill "purporting to convey in different quantities to different parties the said 114 acres of land should be canceled, set aside and held for naught so far as the same affects the interest of said children and their rights under the said will of their grandfather said Henry Knight;" and proceeded to set aside all the said deeds described in the said bill "so far as the same affects the interests of said children and grandchildren under the will of said Henry Knight;" and decreed that the interest of Naoma Bently, one of the children who had died, descended to her father as her sole heir who was entitled to that portion devised to her by said will, being an undivided one-eleventh part; "and that each of said children is entitled to an undivided one-eleventh of said 114 acres;" and referred the cause to a commissioner to ascertain whether the said 114 acres was susceptible of partition among the parties entitled thereto and to ascertain further the value of the said 114 acres and the rental value of the various tracts comprising the same and "what would be a

fair compensation to each of said nine children and to the said W. H. Bently for the land devised (conveyed) away from said children by their mother and her husband." The commissioner filed his report ascertaining that Emmazetta Bently took under the will of the estate in fee one-eleventh of the 114 acres; the husband and father W. H. Bently by inheritance as the heir of two of the deceased children two-elevenths in fee; and the eight living children each one-eleventh; and that the 114 acres as a whole was worth from \$800 to \$1,000 and was incapable of partition into eleven tracts and fixed the rental value of the various tracts which had been conveyed by Emmazetta Bently and her husband; and reported that, "If the contention of the plaintiffs in this matter is correct and sustained, then the husband's $\frac{2}{11}$ and the wife's $\frac{1}{11}$ of the estate would inure to the benefit of these several vendees, and only $\frac{2}{11}$ of the rents, issues and profits should be recovered." To the commissioner's report plaintiff excepted to the effect that the vendees should not take the $\frac{2}{11}$ which afterwards came by inheritance to their grantor W. H. Bently, that at the time of the conveyance the grantor Bently had no interest except his contingent curtesy which was all the grantees purchased. And the defendants made the following objection and exception to the said report: "The defendants object and except to that part of the foregoing report which finds that the plaintiffs or either of them have any interest whatever in and to the tract of land of 114 acres in controversy in this suit. That the finding of the commissioner in that regard is wholly contrary to the law and the evidence, and the defendants have a good and complete title in fee simple to the several parcels of land purchased by each of them respectively as set out in the papers in said cause. This December 10th, 1903."

On January 9, 1904, the cause came on again to be heard upon the motion of the defendants to set aside the decree rendered in the cause on the 25th day of July, 1903, which motion was argued by counsel for plaintiffs and defendants, and the motion was overruled by the court and the cause was heard upon the report of the commissioner made in pursuance of said decree and upon the exceptions to the same filed by the plaintiffs and the defendants. An exception made to said report which quoted from the will certain language, the court ascertained that the quotation from said will by the commissioner was that in reference to the disposition of the personal property and not of the real property, and therefore sustained the exception, and overruled the other exceptions of the plaintiffs and the defendants, and confirmed and approved the report after correcting the same by sustaining the said exception of plaintiffs. "The court doth therefore adjudge, order, and decree that, according to the proper construction of the last will and testament of Henry

Knight, deceased, the tract of one hundred and fourteen acres of land conveyed by J. B. Laidley, commissioner, to said Emmazetta Bently by deed bearing date the first day of August, 1877, and described as follows: [Describing by metes and bounds of two tracts of land, one containing 78 acres and the other 36 acres]—being together one hundred and fourteen acres, is owned by the assignees of Emmazetta Bently and W. H. Bently, her husband, and Lafayette Bently, Della McDermitt (née Bently) Wilson Bently, Albert Bently, Sarah M. Bently, Bonnie Lee Bently, Margarette Bently, and Billie Barlow Bently, children of said Emmazetta Bently and W. H. Bently as follows: The assignees of the said Emmazetta Bently owning one undivided one-eleventh of said one hundred and fourteen acres, and the assignees of the said W. H. Bently owning one undivided one-eleventh of said one hundred and fourteen acres, and Lafayette Bently, owning one undivided one-eleventh of said one hundred and fourteen acres, and the other children, namely Della McDermitt (née Bently) Wilson Bently, Albert Bently, Sarah M. Bently, Bonnie Lee Bently, Margarette Bently, and Billie Barlow Bently, each an undivided one-eleventh thereof, and that said one hundred and fourteen acres should be divided among them accordingly." And it appearing from said report that the land was not susceptible of partition among the several owners the court decreed the sale thereof and gave judgment in favor of the children of Emmazetta Bently against the defendants for the several sums ascertained to be due from them respectively for their proportion of the rents, issues, and profits of the several parcels held by them due to the said children and for costs of the suit. From which decree the defendants Stephen J. Ash, W. J. Robinson, James W. Floyd, Wilson Floyd, W. H. Harvey, and William Clark appealed assigning as error the construction of the will giving to the children of Emmazetta Bently, who were born after the death of the said Henry Knight, their interest in the lands in controversy and in finding that the plaintiff, Lafayette Bently, had any interest or title to any part of said lands; that the court erred in refusing to set aside the decree by default of July 25, 1903, and in referring the matter to a commissioner to ascertain the value of the 114 acres and whether the same was susceptible of partition among the parties; and in overruling defendant's exception to the commissioner's report and finding that the plaintiffs or any of them had any interest in the tract of 114 acres of land; and in decreeing a sale of the said land and the distribution of the proceeds thereof as the court might thereafter direct; and in rendering a judgment against the defendants for rents on the several parcels of land conveyed out of the said 114 acres.

The appellants failed to make any appearance by demurrer, answer, plea, or other-

wise other than to except to the commissioner's report and to make a verbal motion to set aside the decree of July 25, 1903, entered by default, nor have they filed a brief in the cause. The main question for decision in this cause is the construction of the will; in one view of the case the defendants took nothing by their conveyances from Emmazetta Bently and her husband, W. H. Bently, except the one undivided eleventh in said land held by Emmazetta under the will of her father Henry Knight, and the two undivided elevenths held therein by the grantor W. H. Bently who inherited the same as sole heir at law from the two deceased children of the said Emmazetta and himself, and if this construction is right it renders other questions that might be raised on the record immaterial. What was the intention of the testator Henry Knight in his devise to Emmazetta and her child or children? In *Finlay v. King*, 3 Pet. (U. S.) 346, 7 L. Ed. 701, Chief Justice Marshall said: "The intent of the testator is the cardinal rule in the construction of wills, and, if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail." Page on Wills, § 461, says: "The purpose of the court in construing a will is solely to ascertain the intention of the testator as the same appears from a full and complete consideration of the entire will"—citing *Phayer v. Kennedy*, 169 Ill. 860, 48 N. E. 828; *Allen v. White*, 97 Mass. 504; *Stevenson v. Evans*, 10 Ohio St. 307; *Christy v. Christy*, 162 Pa. 485, 29 Atl. 781. "Intention is the life of a will, and when clear, and violates no rule of law, it must govern with absolute sway." *McCamant v. Nuckolls*, 85 Va. 331, 12 S. E. 160; *Cresap v. Cresap*, 84 W. Va. 810, 12 S. E. 527. The will bears date and was executed on the 25th day of March, 1875, and probated on the 20th day of the May following. At the date of the will Emmazetta had a child some five months of age, the testator knew of the existence of the child, and was well aware of the probabilities of the birth of other children to the said Emmazetta, and so expressed in his will clearly the intention of providing for any and all other children that might thereafter be born to his daughter Emmazetta to come in and participate in the provisions of his will. He says, "It is my express will and desire and I hereby give the same to her and her child or children"; that is, "to her and her child" in case she should have no other children but if there should be others born to her then to be held "by her and her children." The words "or children" were clearly added for the sole reason that the probabilities were that others would be born, and that they might take under the will with the one already in existence; then further on in the same sentence says, "and the same shall be held and enjoyed, the said Emmazetta Bently and her child or children, as her or their

separate estate." That the testator intended that the child already born should take under the will is clear, and there is no reason why he should provide for that one alone, when the probabilities were there would be others bearing the same relationship to him, and, to make it clear that such after-born children should not be excluded, he added the words "or children." There can hardly be a question but that the testator intended to devise the land to his daughter Emmazetta and her then living child and to such other children as might thereafter be born to her; if he had intended to include only the child then living he would not have added the words "or children." He intended that each child should hold an interest in said land as his own "separate estate." In *Martin v. Martin*, 52 W. Va. 381, at page 393, 44 S. E. 198, at page 203, it is said by Judge Poffenbarger, speaking for the court: "It is established that under a devise to a person and his children, he having no children at the time of the devise, neither a joint tenancy or tenancy in common between the parent and after-born children is created, unless by some other part of the will it appears that the testator so intended. But, if the devisee has a child at the time of the devise, such child will take an equal share with the parent. In such case the estate will open and let in after-born children"—citing *Hatterly v. Jackson*, 2 Str. 1172; *Moore v. Leach*, 50 N. C. 88; *Gay v. Baker*, 58 N. C. 344, 68 Am. Dec. 229; *Hunt v. Satterwhite*, 85 N. C. 73; *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236. In the construction of a will every word it contains is to have its effect provided effect can be given it, not inconsistent with the general intent of the whole when taken together, and no word is to be rejected unless there cannot be a rational construction of the will with the word as it is found. *Graham v. Graham*, 23 W. Va. 36, 48 Am. Rep. 364; *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527. Under the will of Henry Knight his daughter Emmazetta and her children each took in fee equal parts or undivided interests in the land devised, and the vendees of Emmazetta and her husband took only the three undivided eleventh parts which their vendors were competent to convey, and this is given to them by the report of the commissioner which report in that respect is confirmed and approved by the decree, but evidently by inadvertence the decree departs from the report in this respect and gives to the plaintiffs all except two-elevenths, one held by Emmazetta and one held by the husband and vendor W. H. Bently as heir at law of one of his deceased children, when he in fact held two shares, there being two deceased children as reported by the commissioner and which was confirmed.

In this regard the decree will have to be modified so as to give to the appellants respectively three undivided eleventh interests in the several tracts claimed by them instead

of two undivided elevenths as provided in the decree of January 9, 1904, and, as so modified, the same will be affirmed, with costs to the appellants as the parties substantially prevailing, and the cause is remanded for further proceedings to be had therein.

(73 S. C. 379)

WILLIS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. March 1, 1906.)

1. APPEAL—HARMLESS ERROR.

In an action against a telegraph company for failure to deliver a telegram, evidence that plaintiff was very much worried about his mother's illness before the telegram was sent, though irrelevant, was harmless; the witness simply stating what would be the natural result of such a situation.

2. SAME—REMARKS OF COURT.

Remarks of court in admission of evidence as to matters of fact about which there could not possibly be two opinions, though erroneous, were harmless.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4184.]

3. EVIDENCE—HEARSAY.

In an action against a telegraph company for delay in delivery of a telegram, defendant cannot show reason for delay by eliciting from plaintiff on cross-examination that he had stated on a former trial that the company's agent had told him that the message was sent to a wrong place by mistake; the evidence being hearsay.

4. TELEGRAPHS—DELAY IN DELIVERY OF MESSAGE—INSTRUCTIONS.

In an action to recover for delay in delivery of a telegram, a refusal of an instruction that if plaintiff had other available means of communication with the sender of the telegram, and by using the same could have prevented any mental anguish caused by the delay, it was his duty to do so, and that if he failed to do so the verdict should be for the defendant, was properly refused, where the evidence showed that no degree of diligence in using other means of communication could have relieved him entirely from the consequences of defendant's default.

5. SAME—PUNITIVE DAMAGES.

Where a telegram is delayed for 22 hours without any explanation of the delay, it authorizes a recovery of punitive damages.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 71.]

Appeal from Common Pleas Circuit Court of Cherokee County; Watts, Judge.

Action by James A. Willis against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. H. Ferrons, Evans & Finley, and J. C. Jeffries, for appellant. W. S. Hall, Jr., and Butler & Osborne, for respondent.

WOODS, J. This action is for damages, actual and punitive, on account of mental anguish caused by the failure to transmit and deliver a telegram. There was a former appeal from a judgment for the plaintiff, in which a new trial was ordered. 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828. Upon the second trial plaintiff again recovered a verdict and defendant appeals.

These facts, testified to by plaintiff and his father, seem to be undisputed: The plaintiff received at Gaffney, where he resided, a telegram from his father summoning him to Blackville, the home of his parents, on account of the extreme illness of his mother. Upon reaching Spartanburg, on his way to Blackville, plaintiff, at 10:33 a. m., delivered to defendant for transmission to his father at Blackville a telegram in these words, "Wire me at Columbia, care train 14, stating mother's condition." The plaintiff on his arrival at Columbia inquired at defendant's office for the answer he expected from his father, but was told there was nothing for him. He remained in Columbia from 2 o'clock p. m. until 3 p. m., and on leaving asked defendant's operator to forward message to Branchville, telling her he would not leave that place according to schedule until 7 o'clock p. m. The expected message in reply was not sent by plaintiff's father, because the telegram of inquiry was not delivered to him until 9 o'clock p. m., after plaintiff had reached his mother's bedside. There was, therefore, a delay in transmission of 22 hours and 27 minutes. At Columbia the plaintiff could have communicated with Blackville by one telephone line and two telegraph lines. If his message had been delivered promptly, a reply would have been sent immediately to the effect that his mother was a little better. The claim for damages is founded on the alleged suspense and anxiety of the plaintiff from the time he reached Columbia until his arrival in his father's house, which, it is alleged, would have been relieved by a telegram from his father, but for the delay in transmitting the message of inquiry to him.

1. The defendant first submits the plaintiff should not have been allowed to state that he was anxious and very much worried about his mother's condition before he reached Spartanburg. It is true, the defendant was not responsible for the suffering of the plaintiff on account of his mother's illness, and in that sense the evidence was irrelevant; but any error in its admission was harmless, because he merely stated what would be the result of such intelligence to every normal human being, and it was made perfectly clear in the charge of the circuit judge that the defendant was not responsible for this suffering. Plaintiff was asked this question: "Mr. Willis, when you got to Columbia and failed to find this message, made diligent inquiry if a message had come, and had to leave there without receiving any message, state whether or not you suffered any mental anguish on account of this failure?" and against defendant's objection was allowed to answer, "Yes, sir; I did suffer." We do not think that the position of defendant's counsel that this evidence should have been excluded, on the principle laid down in the former appeal, is tenable. There the inquiry was, could the plaintiff, in testifying, state

his own peculiar apprehensions and conclusions as to the condition of his mother when he failed to receive a telegram from his father in answer to his inquiry, and it was held that the particular conclusions and apprehensions of the plaintiff were incompetent, because different individuals would reach different conclusions and have different apprehensions according to temperament. But the inquiry here was not as to peculiar fears, apprehensions, and conclusions. The failure to receive an answer to a telegram about an ill mother would have brought the suffering of suspense and anxiety to any normal human being, circumstanced as the plaintiff was, whatever might be his peculiar temperament. The question and answer, therefore, involved no claim to damages due to particular conclusions and fears which might be peculiar to the plaintiff. To sustain this exception would require an extension of the rule laid down in the former appeal in this case beyond its reason.

2. In overruling the objection of the defendant to the question just discussed, the presiding judge made this comment: "I don't know what the jury would think about a matter of that sort, but I know once when I was holding court in Abbeville and two of my children got very sick, and they telegraphed that they were about to die, and I told them to telegraph me at Monroe, I was in torture until I got a telegram at Monroe and found they were better. I will allow him to state the distinct fact that he did suffer, without going into how he suffered"—and in excluding the question, "Mr. Willis, are you of a nervous temperament?" He said, further: "Don't you know that the jury has got sense enough to know that if a man's mother was sick, unless he was a brute, he would suffer?" The general rule is that remarks made by a circuit judge in the course of the trial in ruling upon the admissibility of evidence do not fall within the inhibition of the Constitution against charging the jury as to matters of fact. *State v. Marchbanks*, 61 S. C. 17, 39 S. E. 187; *State v. Thrallkill*, 71 S. C. 142, 50 S. E. 551; *Tinsley v. Tel. Co.*, 72 S. C. 352, 51 S. E. 913. No doubt, if such comments were carried to an extent that would make the circuit judge a participant in the decision of the facts upon which the issue depended, this would be good ground for a new trial, as amounting practically to a disguised charge on the facts. In this instance it cannot be denied the circuit judge used strong language, but it related to matters of fact about which there could not possibly be two opinions, and the defendant, therefore, was not prejudiced.

3. It is submitted, next, there was error in not allowing defendant's counsel to ask the plaintiff if he had not stated on the former trial that defendant's agent at Blackville told him the telegram had been sent to Blackburg by mistake. If the plaintiff were asking punitive damages for high-handed con-

duct of the defendant in refusing to give any information about his delayed telegram, then the fact that the defendant attempted to give a bona fide and reasonable explanation would have been relevant. But the task of the defendant here was to prove by competent testimony that there was some good reason for the delay, and this it could not do by the declaration of its agent made to the plaintiff or any other person in its own favor as to the cause of the delay. The record does not disclose that the defendant offered any evidence that the telegram had been sent to Blacksburg by mistake, and therefore, supposing the question to have been asked for the purpose of testing the credibility of the witness, it related to a matter only collateral and entirely unconnected with any other portion of the evidence. *State v. Adams*, 49 S. C. 414, 27 S. E. 451. The statement of the Blackville agent to plaintiff was not part of the *res gestæ*, for it was made many hours after the telegram had been delivered at Spartanburg to another agent for transmission, and any statement made by the Blackville agent to the effect that it had been sent to Blacksburg by mistake was necessarily founded on hearsay.

4. The defendant insists the circuit judge erred in refusing to charge the following request: "If you find that the plaintiff had other available means of communication with his father at hand, and by using the same could have prevented any mental anguish or suffering on his part, I charge you that it was his duty to do so, and, if he refused or failed to do so, your verdict should be for the defendant." Without doubt, it is the duty of one affected by negligence to use all reasonable means to avoid or minimize the damage, and the request considered as an abstract proposition of law was sound. But there was no evidence whatever tending to show that the mental anguish or prolonged anxiety suffered by plaintiff in Columbia, while waiting for a telegram, could have been entirely avoided by his action. On the contrary, it is clear no degree of diligence in using other means of communication could have relieved him entirely from the consequences of defendant's default; for some delay, and hence prolonged anxiety would have been incidental to any effort to establish communication either by telegraph or telephone. Unless all the evidence offered in this case is to be discarded, the only practical issues, therefore, are as to the amount of the damages and whether punitive damages should be allowed. It is therefore clear that the circuit judge covered the point as to the use of other means of communication, when, in refusing defendant's ninth request, he said: "That if he had any means of communicating with his father in Columbia, whereby his suffering and anxiety, if any, could be relieved, such as telephone and telegraph communication, he could not sit still and suffer. But I charge you that it was his duty to

use those means in his power and thus relieve further suffering on his part; and if you find that plaintiff failed or refused to use such reasonable means as he had to diminish his suffering and damage, then you should consider that in mitigation of any damages resulting from such a failure on his part." Inasmuch as it does not clearly appear from the testimony that plaintiff knew of other means of communication, or that they were so close at hand that in using them he could have reasonably expected information as to his mother's condition, within the hour of his detention between trains in Columbia, by their use, the circuit judge properly left it to the jury to say whether, in the exercise of due diligence, the plaintiff should have used such other means of communication. 8 A. & E. Ency. Law, 605, 606.

5. The request to charge that there was no evidence to warrant a verdict for punitive damages was properly refused, under the authority of *Young v. Telegraph Co.*, 65 S. C. 93, 43 S. E. 443. In that case it was held: "Facts that a telegram remained in possession of defendant company for 14 hours without delivery, and absence of evidence tending to show effort to deliver, are circumstances proper to go to the jury as to reckless disregard of plaintiff's rights." In this case there was an unexplained delay of over 22 hours.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 308)

BRAYTON v. BEALL.

(Supreme Court of South Carolina. Feb. 20, 1906.)

1. CHATTEL MORTGAGES — RECORD — NAME OF MORTGAGOR — NOTICE.

Where a name is changed in the manner provided by Civ. Code 1902, § 2899, or as at common law, or where a person has by usage acquired another name than that originally borne by him, the record of a chattel mortgage executed by him under his new name by which he is known in the community is notice to a subsequent mortgagee taking a mortgage from the same person on the same property under another name by which he is also known and recognized.

2. REPLEVIN — PUNITIVE DAMAGES.

Punitive damages are not recoverable in an action of claim and delivery.

3. APPEAL — WHO MAY ALLEGE ERROR.

Where a charge was technically erroneous in granting punitive damages in an action for claim and delivery, where it was made in response to an issue raised by the defendant as well as the plaintiff in the pleadings, defendant cannot claim that such a charge is prejudicial.

Appeal from Common Pleas Circuit Court of Richland County; Watts, Judge.

Action by Ellery M. Brayton against Edward A. Beall. Judgment for plaintiff, and defendant appeals. Affirmed.

Logan & Edmunds, for appellant. A. J. & H. P. Green, for respondent.

JONES, J. This is an action in claim and delivery of a mule, and resulted in a judg-

ment in favor of the plaintiff for recovery of the mule, or \$100, the value thereof, in case a delivery could not be had, and \$11 damages. It appears that in February, 1903, an individual whose surname was McKenzie, residing in Richland county, as a tenant on the lands of plaintiff, executed to the plaintiff, Brayton, a chattel mortgage of the mule in question, signing his name thereto as R. C. McKenzie, which mortgage was duly recorded in the office of the clerk of the court of said county. This same individual subsequently on the 13th day of June, 1903, executed a chattel mortgage on the same mule to the defendant, Beall, signing his name thereto as W. A. McKenzie, which mortgage was duly recorded in the same office. The defendant took this mortgage, after examining the records and ascertaining that no mortgage had been executed on the mule in question by W. A. McKenzie. The evidence in behalf of plaintiff was to the effect that McKenzie was known as R. C. McKenzie; that he rented lands of plaintiff as such; that he had previously executed mortgages and signed notes with that name; that he had bought the mule in question originally from Gregory-Rhea Mule Co., and had executed to that firm a mortgage thereon in the name of R. C. McKenzie. The evidence in behalf of the defendant was to the effect that he was called "Alex." when a boy, as testified to by his brother; that in 1897 he executed a bill of sale signing his name as W. A. McKenzie; and that since the transaction in question he has bought goods and executed papers as W. A. McKenzie.

1. The court instructed the jury: "If he was known in the community as well by the name of R. C. McKenzie as by the name of W. A. McKenzie, both, if he was known by both names and was one and the same person, and made a mortgage of the property in dispute to Brayton and also to Beall, then Brayton's mortgage would be just as good as if he had made it in the name of W. A. McKenzie." The appellant excepts to this charge as error, and contends that the court should have charged as follows: "(a) That the name of an individual consists presumptively of one Christian or given name, and one surname or family name; and that when an individual receives a name in baptism or otherwise, in this state, it becomes and remains for all intents and purposes said individual's lawful name for all time, unless, upon a desire to change it, said individual resorts to the mode prescribed in section 2699, vol. 1, of the Code of Laws of South Carolina, 1902. (b) That an individual can have but one lawful name at one and the same time, and that if the jury should find, in this instance, that the mortgagor had, at the time of the execution of the mortgage to the plaintiff, Brayton, changed his name from that given him in infancy, then in order for said mortgage to have priority of lien over that given to the defendant Beall it must be proven that the

said defendant had actual or constructive knowledge of the change thereof." Appellant assumes that the original and true name of the mortgagor is W. A. McKenzie, and thereupon argues that he could not acquire the name of R. C. McKenzie except by the method indicated in the statute. But there is quite as much ground in the testimony for concluding that the true name is R. C. McKenzie. Moreover, the statutes (section 2699 et seq.), which provide a mode of changing the name, do not abrogate, but are in affirmance and aid of, the common-law rule. *Laffin & Rand Powder Co. v. Steytler*, 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690. When a name is changed under the method prescribed by statute, the time of the change is fixed with certainty, and thereafter the person so changing his name may be sued, plead and be impleaded by his new name, and no other. This, however, does not otherwise affect the common-law right of a person to change his name. At common law a man may lawfully change his name, or by general usage or habit acquire another name than that originally borne by him, without the intervention of court or Legislature. *City Council v. King*, 4 McCord. 487; *Miller v. George*, 30 S. C. 523, 9 S. E. 659; 21 Ency. Law, 311.

2. The finding of the jury under the charge above given shows conclusively that the mortgagor, McKenzie, was as well known in the community by the name of R. C. McKenzie as by the name of W. A. McKenzie. The real question of law, then, is whether, under such circumstances, the record of Brayton's mortgage given by R. C. McKenzie was constructive notice to Beall when he took a subsequent mortgage from the same individual on the same property under another name by which he was known in the community, to wit, W. A. McKenzie. The rule as to constructive notice is thus stated in *Black v. Childs*, 14 S. C. 312, 321: "If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry, and which that diligence might not disclose. 'There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter.'". Since it appeared that the mortgagor was known in the community as well by the name of R. C. McKenzie as by the name of W. A. McKenzie, it is manifest that by the exercise of ordinary diligence in ascertaining the name of the party with whom he was dealing, Beall could certainly

have ascertained that his mortgagor was known also by the name of R. C. McKenzie, and so a record in the name of R. C. McKenzie, must, under such circumstances, give notice that it refers to an individual known also as W. A. McKenzie. In the case of Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347, a lot was granted to an individual in the name of Darby O'Fallon, a nickname by which he was generally or often called and known, although his real name was Jeremiah Fallon. By his true name Jeremiah Fallon conveyed to the plaintiff, and the deed was duly recorded. Subsequently, Fallon executed a deed to the premises in the name of Darby O'Fallon to Teal, who conveyed to Divine, who conveyed to defendant, Kehoe, a purchaser for valuable consideration and without notice. Under these facts the court held that the record of the conveyance by Jeremiah Fallon was constructive notice to a subsequent purchaser, although she took deed in good faith, tracing her title to the name on record by which it was acquired, without notice from the record or otherwise that Darby O'Fallon and Jeremiah Fallon were names of the same person. In the case of Alexander v. Graves, 25 Neb. 453, 41 N. W. 290, 13 Am. St. Rep. 501, the court held that where a person executes and delivers a chattel mortgage under a fictitious name to a mortgagee who did not know that the name was fictitious, the mortgagee may recover the property from another person to whom the mortgagor sold it under his true name after the mortgage was duly recorded. This last-mentioned case is criticised in Mackey v. Cole, 79 Wis. 428, 48 N. W. 520, 24 Am. St. Rep. 728, which, upon a similar state of facts, held the contrary view, on the ground that a mortgage is not effectually recorded where the instrument is executed under a fictitious or false name. We may assent to this view of the Wisconsin court and be unwilling to go so far as the Nebraska court and yet be safe in holding, consistently with both cases, that the record of a chattel mortgage, executed by the real owner under a name by which he is known and recognized in the community, is constructive notice to a subsequent mortgagee, who takes a mortgage from the same person on the same property under another name by which the owner is also known and recognized in the community. This conclusion renders it proper to overrule also the third exception.

3. The remaining question is whether the court committed reversible error in charging the jury that punitive damages were recoverable in this case. The case of Tittle v. Kennedy, 71 S. C. 1, 50 S. E. 544, was decided after the trial of this case, and holds that punitive damages are not recoverable in an action in claim and delivery. In that case, however, the defendant had sought to strike out the allegations as to punitive damages, and the verdict expressly found punitive damages. In the present case the defendant

not only made no effort to strike such allegations from the complaint, but actually set up a claim for punitive damages against the plaintiff, under sections 283 and 299 of the Code of Civil Procedure, for the willful and malicious taking and withholding of the said property from defendant. The charge, therefore, while technically erroneous, was a charge made in favorable response to an issue raised by the defendant as well as plaintiff in the pleadings, and appellant is not in a position to claim that such a charge is prejudicial or reversible error. Moreover, the verdict was for only \$11 damages, and the undisputed evidence was to the effect that plaintiff, besides being deprived of the possession and use of the mule for six days after demand, had expended nine or ten dollars for the issuance of the papers in the case and for the care of the mule before delivery to him. It is therefore extremely improbable that any punitive damages were awarded against defendant.

The judgment of the circuit court is affirmed.

(78 S. C. 336)

STATE v. STUKES.

(Supreme Court of South Carolina. March 1, 1906.)

1. HOMICIDE—EVIDENCE.

On trial for murder, evidence of a witness that he heard the accused call his wife in a loud tone in the house in which they were living, and then heard him walk through the hall and turn the lock on the door of the bedroom of the person who was killed, was admissible, though the witness did not see the accused at the time, but only heard him.

2. WITNESSES—EXAMINATION.

On redirect examination, a witness may be asked if he had not talked with the accused in jail without an effort to impeach him, to show the relationship between the parties.

3. SAME—CROSS-EXAMINATION.

On trial for murder, it is not error on cross-examination to ask defendant as to his failure to keep an agreement with the deceased as to a certain woman to test his veracity.

4. SAME.

On cross-examination of defendant, it was not error to ask him as to an alleged interview with a reporter of a newspaper to test his veracity.

5. SAME.

The cross-examination of a witness may take any range calculated to test his credibility.

6. HOMICIDE—EVIDENCE—ADMISSIBILITY.

Where defendant was charged with having murdered deceased because the latter had withdrawn from his bail bond with intent to surrender him, evidence of improper relations between the deceased and the wife of a third party is incompetent though communicated to defendant before the homicide; it being irrelevant.

7. HOMICIDE—INSTRUCTION—DEFINITIONS.

On trial for murder, it is not necessary that the trial judge shall only charge the crimes of murder and manslaughter in the manner set out in the statute, but he can use the definitions given by the common law.

Appeal from General Sessions Circuit Court of Sumter County; Purdy, Judge.

Colclough Stukes was convicted of murder, and appeals. Affirmed.

J. J. Cantey, for appellant. John S. Wilson and R. D. Lee, for the State.

POPE, C. J. The defendant was tried and convicted of the crime of murder at the July term, 1905, of the court of general sessions of Sumter county. After he was sentenced, he appealed to this court upon seven grounds. From the record it appears that the appellant stabbed to death Capt. D. E. Wells, by the use of a knife upon his neck, throat, and back, inflicting eight wounds from which he instantly died. The history of the crime was about as follows: While the defendant was confined in jail at Sumter, S. C., for some misdemeanor, unable to give bail bond, Capt. D. E. Wells, a planter of some wealth, was induced to become his security upon an agreement that said defendant, being a married man, would quit running around after other women, and stay at home, and attend to his work. The defendant thereafter moved his family to the premises of Capt. Wells, and lived upon his place. It seems that the defendant was upbraided by Capt. Wells on several occasions for his neglect of duty under his aforesaid promises, namely, his failure to work faithfully and stop running after other women. On the 12th day of May, 1905, at noon, when the field hands came to the dwelling house of Capt. Wells and after finishing his dinner, which had been prepared by the family of the defendant, Capt. Wells was sitting in his chair smoking his pipe, and in effect remarked to the defendant that he had failed to keep his word as to his work and as to his conduct, and therefore he intended to surrender him to the magistrate to be put back in jail; that he called another farm hand to go to the magistrate for him in order to make the surrender; that thereupon the deceased, Capt. Wells, arose from his seat and stepped a few paces to place his pipe on the top of a cupboard standing in the passage, whereupon the defendant struck the deceased, and stabbed him with a knife, which stab alone nearly severed his head from his body, and after the deceased had fallen headlong upon his face upon the floor, the prisoner jumped upon his prostrate body and stabbed him repeatedly. All this happened while the deceased was unarmed. The prisoner said, while he was stabbing Capt. Wells a number of times, "You going to send for the magistrate, is you?"

The following are the seven grounds of appeal: "(1) It is respectfully submitted that his honor erred in allowing the witness Frazier Gibbes, over the objection of defendant's counsel, to testify that he 'heard him [the defendant] open the private room door and walk in there,' and 'there was not anybody in there but Colclough' [the defendant], on the ground that said testimony was purely hearsay and not part of the res gestæ. (2) It is respectfully submitted that his honor erred in allowing, over the objection of defendant's counsel, witness to answer or coun-

sel of the state to interrogate John Moulton, a witness for the state, with regard to 'where did you come from when you came into this court this morning,' and 'has not seen Stukes in jail for some months,' on the ground that the evident intention of counsel for the state was to impeach the witness for the state. (3) It is respectfully submitted that his honor erred in allowing, over the objection of defendant's counsel, witness to answer or counsel for the state to interrogate Colclough Stukes [the defendant] upon the subject of his relations with one Beulah Johnson, as set out in the testimony, on the ground that said evidence was entirely irrelevant. 'The issue being [in the words of counsel for the state] whether Stukes killed the deceased with malice aforethought.' (4) It is respectfully submitted that his honor erred in allowing, over the objection of defendant's counsel, witness to answer or counsel for the state to interrogate Colclough Stukes [the defendant] with regard to an alleged interview the defendant had with a reporter of the Sumter Daily Item, as set out in the testimony, on the ground that said interview was not made under oath, and cross-examination, and was, therefore, not the best evidence, and on the ground that said interview did not contradict defendant's testimony on the trial, but was, in consideration of the use made of same by counsel for the state, as evidence independent on the merits of the case. (5) It is respectfully submitted that his honor erred in allowing, over the objection of defendant's counsel, witnesses to answer or counsel for the state to interrogate Maria Stukes [defendant's wife] with regard to an affidavit, which purported to impeach the oral testimony of witness at the trial, and given to John F. Ingram and Mr. Wells and Mr. W. C. Wells, on the ground that John F. Ingram and Mr. Wells and Mr. W. G. Wells were interested witnesses, and on the further ground that said affidavit was not the best of evidence. (6) It is respectfully submitted that his honor erred in denying counsel for defendant to interrogate or introduce in evidence the testimony of Cain Burris, a witness for the defendant, who testified that he lived and worked with deceased, and who left the employ of deceased because deceased took away and interfered with wife of witness, on the ground that the aforesaid experience of witness was known to defendant, and was, therefore, a warning to defendant, and was competent in view that such was calculated to influence the conduct of the defendant and make him apprehensive. (7) It is respectfully submitted that his honor erred in charging the jury the definition of murder and manslaughter as existed at common law in this state, and should have confined himself to charging the same in the words of the statute, which abrogated the rules of common law in the state, and thereby misled the jury to the prejudice of the defendant."

We will now examine the grounds of appeal.

1. The witness, Frazier Gibbes, testified that the only person left in the house when Capt. Wells was killed was Colclough Stukes. That he, the witness, had changed his own position immediately after the appellant had killed Capt. Wells, so that he could not see into the house, but that he heard Stukes call his wife in a loud tone three times, and then, turning, Stukes walked through the hall and turned the bolt of the lock on the door of Capt. Wells' bedroom. The defendant objected to this testimony, because the witness did not see said Stukes, but only heard him. The witness gave as his reasons for so stating that it was Stukes, who entered the bedroom of Capt. Wells, that he heard Stukes call his wife, and from where he was when he called his wife he heard him walk to said bedroom, and that he (Stukes) was the only person in the house at that time. It is true, the witness Gibbes did not see Stukes enter the bedroom, but he gave good reasons for his statement, which was made in the presence of the jury. The statement was made after Stukes had killed Capt. Wells, and that he had killed Capt. Wells was abundantly proved by eyewitnesses and was admitted by the appellant himself. We see no objection to this declaration or the statement by this witness. No use was made of the same to the injury of the appellant. This exception is therefore overruled.

2. John Moulton had been called and used as a witness for the state. After his cross-examination by the defense, on a redirect examination by the state, he asked where he came from when he came into court to testify, he replied, from jail, and admitted that the appellant was there with this witness, and that while together they talked a good deal. At this point the defense objected to this testimony, on the ground that it seemed that the state wished to impeach its own witness. The court held that it was competent for the state "to show the relationship of the witness and defendant; that it is perfectly competent, and the weight of his testimony will be determined by the jury." It had not been developed that the purpose of the state was to impeach the credibility of its witness; so, therefore, if that was to be the purpose of the state, the objection had the desired effect. It is legitimate to show that a witness for the state, or any other party to the prosecution, has relations with the state or such other party. It is well for a jury to know these matters. This exception is overruled.

3. When the defendant, Colclough Stukes, was on the witness stand or a witness in his own behalf, on his cross-examination, the state sought to ascertain his relation to one Beulah Johnson. The defense objected to this testimony, on the ground that it was irrelevant. The record discloses that Beulah Johnson was the young woman whom the

defendant had been charged of visiting. This was one of the grounds upon which the deceased, Capt. Wells, had charged the defendant with a violation of his agreement with him to stay at home and quit running after other women. This question was justified on the cross-examination of the defendant to test his veracity, which is justified by the rules of evidence. *The State v. Howard*, 35 S. C. 201, 14 S. E. 481; *State v. Wallace*, 44 S. C. 357, 22 S. E. 411; *Chapman v. Cooley*, 12 Rich. 654. These matters of cross-examination of a witness are very much within the discretion of the circuit judge. *State v. May*, 33 S. C. 89, 11 S. E. 440. This exception is overruled.

4. Counsel for defense excepts to the right of the state, while the defendant is on cross-examination, to ask him as to an alleged interview had by the defendant with the reporter of the Sumter Daily Item. This was evidently intended to test his veracity as a witness, and is allowable. This is covered by our consideration of the third exception. This exception is overruled.

5. This exception relates to the competency on the cross-examination of Maria Stukes to interrogate her as to an affidavit made by her, on the ground that the affidavit had been given by said witness to persons who were interested witnesses. This cross-examination could take any range calculated to test the credibility of said witness. There could be no interested witnesses in a state prosecution. Every citizen is supposed to uphold the law, to the end that justice may be administered under our law. This exception is overruled.

6. This exception involves the right of the defendant to introduce testimony tending to establish that the deceased had sustained improper relations with the wife of one Cain Burris, which fact, as alleged, had been given to the defendant. What possible connection such testimony could have borne to the case on trial we cannot see. This exception is overruled.

7. Should a circuit judge in his charge to the jury, wherein he gives definitions of the crimes of murder and manslaughter, be confined and limited to the definitions given in our statute law so that the definitions of said two offenses by the common law shall not be given? We do not think a circuit judge is so circumscribed. The Constitution of our state forbids a circuit judge from charging upon the facts, but requires that he shall charge the law. There is no requirement in our own statute law that our circuit judges shall alone charge the crimes of murder and manslaughter as set out in the statute. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed, and, after the remittitur reaches the circuit court, that court shall resentence the defendant herein.

(73 S. C. 402)

BUTLER et al. v. BUTLER et al.

(Supreme Court of South Carolina. March 8, 1906.)

PARTITION—ATTORNEY'S FEES.

There is no warrant for the allowance of a fee to attorneys for plaintiffs in partition out of the common fund.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Partition, §§ 445, 447.]

Appeal from Common Pleas Circuit Court of Saluda County; Prince, Judge.

Action by Henry Butler and others against Lucinda Butler and others. From the decree, the plaintiffs appeal. Affirmed.

Able & Blease, for appellants. Wm. N. Graydon, for respondents.

WOODS, J. The brothers and sisters and the nephews and nieces of Silas Butler brought this action for partition against his widow. Partition in kind having been found impracticable, the land was sold by order of the court. The master reported that attorneys for plaintiff should be allowed a fee of \$250 for their services in the partition suit, to be paid out of the proceeds of sale of land before distribution. Upon exception to this recommendation of the master, the circuit judge held there was no warrant for the allowance of a fee to the attorneys for the plaintiffs out of the common fund. The precise point was decided in *Westmoreland v. Martin*, 24 S. C. 238.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 413)

WATSON v. PASCHALL & CO.

(Supreme Court of South Carolina. March 7, 1906.)

1. ATTACHMENT—MOTION TO DISSOLVE.

Where defendant moved to vacate an attachment, an order deciding that the order of publication of summons was improperly issued because of insufficiency of the affidavit is erroneous, as not based on the motion.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, § 858.]

2. SAME—BOND—APPROVAL.

Rule 69 of the circuit court requires that there shall be indorsed on the bond of plaintiff in attachment the approval of the clerk of court. Code Civ. Proc. 1902, § 156, requires that the clerk shall be satisfied, as an officer, that the bond shall be approved. *Held*, that a bond in attachment, without the approval of the clerk indorsed thereon, is valid.

Appeal from Common Pleas Circuit Court of Chesterfield County; Watts, Judge.

Action by E. T. Watson against Paschall & Co. From an order vacating attachment, plaintiff appeals. Reversed.

Stevenson & Matheson, for appellant. R. T. Gaston and Edward McIver, for respondents.

POPE, C. J. The plaintiff began his action against the defendants above named by

a regular summons and complaint on the 1st day of May, 1905, to recover the sum of \$5,000. He obtained a warrant of attachment upon the defendants' property located in this state to secure the sum of \$5,000. The defendants set aside such warrant of attachment. Their motion came on to be heard before Judge Watts, whereupon he ordered the attachment set aside, from which order the plaintiff appealed to this court.

The following statement will put us in possession of the facts underlying the controversy: The complaint sets out, amongst other things, that the plaintiff was a broker, and that in 1905, he was employed by the defendants to sell for them certain timber lands in Chesterfield county, in this state, and for which service the defendants agreed to pay him the sum of \$5,000; that he secured, as purchasers therefor, Holley and Stephenson, which said sale was confirmed by the defendants, but when the parties appeared to consummate such sale according to the terms of their previous agreement, the defendants refused to carry out the same. They refused to pay the sum of \$5,000 or any part thereof to the plaintiff, and it is to recover this sum of money that the action is brought. On the 1st of May, 1905, the plaintiffs sought to have a warrant of attachment issued by R. E. Rivers, as clerk of the court of common pleas of Chesterfield county, upon the property of the defendants in Chesterfield county. To do this he filed the summons and complaint in his action against the defendants. At the time of filing his complaint he filed his affidavits, setting forth the previous facts herein recited, with the names of the individual defendants and their respective places of residence, showing that they were nonresidents of this state. Thereupon an attachment in the usual form was issued, on the same day the plaintiff obtained from said clerk of court the usual order for publication, so that the defendants might each one be served thereby with the summons and complaint. That said summons was published for the first time on May 5, 1905, in the "Carolina Citizen," and for five successive issues, once in each week, said notice was published. On June 27, 1905, the defendants gave notice of their motion before Hon. R. C. Watts, Judge of the fourth circuit, for an order dismissing, vacating and setting aside said attachment on the following grounds: "(1) That said attachment was improvidently issued. (2) That said attachment was irregularly issued and without warrant of law, in that (a) no undertaking, with the approval of the officer taking same, indorsed thereon, has ever been filed with the clerk of the court in this cause; (b) the affidavit upon which said attachment was granted has never been filed with the clerk of this court; (c) no undertaking upon the part of the plaintiff in said cause was filed with the clerk of this court within

10 days after the said issuing of said attachment; (d) that neither the order for service of summons by publication in this case, nor the affidavit for such order, has ever been filed with the clerk of this court; (e) that there is no order of publication of summons in this case on file with the clerk of this court, or in his office; (f) the summons in this cause was issued and published before complaint in said cause was filed with the clerk of this court; (g) the summons does not state in the past tense, when and where said complaint was filed, but was dated April 29th, and states that complaint was filed May 1st; (h) the said proceedings are otherwise irregular and without warrant of law."

From time to time the motion was continued, until finally it was heard about the 25th of July, at which hearing the following affidavits were used, captions being omitted:

"Personally before the subscribing officer appears R. E. Rivers, clerk of court in above county and state, who, being duly sworn, says: (1) That before the attachment in the above stated case was issued by him, that an undertaking or bond was given in the sum of \$1,000, which undertaking had sufficient surety which was approved by me and filed in my office as required by law on the 1st day of May, 1905, and that I did not write on the bond the word 'approved,' for the reason that I did not consider it necessary, but I had actually approved the bond before I issued warrant of attachment. This bond was filed with me just before the attachment was issued. (2) The attachment was issued upon an affidavit and a verified complaint, both of which were filed in my office before the warrant of attachment was issued on May 1, 1905, and the said warrant was issued upon them. (3) That thereupon an affidavit, on which was based an application for order of service of summons by publication, was on the same day filed with me; on this affidavit I granted the order of service of summons by publication and the said papers were then and there filed with me in my office, and the order of publication is now on file in my office. That the complaint was filed with me at the same time that I signed the order of publication. And I considered the complaint filed with me before order of publication was granted, and I am satisfied it was so filed. The first notice in the paper of the publication of the summons did not appear until several days after an order was granted and papers filed with me. (4) The complaint in this case was filed with me on the 1st day of May, 1905, and the order of publication granted the same day, and an inspection of the file of the 'Carolina Citizen' shows that the publication was not until after that date was the first publication made. (5) That the complaint, the affidavit for attachment and order of publication and the

bond for attachment in above stated case were all filed with me the 1st day of May, but only the complaint, which was on the outside paper, inclosing the others was actually marked 'filed' on that day, and the others having since then been marked 'filed' by me, having never been out of my office since filed. R. E. Rivers, Clerk of Court Chesterfield County, S. C.

"Sworn to before me, this 3d day of July, 1905. D. S. Matheson, Notary Public. [Seal.]"

"Personally comes W. F. Stevenson, who, on oath, says that he had the papers prepared to obtain the attachment in this case on Saturday, April 29th, and dated his summons as of that date, expecting to get the warrant of attachment from Judge R. C. Watts here in Cheraw, but at the last minute it was inconvenient to do so, and he postponed the application until Monday, May 1st, when he obtained the attachment from Mr. R. E. Rivers, clerk of court, and immediately attached the notice to the bottom of summons, notifying the defendants that the complaint was filed on May 1st at the clerk's office, in Chesterfield county, a copy of which summons as published is heretofore attached, being first published May 5, 1905, in 'Carolina Citizen.' That on obtaining the attachment, he left the affidavit of nonresidence and the verified complaint and the bond and the order of publication, all properly signed and complete, with the clerk of the court for filing and they were so filed on that date. W. F. Stevenson.

"Sworn to before me, July 29th, 1905. T. G. Matheson, Notary Public. [Seal.]"

"Personally before the subscribing officer appears J. T. Meehan, who, being duly sworn, says that he is the editor of the Carolina Citizen. That the summons in the above stated case was published in his paper, and that the first issue in which the same was published was dated May 5, 1905, of which a copy is hereto attached. John T. Meehan.

"Sworn to before me, this 29th day of July, 1905. D. S. Matheson, Notary Public."

Upon August 1st, the presiding judge granted the following order, caption being omitted: "The defendants, appearing for the purpose only, having moved to dismiss the proceedings in the above-stated case, and to vacate and set aside the warrant of attachment therein granted by the clerk of this court, on the grounds fully set forth in their notice of motion, served on plaintiff's attorneys; the motion was heard by me upon the papers in the case, and certain affidavits submitted by the plaintiff's attorneys. It appears that the undertaking on the part of the plaintiff did not have the 'approval of the judge or officer taking the same indorsed thereon,' as required by the sixty-ninth rule of the circuit court, at the time the warrant of attachment was issued; nor was same, so indorsed, filed with the clerk of court of this county within 10 days thereafter. This failure to have the undertaking approved,

as required by this rule of court, cannot be cured by the fact that such approval was indorsed thereon afterwards. There was no sufficient affidavit, as required by section 156 of the Code of Civil Procedure of 1902, that the defendants 'cannot, after due diligence, be found within the state'; this is necessary where it is desired to serve the defendants by publication. It is, therefore, on motion of R. T. Gaston and Edward McIver, attorneys for the motion, Ordered, That the attachment herein be vacated and set aside, and that the proceedings had by plaintiff to serve the defendants herein be dismissed with costs. It is further Ordered, That the notice of motion, and also the affidavits read by plaintiff's attorneys, be filed with the clerk of this court. August 1, 1905. R. C. Watts, Judge of 4th Circuit."

To this order due notice of intention to appeal was served, and the following exceptions are the grounds of appeal on behalf of the plaintiff:

"(1) The circuit judge erred in holding that there was no sufficient affidavit to procure the order of publication, this being error: (a) Because that was not a ground of the motion, the motion as to that matter being on the ground that there was no such order or affidavit on file with the clerk. (b) Because it is a judicial matter for the clerk to determine whether it is proved to his satisfaction whether it is a proper case in which to order publication, and, unless fraud is charged, his decision as to whether the proof is sufficient to warrant the conclusion that the defendants cannot be found in the state with due diligence is final, and no special statement of facts is required by section 156 of the Code of Civil Procedure of 1902, it being necessary only to prove the statement to the clerk's satisfaction, and his honor erred in holding that the affidavit was insufficient, or going into its sufficiency at all, as that was exclusively for the clerk. (c) In holding that the affidavit was so defective as to nullify the order of court based thereon, there being no motion to set aside said order of publication as fraudulently granted.

"(2) His honor erred in dissolving the attachment on the ground that the undertaking was not filed with the approval indorsed thereon within the rules of this court, in that: (a) The approval was duly made at the time the bond was filed, and it is error to hold that the clerk, by an oversight, could commit error which could not be remedied by indorsing that which he had done, on the bond nunc pro tunc. (b) In holding that it is the indorsement of approval rather than the approval that makes the bond sufficient. (c) In holding that the rule as to approval 'of the judge or other officer' refers to undertakings taken by the clerk; whereas, he should have held that where the attachment is issued by the judge or other officer, and the bond is filed with the clerk, it should have the approval of the officer indorsed

thereon, but where the clerk himself issues it, no such indorsement is required. (d) He also erred in holding that the failure to have the clerk indorse the bond was fatal to the attachment, when the rule of court says that if the undertaking is not filed the attachment may be dissolved, but does not make the penalty for omitting the indorsement, the dissolution of the attachment. (e) He also erred in holding that the indorsement by the clerk who took the bond, having approved it at the taking, made as soon as his attention was called to the same, was not a compliance with the spirit of the rule and should have sustained the attachment; and in not holding that in the absence of proof of injury from such omission, the defendants could not complain.

"(3) The court erred in holding that a defect in the affidavit for order of publication, if there was such defect, would dissolve the attachment."

We will now consider the exceptions. It must be remembered that the showing before the circuit judge for the order passed by him were the papers themselves, and the affidavits of R. E. Rivers, clerk of court, W. F. Stevenson, attorney, and John Meehan, as the editor of the Carolina Citizen. By the first two affidavits it is clearly made to appear that the attachment was issued upon an affidavit and a verified complaint, both of which were filed in the office of the clerk of court before the warrant of attachment was issued on the 1st of May, 1905, and it was upon said papers that the warrant of attachment was issued on said date. That thereupon an affidavit was made on the said 1st of May, on which was based an application for an order for service of summons by publication, and upon such affidavit the order for service of summons by publication was made, and the said papers were filed on that date by the clerk of court and such order for publication is now on file. And that the complaint, the affidavit for attachment and order for publication, the bond for attachment and order for publication, were all filed with the said clerk of court on the 1st day of May, 1905, but only the complaint, which was on the outside paper inclosing the others, was actually marked "Filed" on that day, and the others have since then been marked "Filed" by said clerk of court, having never been out of his office as clerk. The affidavit of Mr. Stevenson, who prepared the papers, substantiates the statement of the clerk in every particular. The affidavit of Mr. Meehan merely states the publication of the order for service upon the defendants by publication. There was no affidavit to deny or modify any of these statements for the plaintiff. The order of the circuit judge, appealed from, relates to the failure of the clerk of court to indorse his approval upon the attachment bond itself, and that no sufficient affidavit appears, as required by section 156 of the Code of Civil Procedure of 1902 that the de-

fendants cannot after due diligence be found in the state.

1. We cannot sustain the order in the last respect, for it was no part of the motion of the defendants, and so much, therefore, of the judge's order cannot be sustained, but as to the other portions we have been greatly exercised.

2. In the case of *Townsend v. Sparks*, 50 S. C. 380, 384, 27 S. E. 801, 803. Mr. Justice Jones, speaking for this court, held that the filing of a paper by the clerk of court is when a paper said to be filed is actually "delivered to the proper officer and by him, received to be kept on file." It is true, in the case just cited, that court held that the paper there in question was not filed in the proper sense of the word, because it was immediately afterwards allowed to be removed from the said clerk's office; but unquestionably in the case at bar every paper referred to was actually on file in the office of the clerk of court, although each one was not so marked. The word "Filed" was placed by the clerk on the complaint, in which complaint was inclosed each of the other papers referred to. We hold, therefore, that each one of these papers has received the full benefit of the requirement to be filed. The greatest trouble is raised by rule 69 of the circuit court, which requires that there shall be indorsed on the undertaking or bond of the plaintiff the approval of the clerk of court, which was required to be indorsed on the bond itself. Section 156 of the Code of Civil Procedure of 1902, only requires that the clerk shall be satisfied, as an officer, that the bond or undertaking in question shall be approved by the clerk of court. This bond was held by the clerk to be sufficient, as is evidenced by the fact that he acted thereon by his conduct in thereafter issuing the attachment. We admit that there are reasons at times why the approval should appear by an indorsement upon the bond itself, but it does seem to us that in the case at bar there is no allegation that the bond was insufficient. It was approved by the clerk himself, whose duty it was not to issue a warrant for attachment until a sufficient bond was executed by the plaintiff. However, we think that the decision of this court in *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272, is applicable, wherein it is held that rule 66 of the circuit court requiring undertakings in attachment to be witnessed was inoperative because a rule of court cannot impose conditions not required by the statute. So we hold in accordance with the reasoning and decision of the case just cited, that this rule of court 69 should not be held to go beyond the statute of this state, which nowhere required any such thing to be so indorsed on the bond. We, therefore, sustain the exceptions of the plaintiff.

It is therefore the judgment of this court that the order appealed from be reversed, and the case remanded to the circuit court.

(73 S. C. 423)

EXCHANGE BANKING & TRUST CO. v.
FINLEY et al.

(Supreme Court of South Carolina. March 7, 1906.)

PARENT AND CHILD—DUTY TO SUPPORT.

Where a mother obtains a judgment in divorce giving her the custody of the child, the father, though absolved from all legal obligation to support the child, is morally bound to assist it, and where he receives a legacy for such child as executor, and he makes payment to her to relieve her necessities, they will be deemed made under his moral obligation, and he cannot obtain credit therefor on the legacy received.

Appeal from Common Pleas Circuit Court of Charleston County; Memminger, Judge.

Action by the Exchange Banking & Trust Company, as guardian of Minnie J. Finley, against Edward Finley and others. Decree for plaintiff, and defendant Finley appeals. Affirmed.

Mitchell & Smith, for appellant. B. A. Hagood and Legare Walker, for respondent.

GARY, A. J. The question presented by this appeal is whether a father who, as executor, had in his hands a legacy bequeathed to his infant daughter, has the right to set up as a counterclaim sums expended for her maintenance, when sued by her to recover said legacy, on the ground that he had been previously absolved from legal liability to support his daughter.

The facts out of which the controversy arose are thus stated in the decree of his honor, the Circuit Judge: "Thomas Finley, late of Charleston, died in 1892, leaving an estate of about \$29,000. He had executed a will, whereby his brother, Edward Finley, was appointed executor, and wherein a legacy of \$1,000 was bequeathed to Minnie J. Finley (daughter of Edward Finley), then a very young child and now about 19 years of age. This legacy was to be paid 15 months after testator's death, without interest until the expiration of the said 15 months. In 1891, Edward Finley was divorced, at Chicago, from his wife, the mother of Minnie Finley, and she was given custody of the child, and he, under the law, freed from all legal obligations to support the child; the divorced mother of Minnie Finley placed the child at a Catholic educational institution at Chicago, and paid her board and tuition there for a while, when, it seems, she ceased paying, and, upon application of the authorities there, the father, Edward Finley, paid such board for a time; but several years ago, upon his ceasing to pay, the child was discharged from the institution. How she has been supported and cared for in the interval to this time does not appear, but certainly not by the father. It does not appear that any guardian of the estate of Minnie Finley was ever appointed anywhere, and it is quite sure there was none in South Carolina up to the time of the appointment

of the plaintiff herein, which as such guardian now brings this action for an accounting against said Edward Finley, as executor, etc., and for the recovery of said legacy for Minnie Finley. On November 4, 1893, Edward Finley filed an account in the probate court at Charleston, in which account said legacy is stated to be paid, and he was discharged as executor of his brother, Thomas Finley. As a matter of fact in the case, no part of this legacy has ever been paid to any duly appointed guardian of Minnie Finley, although under the terms of the will it has been payable with interest for some seven or eight years. But the claim of the defendant, Edward Finley, here is that he has paid out of the bulk of it for necessities for her support and maintenance; and as against this action for the legacy, he sets up these alleged payments (amounting in all, it is alleged, to \$969), both as an equitable defense and as a counterclaim; and seeks to have them set off against the legacy admittedly in his hands as executor of his brother's will. Stripped of extraneous matter, there are really but two questions which fall out for decision in this case: First. Did Edward Finley actually pay out of the amounts set out in his answer for necessities for Minnie Finley? Second. If so, should they be legally or equitably set off against the legacy, as prayed for in the answer? It is a conceded proposition of law in the case that, after the divorce, Edward Finley was under no such legal obligation as that of a father to a child to pay for necessities for his infant daughter, Minnie Finley. It is denied, as a matter of fact, that the evidence is sufficient to establish the payments, or that, if established, they can be considered more than mere gratuities, induced by the natural tenderness and affection of a father to a child, the decree for divorce excusing him from any such legal obligation to the contrary notwithstanding. It is argued for defendant that the idea of gratuity is inconsistent and irreconcilable with the idea of misapprehension of the legacy."

The findings of fact and conclusions of law by the circuit judge are as follows: "I have reached a conclusion, however, upon the facts of the case, after a careful examination of the pleadings and testimony, which lead me to the irresistible conclusion that this is no such case in which a court of equity should sanction any such actions as those of Edward Finley towards his infant daughter, Minnie Finley, whereby he has deprived her of her uncle's bounty entrusted to his hands for her benefit and unqualifiedly under the will for her with interest, 15 months after the said testator's death. I do not think it is necessary even to attempt to reconcile the dilemma in which her attorneys are sought to be placed upon the argument (and I must say right here that this case has been most ably and completely argued before me, and in all respects presented so that I have had

as little difficulty as possible in arriving at my conclusion). The testimony, viewed in the light of the intrinsic probabilities of the situation, disclosed by the record, satisfies me that Edward Finley simply appropriated this legacy of his daughter, and converted it to his own use, and when demands were made upon him for necessities which it was said her mother was unable to meet, he met those demands reluctantly out of his own funds, and the least extent possible (either moved by those natural dictates of a parent for his offspring, which as above stated, no decree for divorce, nor any other human agency, can eradicate altogether from the human breast; or to avoid bringing on legal inquiry and the consequent compulsion upon him to make a settlement with her and discharge the legacy). The payments he made for her at the Catholic academy and to the doctors and for clothing, if he made them to the extent claimed in his answer (and the testimony is very meager and unsatisfactory as to these alleged payments) were, in my opinion, paid by him gratuitously in the sense of the law, but more in the nature of expediency to keep his daughter from actual want and consequent more rigid inquiry on her behalf into her affairs. And he never had expressed the slightest intention of making these payments a charge against the legacy. He, perhaps, intended to pay her the legacy when he saw fit; but he did not intend to, and did not in the law or fact, carry out the solemn sentence of his brother's will. He undertook to ignore and set at naught the directions of the most sacred instrument known to the law, a dead man's will, and yet he is here invoking the aid of a court of equity, which, through the humble instrumentality of its presiding judge, is here charged by decisions of our courts now hoary with age, coming down to us from judges and chancellors whose very names demand our reverence, admiration, and respect, with the sacred duty of protecting the interests of those who, by reason of their tender years, cannot protect themselves. He was divorced from the mother and she given the custody and control of the child. It is manifest he did not intend the mother to get control of the legacy. See his letter to Dr. Smith, of August 4, 1900, 'I know nothing would be more pleasing to her mother than to get her fingers on that money.' Now, it is no use to go over the cases from our state and elsewhere, which establish the principles of law controlling the situation here. There can be no doubt, from these cases, that while it is better practice for a guardian or trustee to get the sanction of the court for the expenditure of any of the capital of the ward as cestui que trust, there may be exigences which will require such a break in the capital before such sanction can be obtained, and which will at once be sanctioned when brought to the attention of the court; and there may be cases even where there is no exigency, but the money

has actually and in good faith been paid out for necessities of the ward as cestui que trust, which a court of equity would ratify and allow to be set off in a suit subsequently brought by or on behalf of the ward or cestui que trust. All I can say here is that this does not appear to me as such a case. There does not seem to me to surround it and to characterize the actions of the executor here, who held this legacy as guardian of his own wrong as trustee by operation of law, after it became payable under the will, that apparent openness of dealing and purpose to act for the best interest of the child which recommends a case to the court when such a defense is interposed as we have here. The atmosphere here is one of concealment and deceit. The executor credits himself in the probate court with paying the legacy in full, when, as a matter of fact, he had not, even on his own showing, paid it more than in part. There is no real pretense at an investment of the fund for the benefit of the child (unless the mere juggling with the bank stock can be called such investment, which it cannot) and the application of the income to her needs and a break into the capital only upon clear proof of necessity. The terms of the dead uncle's will were not complied with, and yet the discharge as executor was deceitfully obtained; the infant abandoned, and for years no money paid for her at all, or income credited to her. The doctor whose services she seems to have required, deceived as to her ability to pay his bill, no frank disclosure of the status of her legacy in his hands, no systematic or any other sort of accounts kept; and the bold claims set up here, years after the money should have been paid or invested for her, that a large sum, almost the whole capital of the legacy, was expended by him for necessities for her, and an appeal made to the conscience of the court in his behalf therefor. The plaintiff herein is entitled to the relief demanded in the complaint, and the defense and counterclaim are neither sustained. Let it be referred to Master Mitchell to compute the amount due under the will of Thomas Finley to the legatee, Minnie Finley, pursuant to the conclusions herein announced, and report the same to this court for its further order and decree thereupon."

The appellant's attorneys in their argument say: "The sole question in the case under the decision of the judge is: Were these payments made by Edward Finley, in the eye of the law, such gratuitous payments as that he is not entitled to have the benefit of credit for the amounts so paid, in an accounting with the plaintiff? This issue is further narrowed, inasmuch as the facts are not disputed and the question is: Did the circuit judge draw a correct legal conclusion from those facts?" In Riddle v.

Riddle, 5 Rich. Eq. 31, 34, it is said: "Whenever the father or other near relative of the infant is trustee, in such case he should show distinctly his purpose to charge for maintenance; or maintenance before such manifestation, may be justly inferred to be afforded gratuitously." The case of Crosby v. Crosby, 1 S. C. 337, states the principle correctly, that when a father makes a gratuity to a child, he cannot afterwards convert it into a debt. In the case of Pressley v. Davis, 7 Rich. Eq. 105, 62 Am. Dec. 396, the following principle is announced: "If the father were now claiming for the past maintenance of his children, the claim would be rejected. A father is bound to maintain his infant children from his own estate, however ample may be their separate resources, and no allowance for this purpose will be made to him out of their estate. If he is unable to maintain them, the court may order maintenance out of their own property, upon his petition for this purpose; the first point of inquiry being his ability to maintain them suitably from his own estate. But his past maintenance of them, creates no debt from them to him."

The appellant's attorneys, however, contend that, after the defendant was absolved from the legal obligation imposed upon him to support his infant daughter, they sustained towards each other the relation of strangers; and that when he, as executor, came into possession of the legacy bequeathed to her, he occupied no other attitude than that of her trustee. While it is true that the judgment in the divorce proceedings absolved him from all legal obligation to maintain her, nevertheless he still remained under a moral duty to render her assistance, which was not lessened by those proceedings. Indeed, when it was adjudged in a proceeding to which he was a party that he was no longer liable for her support, the moral obligation became greater, for the reason that he took part in depriving her of her legal rights. The defendant invokes the aid of the court in the exercise of its chancery powers, which it cannot grant without ignoring the moral obligation that rested upon him to support his infant daughter. He does not come into court "with clean hands," and, therefore, is not in a position to ask for equitable relief. In making the expenditures for the maintenance of his daughter, the court will presume that his intention was to discharge and not to violate his moral obligation, or, as said by the circuit judge, that he was "moved by those natural dictates of a parent for its offspring, which no decree of divorce nor any other human agency, can eradicate altogether from the human breast."

It is the judgment of this court that the judgment of the circuit court be affirmed.

(141 N. C. 60)

EDWARDS v. CITY OF GOLDSBORO.
(Supreme Court of North Carolina. April 10, 1906.)

1. MUNICIPAL CORPORATIONS — ILLEGAL CONTRACT — LOCATION OF PUBLIC BUILDINGS.

A contract between a city and the owners of property therein to locate certain public buildings near their property in consideration of certain payments to be made by them to the city was illegal, as in violation of Revisal 1905, § 2916, declaratory of the common law, requiring municipal officers to use the public property as the interests of the municipality may require.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 570, 571, 595.]

2. CONTRACT — ILLEGALITY — PARTIAL PERFORMANCE — RECOVERY OF CONSIDERATION PAID.

Where a city made an illegal contract with certain property owners, whereby a city hall and market house were to be erected by the city, and the city erected the hall, but not the market house, the property owners could not recover the sums paid by them to the city under the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 688.]

Appeal from Superior Court, Wayne County; Ward, Judge.

Action by Asher Edwards against the city of Goldsboro. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The plaintiff, in his complaint, alleged that, by an act of the General Assembly, the defendant was authorized to build a city hall and market house, and that plaintiff and other citizens of Goldsboro, who owned real estate therein and who believed that the location of the proposed public buildings near their property would greatly enhance its value, offered to subscribe and pay to the city divers sums of money, amounting in the aggregate to \$1,035, if the city authorities would erect said buildings on a site near the property of the subscribers, and the offer was made and the money was afterwards actually subscribed and paid for the purpose and with the intent of inducing the city to locate the buildings at said place and with the view of enhancing the value of their property and receiving the benefit of the said location, and the money was accepted by the city with knowledge of said intent. That plaintiff paid the sum of \$600 to the fund for that purpose, and that, notwithstanding the receipt of the money by the defendant and its promise in consideration of the sum to locate both buildings at the said place, the defendant has erected the city hall as it promised to do, but has failed, and, upon demand, has refused, to so erect the market house, but instead has put up fish stalls, which have proved to be a real detriment to their property. That the erection of the city hall, while of some, is yet of very little benefit; the location and erection of the market house being the main object of their subscription. The plaintiff demanded the return of the \$600 paid by him, and, upon refusal of the defendant to comply therewith, brought this action to re-

cover the same with interest, and the prayer of his complaint is to that effect. The principal allegations of the complaint as to the subscription and its purpose are admitted in the answer, though the defendant denies that it has not complied with the agreement, and alleges that the structures erected had improved the value of plaintiff's property. It is not necessary to make further reference to the answer. Issues were submitted to the jury which, with the answers thereto, are as follows: "(1) Did the defendant city fail to locate and erect a market near the property of the plaintiff as alleged? Ans. Yes. (2) Did the plaintiff pay to the defendant \$600 on agreement that the defendant would locate the city hall and market house near plaintiff's property? Ans. Yes. (3) What amount, if any, has the property of plaintiff been enhanced by the erection of the buildings by the defendant on the location mentioned in the pleadings? Ans. \$600." The plaintiff, upon the first two findings of the jury, prayed ore tenus for judgment in the nature of a mandamus to compel the defendant to locate and erect a market house as it had agreed to do. This prayer was refused, and plaintiff excepted. The court thereupon entered judgment for the defendant, that it go without day and recover its costs. The plaintiff excepted and appealed.

Aycock & Daniels and W. C. Munroe, for appellant. Dortch & Barham, for appellee.

WALKER, J. (after stating the case). While the plaintiff, in his complaint, prayed for the judgment to which we think he was legally entitled, instead of a mandamus, if the contract with the city had been valid, yet his cause of action was not properly conceived, and he cannot recover the \$600 which he subscribed and paid because the contract with the city was broken by it, as it was void, being against public policy and founded upon an illegal consideration. For the same reason, the third issue was immaterial, as constituting the basis for affirmative relief, in behalf of the defendants. The enhancement in value of plaintiff's property by the erection of the city hall on the site designated in the contract cannot be used as a counterclaim, as the city can gain nothing, either directly or indirectly, by the illegal transaction. It surely cannot benefit in any way by a void contract, for, when it is determined that the transaction was invalid, any increase in value of the plaintiff's property becomes a mere incident of the erection of the building at that place, and the case stands the same as if the contract had not been made, and what the city did was merely a voluntary act on its part. There is nothing, therefore, to support the claim for an allowance because of the enhancement, for the reason already stated and for the reason hereafter assigned for denying relief to the plaintiff. The form of the issues

indicates that the court proceeded in the trial upon the theory that the contract was valid, and had been broken, and for this reason submitted the third issue, whereas the case should have been tried upon the opposite idea—that the contract was void, and that no question of damages or other question which presupposed the validity of the contract, such as the enhancement in value of plaintiff's property, was presented. While the third issue was not material in the respect indicated, it is material in another respect, as will hereafter appear. If the contract was void, and plaintiff is not, by his relation to the transaction, prevented from recovering, it follows that he would be entitled to judgment, as for money had and received to his use, or for money paid upon a consideration which has failed or upon a condition, compliance with which cannot be enforced, which practically amounts to the same thing. For the same reason as that just given, plaintiff's prayer for a mandamus, or coercive process, was properly denied. This sufficiently disposes of all preliminary matters and brings us to the consideration of the real issues involved.

The case naturally resolves itself into two questions which require discussion: First. Was the contract against public policy, or based upon an illegal consideration, and therefore void? Second. The plaintiff being a party to the illegal transaction, if it was illegal, is he in a position to ask for a return of the money, or is he debarred of a recovery, being in *pari delicto*?

The statute provides that the authorities of a town, whether commissioners or aldermen, shall make such orders for the disposition or use of its property as the interest of the town may require. Revisal 1905, § 2916. Judge Dillon, referring to the general duty of municipal officers with respect to the affairs which they have in charge, says: "Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, so they cannot, without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. The cases cited mark the scope and illustrate the application of this salutary principle in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full extent and vigor." 1 Dillon, Mun. Corp. (4th Ed.) p. 156, § 97. It will be seen, therefore, that public office in a city is a public trust to be administered for the equal benefit and advantage of all the citizens of the municipality, and the governing body will not be permitted to contract

at any time so as to deprive itself of the free exercise of its judgment and discretion in providing for what may afterwards turn out to be the best interest of all citizens alike, and especially will it not be allowed by an obligatory agreement to discriminate in favor of one citizen or class of citizens as against another entitled to equality of privilege and benefit, even for a valuable consideration. It must at all times retain freedom of judgment, so that its decisions will be influenced only by a regard for the public welfare. We take it that any contract by which it should be attempted to prevent the city authorities from deciding impartially on a matter affecting the general welfare would be unenforceable. If public trustees or officers may, by contract, divest themselves of any portion of the essential powers intrusted to them, they may just as well alienate all of them, though by degrees, and thus eventually abdicate the exercise of every governmental function. Such agreements are, therefore, contrary to the true principles upon which society is founded and subversive of all well-regulated government. These propositions would seem to be self-evident. "All agreements for pecuniary considerations, to control the business operations of the government, or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868; *Cameron v. McFarland*, 4 N. C. 299, 6 Am. Dec. 566; *Wharton on Contracts*, § 403.

The leading case of *Martin v. Mayor*, 1 Hill (N. Y.) 546 is one in which the principle was applied, and where it appeared that, for a consideration, public trustees agreed with a lot owner to make certain improvements, which they refused to do. The court held that they might decline to go forward with the improvement on the ground that it was injurious or unprofitable to the public, and that in this respect they enjoyed a discretion which individuals have no power to control and the trustees no power to part with. It was further said: "To allow that commissioners of streets and highways may bind themselves by contract to subserve the interests of individuals would be a clear violation of public policy. They are officers of municipal corporations or quasi corporations, and, in respect to the laying out of streets and highways, are primarily bound to consult the interests of the community at large." The doctrine there enforced was that a contract will not be sustained which tends to restrain or control the judgment of public officers, which must always be impartial. But all promises of individuals to

pay a portion of the expenses of public improvements do not necessarily fall within the principle and may not be void. The validity of the particular contract will depend, of course, upon whether it has the evil tendency to influence the officer in the discharge of his public duty by trammelling his judgment in matters about which he should be left free to act as the public interest alone may dictate or require. This is the vitiating element, and if the agreement has that tendency in the eye of the law, it makes no difference what is the actual motive in the particular instance, or how pure it may be. In the case of *W. S. E. Society v. Philadelphia*, 81 Pa. 175, 72 Am. Dec. 730, the rule was said to rest upon the ground that a corporation, acting for the benefit of others, has no power to enter into a contract which would prevent it from performing its public duties, and that this restriction upon the power of a corporation to make such contracts is nothing more or less than the application of the familiar principle which avoids the contracts of individuals when they are detrimental of the rights of the public. This identical question was fully considered by a court of exceptional ability in *Gale v. Village of Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 74, in which Cooley, C. J., for the court, said: "If a municipal corporation can preclude itself in this manner from establishing markets wherever they may be thought desirable, or from abolishing them when found undesirable, it must have the right also to agree that it will not open streets, or introduce water for the supply of its citizens, except from some specified source, or buy fire engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might, in various directions, engage it in permanent contracts, which, while ostensibly for the public benefit, would impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For, if the village might bind itself to one market house for 10 years, it might do so for all time to come; and, if it might agree that improvements and conveniences of one class might be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or unscrupulous proprietor of town lots that all improvements of every description should be so located or made as to con-

duce to his benefit, irrespective of the general good. It will not do to say of such a contract that it must be assumed to have been reasonable in view of the actual condition and wants of the village, and of its probable growth and future needs. Indeed, it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise." The court concludes that the village had incurred no liability to the plaintiff by its breach of the contract, as it was void, being against public policy.

We have quoted liberally from the opinion in that case, not only because the personnel of the court entitles its judgments to the greatest respect, but because the proposition is stated in concrete form and sustained by most cogent reasoning and apt illustration. We do not ignore the fact that there the contract involved the idea of permanency in the location of the market house, but the court attached no special importance to that feature, but decided the case rather upon the ground that if the agreement was held to be valid, the town commissioners would be deprived of the exercise of that judgment and discretion in the premises so essential to the public welfare. In our case the promise that the buildings shall remain near the plaintiff's property is, it seems to us, necessarily implied by the nature of the contract, for it could be of little or no benefit to him if they could be removed at any time, even if such a course were practicable. The principle of that case is applicable here, and the closing words of the court, as quoted by us, clearly so indicate. The question is fully discussed in *Fuller v. Dame*, 35 Mass. (18 Pick.) 472, in which Chief Justice Shaw, with his accustomed learning and ability, presents most satisfactory reasons and unanswerable arguments in condemnation of such agreements, and proves their invalidity to a demonstration. He argues that it is not a satisfactory excuse to say that when the agreement was entered into, the officers or trustees had come to the opinion that the location in question was the best for the interests of the public, and for the interests of the corporation. Such an opinion might be changed by new views and new offers. Upon all these questions the influence of the promise of separate and distinct advantage deprived the officers of the power of exercising a free, disinterested, and unbiased judgment. Any influence from any quarter, created by the promise of a sum of money, to induce them so to contract, and to yield to particular terms, with a view to benefit separate and individual interests, operated as an injury to the public and rendered the contract void. The confidence of the people in the proper transaction of business by its officials could only be safely reposed under the belief that they will fairly exercise their best and un-

biased judgment upon the question of fitness, without being influenced by extraneous considerations having no connection whatever with the accommodation of the public. The conclusion is thus substantially stated: It is obvious that if one large landholder may make a valid, conditional promise to pay a large sum of money to a stockholder or influential citizen, on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other landholders may make like promises on similar conditions, and public works, which should be conducted with a view to the public interest, and to the just rights of those who make advances for the public benefit, would be in danger of being overlooked and sacrificed in a mercenary conflict of separate local and private interests.

We regard the reasons advanced in that case as conclusive of the question, and find that the courts and text-writers have generally adopted the same views. "A contract will not be sustained which tends to restrain or control the unbiased judgment of public officers; it being contrary to public policy and void as abdication of a public function." *Ingersoll on Pub. Corp.* 310. The powers conferred upon officers of cities to be exercised for the public good in making improvements demanded by public convenience are continuing and inalienable. 2 *Dillon, Mun. Corp.* (4th Ed.) § 685. "This power the city cannot refuse to exercise when public necessity or convenience demands that it shall be done, nor can it be allowed to excuse its failure in this particular upon the ground that it, has by contract deprived itself of the right to act." *Louisville City Railway v. City of Louisville*, 71 Ky. 417; *Gas Co. v. Columbus*, 5 Ohio St. 65; *New Haven v. Railroad*, 62 Conn. 257, 25 Atl. 316; *Indianapolis v. Gas Co.*, 66 Ind. 404; *McKeesport v. Railway*, 2 Pa. Super. Ct. 242; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Matthews v. Alexandria*, 68 Mo. 119, 30 Am. Rep. 776. The court, in *Mayor v. Bowman*, 39 Miss. 682, said: "Even if we suppose the city to have legislative power and control over the liquor license, which it clearly has not, it was not competent for the board to bind the city by a contract taking away the legislative discretion; nor would the exercise of its legislative discretion in violating the terms of the contract subject the city to the payment of damages or a penalty. The authorities on this point are clear, but the reason of the thing is enough." The question has frequently arisen in the establishment of railroad depots. Railway companies are quasi public corporations, and it has been said that the public have an interest in the location of their depots; the public convenience and accommodation being involved. "It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points and in such man-

ner as to subserve the public necessities and convenience, that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void." *People v. Railway*, 130 Ill. 175, 22 N. E. 857. "It seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy." *Railroad v. State*, 31 Fla. 508, 13 South. 106. Cases and text-books to the same effect can be cited numerous. We give only a few of them. *Railroad v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *Railroad v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Railroad v. People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; *Railroad v. Marshall*, 186 U. S. 393, 10 Sup. Ct. 846, 84 L. Ed. 385; *Railway v. Louisville*, supra; *Holladay v. Patterson*, 5 Or. 177; *Marsh v. Railroad*, 64 Ill. 414, 16 Am. Rep. 564; *Greenhood on Public Policy*, 319; 2 *Beach, Mod. Law of Contracts*, § 1517.

When a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract and not its actual result. 15 *A. & E. Enc.* (2d Ed.) 934. We must not be understood as holding that in no conceivable case can a citizen contribute to the expense of erecting a public building. We can easily imagine circumstances where such contributions might be lawful and proper to be considered in determining the best location for the public, but the donation of money must not be the inducement to the selection of a site apart from the public interests concerned. Cases which strongly approve the doctrine by which the particular contract in this case is condemned and in which the authorities are reviewed at length are *Woodman v. Innes* (Kan.) 27 Pac. 125, 27 Am. St. Rep. 274, and *Elkhart Co. Lodge v. Crary* (Ind.) 49 Am. Rep. 746. This court has recently had under consideration, in *Glenn v. Commissioners*, 139 N. C. 412, 52 S. E. 58, a question very similar to the one now presented. The plaintiff in that case alleged that the defendants had contracted to maintain a public bridge over a river at a certain point on his lands for the considerations set forth, and that they were about to abandon the bridge and erect a new one at another place on the river not far away. He sought to enjoin the defendants from constructing the other bridge. This court held that the discretion of the commissioners could not be thus controlled or coerced. The reasons for this conclusion are fully stated by Mr. Justice Connor in the opinion of the court delivered by him. *Citing Bridge Co. v. Commissioners*, 81 N. C. 491, the court says: "The essential powers of government conferred for wise and useful

purposes should remain undiminished and unimpaired in the legislative body itself and pass in full force to its successors. When a contract undertakes to alienate any of these it is inoperative, and as no right vests, so no obligation is created under it." The two cases are not distinguishable in principle. The court would be fully as reluctant to give the plaintiff relief in the case at bar as it was in the case cited, because here it is expressly alleged that the money was paid for the purpose of inducing the defendant to erect the buildings near the plaintiff's lands so that the latter would be enhanced in value. This was virtually inducing them to part with a discretion which should have been exercised in behalf of the public and not of the plaintiff.

This brings us to the consideration of the next question—whether, the contract being void as founded upon an illegal consideration, the plaintiff can recover the money he has paid in part execution of the same. With reference to this subject, certain rules may be taken as settled. The law gives no action to a party upon an illegal contract, either to enforce it directly, or to recover back money paid on it after it has been executed. *Webb v. Fulchire*, 25 N. C. 485, 40 Am. Dec. 419; *Warden v. Plummer*, 49 N. C. 524; 15 Am. & Eng. Enc. (2d Ed.) 997. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. The maxim is, "*Ex dolo malo (or ex turpi causa) non oritur actio*," and the kindred one is, "*In pari delicto potior est conditio defendentis*." In such cases the law leaves the parties where it finds them. When parties are in *pari delicto* in respect to an illegal contract, and one obtains advantage over the other, a court will not grant relief (*Wright v. Cain*, 93 N. C. 296), and when they have united in an unlawful transaction to injure another or others or the public, or to defeat the due administration of the law, or when the contract is against public policy, or *contra bono mores*, the courts will not enforce it in favor of either party. *York v. Merritt*, 77 N. C. 213; *Id.*, 80 N. C. 285; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Pinckston v. Brown*, 56 N. C. 494; *Sparks v. Sparks*, 94 N. C. 532. Chief Justice Smith said, for the court, in the last cited case: "But the principle is that such an agreement will not be enforced at the instance of either party, not that what may have been done in carrying out its purpose will be undone by the court. It will not assist when its aid is asked; or, in other words, its provisions 'will not be enforced in this court'—a court exercising equitable functions. The rule that refuses to compel the execution of such a contract, for similar reasons refuses to relieve from the consequences of what the parties have done under it, in giving it full effect." The rule is departed from when there is inequality of con-

dition as between the parties, or one of them has come under the subjection of the other, or has been induced by oppression, imposition, undue influence, or improper means, to make the contract, in which case he is not equally at fault with the other. While in *delicto*, he is not in *pari delicto*, but stands, as it were, in *vinculis*. *Pinckston v. Brown*, supra; 15 Am. & Eng. Enc. (2d Ed.) 1004. When the contract is executory, the court will not enforce it, and when executed, will not set it aside as against one party at the instance of the other. We need not decide nor inquire whether, when money is paid on an illegal contract, the aid of the court can be successfully invoked for its recovery, though the other party refuses to perform any part of the agreement, so that it is wholly executory on his side. There is conflict of authority upon this question. *Ibid.*, 1001; 1 Page on Contracts, § 526; *Greenhood on Public Policy*, p. 80; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Knowlton v. Spring Co.*, 57 N. Y. 518; *Kearley v. Thompson*, L. R. 1 Q. B. Div. 742; *White v. Bank*, 22 Pick. (Mass.) 181; *Wald's Pollock on Contracts* (3d Am. Ed.) p. 502. We have seen that he may recover where there has been any unfair advantage taken or any imposition practiced. *Webb v. Fulchire*, supra.

But it must not be supposed from what has been said that in order to deprive a party of the right to repudiate an illegal contract and to recover money already paid thereon, it is necessary that the illegal transaction should have been fully executed, as it is quite sufficient for that purpose that there has been a partial fulfillment of the illegal undertaking by the party against whom the action is brought for the recovery of the amount so paid to him. 15 Am. & Eng. Enc. of Law, 1007. We believe that the law writers and the courts are fairly well agreed upon that proposition. *Kearley v. Thompson*, L. R. 1 Q. B. Div. 742; *Knowlton v. Spring Co.*, 57 N. Y. 518; *Ullman v. Fair Ass'n*, 167 Mo. 273, 66 S. W. 949, 56 L. R. A. 606; *Wald's Pollock on Contracts* (3d Am. Ed.) pp. 502, 507; *Hooker v. De Palos*, 28 Ohio St. 251. Especially should this be the law where the party who has thus partially performed the contract in return for the money received by him from the plaintiff cannot be put in *statu quo*, which is the case here. Lord Justice Fry, in *Kearley v. Thompson*, supra, for the court, said: "We hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under the illegal contract can be recovered back." Chief Justice Coleridge, Lords Esher, Bowen, and the other eminent judges who sat with them fully concurred in this view. This has been generally accepted as the correct rule, even by the courts which hold that money

paid on an illegal contract may be recovered back, where the contract is executory on the other side or as to the defendant. The principle should certainly apply to our case, in which it appears that the defendant has substantially performed the contract in part and cannot be restored to its original position, and that the plaintiff has received a benefit which is not only substantial but fully commensurate with the amount he has paid on the contract. While he loses the right to have the unexecuted portion of the contract performed, he does not by any means depart from the court empty handed. Having received an equivalent for his money in the increased value of his property by the placing of the city hall where it is, he has no just ground to complain. We find no error in the conclusion and judgment of the court upon the verdict.

No error.

(141 N. C. 75)

ALEXANDER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. April 10, 1906.)

1. TELEGRAPHS—DELIVERY OF MESSAGE—DELAY—ACTION—BURDEN OF PROOF.

In an action against a telegraph company for delay in the delivery of a message, evidence that it was sent at 1 o'clock p. m. to another place in the same state, and not delivered until after 8 o'clock the next morning, made out a prima facie case.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 63.]

2. SAME—ACTION—PLEADING—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

Where, in an action against a telegraph company for delay in delivering a message, the complaint alleged that the telegram was not delivered "until after 8 o'clock a. m.," it was proper to permit plaintiff to testify that he received the message at 9:25 a. m.

3. SAME—SUBMISSION OF ISSUES.

In an action against a telegraph company for delay in the delivery of a message announcing the death of plaintiff's brother-in-law, the court submitted an issue as to what damage plaintiff had sustained, and charged that he must have exercised reasonable diligence to avert the consequences of the negligence, and that if he by reasonable diligence could have been at the funeral and failed to do so he could recover only the cost of the message. *Held*, that there was no error in refusing to submit an issue as to whether plaintiff by reasonable care could have attended the funeral after the receipt of the message.

4. SAME—DAMAGES—MENTAL ANGUISH.

In an action against a telegraph company for delay in the delivery of a message, whereby plaintiff was prevented from attending the funeral of his brother-in-law, mental anguish was not presumable, but must be proved by plaintiff.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 61.]

5. SAME—DELAY IN DELIVERING MESSAGE—ACTION—EVIDENCE.

In an action against a telegraph company for delay in delivering a message whereby plaintiff was prevented from being at the funeral of his brother-in-law, evidence that the plaintiff and deceased were not only brothers-in-law, but very intimate friends, that the most affectionate relations existed between them, and

testimony on the part of plaintiff that he felt as near to the deceased as a brother and that they were closely associated, was properly admitted.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 62.]

Appeal from Superior Court, Alamance County; Ward, Judge.

Action by Samuel Alexander against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Action to recover damages for negligence alleged in the delivery of a telegram addressed by Eli Alexander at Burlington, N. C., to Sam Alexander at Spray, N. C., announcing to the plaintiff the death of his brother-in-law, and requesting the plaintiff to come at once. These issues were submitted to the jury: "(1) Was the defendant guilty of negligence as alleged in the complaint? Yes. (2) What damage, if any, has the plaintiff thereby sustained on account of mental anguish caused by such negligence? \$900." From the judgment rendered, the defendant appealed.

King & Kimball and F. H. Busbee & Son, for appellant. W. H. Carroll and Brooks & Thompson, for appellee.

BROWN, J. 1. His honor properly instructed the jury that in any view of the evidence, if believed, the defendant was guilty of negligence, and to answer the first issue, 'Yes.' The telegram was delivered at the defendant's office in Burlington for transmission at 1 o'clock p. m., November 22d, and was not delivered at Spray until the next morning after 8 o'clock. This made out a prima facie case of negligence, and there is nothing to rebut it.

2. The court properly permitted the plaintiff to testify that the telegram was delivered to him at 9:25 a. m. November 23d. There is nothing in the complaint which forbade the reception of the evidence. It contradicted no alleged fact. The complaint states that the telegram was not delivered "until after 8 o'clock a. m. on November 23, 1904, too late for the plaintiff to reach his home in Burlington to attend the funeral." As the complaint does not allege the actual time of delivery, in testifying that it was delivered at 9:25 a. m. the plaintiff contradicted nothing that he had alleged.

3. We do not think the court erred in submitting the two issues given, or in refusing issue No. 2 of those tendered by the defendant, which was as follows: Could the plaintiff by the exercise of reasonable care have reached Burlington in time for the funeral after the receipt of the message by him? The two issues submitted are substantially the same as issues tendered by the defendant. As to the issue which his honor declined, we think that the defendant had the full benefit of that feature of the case under the second issue as to damages. In any view

of the evidence it is admitted that the plaintiff is entitled to recover nominal damages; therefore if his honor in his charge gave the defendant the full benefit of such evidence in mitigation of damages, the defendant cannot complain. His honor charged: "The law is where a party is affected by the negligence of the defendant company, in the telegraph cases, that he must himself exercise reasonable diligence either to avert or minimize the harmful consequence of the company's negligence, and in such cases the mental anguish, which might have been prevented by the exercise of reasonable diligence, would form no ground for a recovery. If the jury shall find from the evidence that the plaintiff, by the exercise of reasonable diligence, could have caught a train from Reidsville on November 23d and been at the funeral and burial, and failed to do so, then he would be entitled to recover the cost of the message, 25 cents, and, if you so find, you will answer that issue, '25 cents.' The court charges you that notwithstanding the previous negligence of the defendant company, if you find it was negligence, if you should find from the evidence that the plaintiff by the exercise of reasonable care could have been at the funeral, then he would be entitled to recover nothing over 25 cents." We do not see how this phase of the case could have been more clearly or fairly put to the jury than by the language employed. If the defendant has been hurt by the verdict, it is not because the jury failed to understand so lucid an instruction, but doubtless because they were not impressed by the defendant's view of the matter.

4. The remaining assignment of error is to the action of the court in submitting the case to the jury at all in the absence of sufficient proof on the question of mental anguish. There are two reasons why the assignment cannot be sustained: First, because the question is not raised either by motion to nonsuit or prayer for instruction; and, second, because there is evidence of mental anguish, appearing in the record. While the writer of this opinion has occasionally not been as profoundly impressed with the reality and poignancy of the mental anguish averred in some cases of this character, as the jurors in some instances appear to have been, yet, he expresses his own, as well as the opinion of this court, in saying that there is ample evidence in this case to show mental anguish and to justify his honor's charge. The jurors were very properly instructed that mental anguish is to be proved and not to be presumed in this case. As is well said by the able judge who tried it: "A brother's love is sufficiently universal to raise the presumption, but that is not so with respect to a brother-in-law. Such affection may exist, but it is incumbent upon the plaintiff to show it." There was evidence tending to prove that the plaintiff and the deceased were not only brothers-in-law but very intimate friends, and that most affectionate relations existed

between them. The plaintiff states that he felt as near to the deceased as a brother; that they were closely associated; that the plaintiff had been at the house of the deceased a great deal and often applied to him for advice; that they were often together at the home of the plaintiff's father; that they kept up an intimate correspondence when separated; that he was very much affected by reason of his inability to be present at the funeral rites. The evidence discloses no imaginary or fanciful sentiment. Such affections are sometimes real between men connected by the ties of marriage only. We sometimes see it illustrated in our daily life. While the defendant was not responsible for the death of the deceased, yet it was responsible, according to the findings of the jury, for such mental suffering as the plaintiff endured from grief at not being able to pay his last sad tribute at the grave of his dead brother and friend.

All the evidence admitted, tending to prove the existence of mental anguish, is clearly competent under numerous decisions of this court. Bright's Case, 132 N. C. 317, 43 S. E. 841; Cashion's Case, 123 N. C. 287, 31 S. E. 493; Hancock's Case, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403. His honor presented the entire case to the jury with clearness, accuracy, and fairness, and we find.

No error.

(41 N. C. 50)

HORNE v. CONSOLIDATED RY., LIGHT & POWER CO.

(Supreme Court of North Carolina. April 10, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS.

Evidence tending to show that an employé of an electric light company could have performed his duties in lifting and lowering lamps, without coming in contact with an iron awning near the pole for the electric wire, and that if he had stood on the steps attached to the pole in doing his work, without contact with the iron awning, he would have been insulated, and would not have received the shock causing his injuries, required an instruction that if the jury found these facts, they should find that he was guilty of contributory negligence.

2. TRIAL—INSTRUCTIONS—REFUSAL—CURE OF ERROR—MASTER AND SERVANT—INJURY TO SERVANT.

Refusal to charge that if an employé of an electric light company could have avoided an iron awning near electric light pole on which he was working, and would not have received the shock causing his injuries if he had done so, he was guilty of contributory negligence, was not cured by an instruction that it was the duty of plaintiff to use ordinary care, and if he failed in this duty, and this was the real cause of the injury, he would be guilty of contributory negligence.

Appeal from Superior Court, New Hanover County; W. R. Allen, Judge.

Action by Melvin Horne against the Consolidated Railway, Light & Power Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This was an action prosecuted by the plaintiff to recover damages for personal injuries sustained while in the employment of the defendant company. The facts material to the question upon which the appeal is disposed of are: Plaintiff, 23 years of age, had been in the defendant's employment, as motorman, and conductor, on its surface railway cars one year. Some five or six months prior to the day of the injury he was, at his own request, assigned to the duty of trimming the arc lamps on the streets of the city of Wilmington. When he was assigned to this duty, Mr. Horton, who was an electrician in the employment of the defendant, explained his duties, went with him four days, showed him how to trim the lights and fix them; told him that if he had any trouble about the lights, which he did not understand, to come to him. Plaintiff had nothing to do with wires; was not an electrician. Horton was not in the employment of defendant company at time of injury. He was introduced and his testimony tended to corroborate that of plaintiff. Defendant introduced R. Hunt, an electrician in its employment. He testified, among other things, that when plaintiff was taken from the trolley and assigned to the arc lights he instructed him how to do his work; explained his duties and responsibilities in a general way; explained the amount of shock he was liable to get anywhere on an arc circuit. When he reported the shock he had gotten from an arc lamp in the Coast Line Building, told him he must always consider the current as being on the line, never depend upon the insulation. In other words, always consider all wires as bare and live, as a matter of precaution. The defendant maintained a system of arc lights in the streets of the city of Wilmington, together with a system of wires for other purposes not material to be noted. The wires of the several systems crossed at certain points. Those carrying the current to the arc lamps were strung upon poles posted on the edge of the sidewalks as prescribed by the city ordinance. The lamps were lowered for the purpose of trimming by means of a wire cable connecting with a drum attached to the poles several feet from the ground and operated by attaching a handle or crank, made of iron covered with wood where it was necessary to grasp it with the hand of the operator; the wood was held upon the iron rod by means of an iron bolt at the end. The operator ascended the pole by means of wooden steps made by nailing strips across the poles beginning near the ground and continuing upwards a few feet, after which iron steps are attached to the pole. One of these poles was posted at the corner of Front and Dock streets, to which was attached a drum for the purpose of lowering the arc lamp to be trimmed. Near by the pole was an iron frame attached to a store for the purpose of supporting an awning, one of the iron poles of this frame stood within a few inches of

the light pole. On February 22, 1904, plaintiff went to the said pole and went up the first two or three steps which were of wood, the rest of iron. He says: "I had my right foot on the wooden step and the left on the iron step. The distance between these steps I do not know. (Witness showed position in which he was standing.) The crank fits on this side of pole (illustrating by model), and on side next to awning. I went up the pole. I put my handle and hand on there, and put this leg around the pole, which brought my leg between the awning and the pole and steps set on this side. I put my leg in between there, on a peg on that side, and put my right foot on this side. That brought this leg against the awning. I lowered my lamp down, turned my handle loose, and started to go down the pole. I noticed my lamp was not low enough to reach it from the ground. I put myself back in the same position. I took hold of the handle and started to reach the latch. I don't know whether I got hold of it or not. I don't know where I went to. It knocked me senseless."

It appeared from the testimony that the plaintiff was injured by reason of a live wire coming in contact with the light wire from which the insulation had worn off. The causes bringing about this condition originated near the Atlantic Coast Line from a wire belonging to that system. The manner in which the wires came in contact was illustrated by model used in the trial below and in this court. In view of the disposition which is made of the appeal, it is not material to set forth that phase of the evidence. There was testimony tending to show that notwithstanding the condition of the wires, it would not have been possible for plaintiff to have sustained an injury if he had not put his leg around the iron pole and his hand had not come in contact with the iron bolt which secured the wood on the handle of the crank. There was evidence tending to show that within a few minutes after the injury a witness ascended the pole and lowered the lamp as the plaintiff was endeavoring to do without sustaining injury. There was also evidence tending to show that there were four wooden steps to the pole, two on each side north and south, the first one 18 inches from the ground and the others 18 inches apart. A witness for the defendant testified: "I have made a test and am sufficiently familiar with the location of the pole to state whether or not a man can lift and lower the arc lamp with this crank and handle without touching the iron awning, and you can raise it and lower it without touching the awning, probably in two or three positions. I made on the same day and afternoon after the accident a personal inspection of this section of the system for the purpose of ascertaining the cause of this accident. In the beginning I found that the arc lamp when it was down at the pole where plaintiff was injured made this contact and he got the current

through the handle to the awning pole. In the meantime, in consequence of information from the Coast Line, I went to the corner of Front and Redcross streets where the Coast Line offices are located. In examining there I found that there was a telephone wire laying across this opposite primary wire to the other primary wire with which Mr. Horne was connected at Front and Dock streets. This telephone wire was again crossed with another telephone guy wire, the guy wire being again tied up to the Atlantic Coast Line telephone messenger wire, which was a dead ground wire, and where it was tied up to the wire it burned through and gave a dead ground." Mr. Hunt testified: "I have made a practical test to see whether or not a man can raise or lower that lamp where the plaintiff received his accident without touching the iron awning. He can do it easily. I have seen it done in three different positions. I saw it done to-day. The awning and pole and framework are exactly to-day as they were at the time of the accident, except two primary wires are not there now. These primary wires were removed because in doubling the wire to place a motor in Mr. Johnston's store we moved the transformer up on Dock street above Front street. I made the test with Mr. Williamson. He did actually raise and lower the lamp in my presence in the several different ways stated."

There was other evidence for both plaintiff and defendant bearing upon the issues. The court submitted the following issues to the jury: "(1) Was the plaintiff injured by the negligence of the defendant? (2) If so, did plaintiff by his own negligence contribute to his injury? (3) What damages, if any, did plaintiff sustain?" The defendant requested the court in apt time to instruct the jury: "If the jury shall find from the evidence that the plaintiff could have performed his duties in lifting and lowering the lamps at Front and Dock streets, by the exercise of reasonable care and prudence, without coming in contact with the iron awning near by, and that, if he had stood upon the steps attached to the pole in doing his work, without contact with the iron awning, he would have been insulated, and would not have received the shock, then, in placing himself in contact with the iron, he was guilty of contributory negligence and they should answer the second issue, 'Yes.'" His honor declined to so instruct the jury. There were other assignments of error, which it is not necessary to consider. The defendant duly excepted. Judgment having been rendered upon the verdict, defendant excepted and appealed.

Iredell, Meares & Ruark and Davis & Davis, for appellant. W. Kellum, H. McClammy, and Rountree & Carr, for appellee.

CONNOR, J. (after stating the case.) It is the duty of the employer to furnish to his employé reasonably safe appliances with which

and a reasonably safe place in which to discharge his duties and to maintain and keep them in such condition and there is a correlative duty of the employé to exercise reasonable care in using the appliance and means furnished him. These are the cardinal principles upon which the duties and liabilities of employer and employé are based. They include of course the duty of the employer to properly inform the employé of unusual or extraordinary danger and hazard incurred in the employment and the duty of the employé to avail himself of the information thus derived, and instruction given him. These propositions are entirely independent of any question of assumption of risk or the duty of furnishing safety appliances prescribed by statutes or by the courts as in *Troxler's Case*. The principle is well stated in a recent work on the subject: "At common law, the master impliedly agrees to use reasonable care to provide reasonably safe premises and places in and about which the servant is required to work, to furnish reasonably safe and suitable machinery and a sufficient supply of proper materials, tools, and appliances for the work to be done and at all times during the continuance of the work to repair and keep in the same safe and suitable condition." *Dresser, Employer's Liability*, 192; *Chesson v. Lumber Co.*, 118 N. C. 59, 23 S. E. 925; *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17; *Creech v. Cotton Mills*, 135 N. C. 680, 47 S. E. 671; *Bottoms v. Railroad*, 136 N. C. 472, 49 S. E. 348; *Hicks v. Mfg. Co.*, 138 N. C. 819, 50 S. E. 703; *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69. While some difference of opinion exists as to the manner of applying the principle in the trial of causes, when seeking to fix the legal liability for an injury, the courts are unanimous regarding the general principles.

We find no valid objection to his honor's instruction to the jury regarding the defendant's duty to establish and maintain a system of wires, when charged with electricity, by using every means for the safety and protection of its employé known to science and in general use, and to constantly and repeatedly, at short intervals, inspect its own and other wires liable to come in contact with them. Insulation is a positive duty. There was ample evidence to sustain the plaintiff's contention that there was negligence in that respect. The defendant says, however, that may be, it had furnished to plaintiff a perfectly safe place and appliance for the purpose of performing his duty. That before entering upon the performance of the duty he was instructed how to do the work safely and that after entering upon the employment he was told to regard every wire as bare and live as a precaution. That notwithstanding the very peculiar and unexpected conditions by which the wire at the pole on Front and Dock streets became charged with electricity, the plaintiff would have been absolutely

safe if he had used with reasonable care and caution the means and appliances furnished him. That if he had obeyed instructions given him, it would have been impossible for him to have sustained any injury. That notwithstanding the proximity of the post to the frame of the iron awning, he had room to stand upon the wooden steps and lower the lamp. It was the office of the third prayer for instruction to present defendant's contention to the jury in that aspect of the case. We are of the opinion that there was evidence which, if accepted by the jury, tended to sustain the defendant's contention.

The third prayer for instruction is directed to the second issue. It presents to the jury the question whether the defendant had furnished a safe method and place for plaintiff to do his work and whether by the exercise of reasonable care and prudence in the use of such method he could have lowered and trimmed the lamp, without coming in contact with the iron awning. We think that defendant was entitled to have this question submitted to the jury. There was evidence upon which the jury may have found the fact to be as contended by the defendant. There was also evidence tending to sustain the plaintiff's contention. In this condition of the evidence it became a question for the jury. It was clearly the duty of the defendant to furnish to the plaintiff a reasonably safe place and reasonably safe means to enable him by the exercise of reasonable care and caution to do the work in safety. Whether it had done so, was a question for the jury. It is true that his honor said to the jury that it was the duty of the plaintiff to use ordinary care, and "if he failed in his duty, and this was the real cause of the injury, then he would be guilty of negligence, and it would be your duty to answer the second issue 'Yes.'" This was correct so far as it went, and in the absence of any more specific prayer it would not be open to defendant to complain. The real controversy upon this issue was whether, notwithstanding the negligence of defendant in permitting its wire to become and remain for an unreasonable length of time without insulation, it had, in providing a place and method for doing his work, insulated the plaintiff from contact with the wire. In other words, defendant contends: That it had made a double provision for the safety of its employé: First, by insulating its wire; and, if for any reason that failed, by insulating the employé from contact with the wire. That "as a matter of precaution" it had instructed plaintiff "to consider the current as being on the line, never depend upon the insulation, always consider all wires as bare and live." That it had, in addition to this instruction, provided appliances which, if used with reasonable care and caution, insulated the plaintiff from danger. The bur-

den of establishing this contention was upon defendant. We think that, if established, with the further fact that plaintiff failed to exercise "reasonable care and prudence" in the use of these means, the defendant is not liable to the plaintiff for the injury sustained. While it is true that parties are not entitled to have their contentions submitted to the jury in the precise language which they may adopt, it is also true that, if the prayer for instruction is correct in itself and there is evidence tending to sustain it, the court should give the instruction either in the form requested or substantially so. "Where instructions are asked upon an assumed state of facts which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the questions so presented and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts; and so in respect to every state of facts which may be reasonably assumed upon the evidence." *State v. Dunlop*, 65 N. C. 288. The rule is clear, and we are quite sure that his honor was of the opinion that he had complied with it. He did state at length and fairly the contentions of the parties, but upon a careful examination of the charge we do not think that he instructed the jury in substantial compliance with the defendant's third prayer.

There appears to have been but little controversy in regard to the condition of the system and the source of the trouble with the wire near the pole on Dock and Front streets. The most seriously controverted phase of the case was directed to the second issue. While, as indicated by the uniform decisions of this court, certainly of late years, there is no disposition to relax the principles upon which the primary duty of the employer to furnish to and keep in repair, reasonably safe ways, appliances, and methods for the performance of the duties of their employés, and to give notice of extra hazards and dangers incident to such work and the machinery used therefor, nor to extend the doctrine of the assumption of risk, we think that the correlative duty of employés to exercise reasonable care and observe that degree of caution which their own safety as well as the interest of the employer demands, to avoid injury both to themselves and the public, should be enforced. The rule as applied to employés in the service of electric companies is thus stated: "When the employé is provided with implements or apparatus, by the use of which he may be able to avoid injury to himself, a failure on his part to use such implements or apparatus will prevent recovery for any injury received by him which might have been averted by the use thereof." *Joyce on Elec.* § 668.

For failure to give the instruction prayed, there must be a new trial.

(141 N. C. 80)

FEARINGTON v. BLACKWELL DURHAM TOBACCO CO.

(Supreme Court of North Carolina. April 10, 1908.)

1. MASTER AND SERVANT—MACHINEERY AND APPLIANCES—DUTY OF MASTER.

An employer of labor, in plants where the machinery is complicated, and especially when driven by mechanical power, is required to provide a reasonably safe place to work and to supply appliances reasonably safe and suitable for the work and such as are approved and in general use in plants of like kind.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 171-176.]

2. SAME — PERSONAL INJURIES — EVIDENCE — NEGLIGENCE—QUESTION FOR JURY.

In an action by servant for personal injuries received while riding upon a freight elevator in the discharge of his duties, evidence held sufficient, under the doctrine of *res ipsa loquitur*, to require submission to the jury of the question of defendant's negligence.

3. SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE—ORDERS OF FOREMAN.

In an action by a servant for personal injuries received while riding, under the direction of a foreman, on a freight elevator, evidence that the foreman, with knowledge of plaintiff's inexperience, directed him to work on the elevator, was competent to show absence of contributory negligence.

Appeal from Superior Court, Durham County; Shaw, Judge.

Action by Arthur Fearington, by next friend, against the Blackwell Durham Tobacco Company. From a judgment for defendant, plaintiff appeals. Reversed.

Civil action to recover damages for personal injuries tried before Shaw, J., and a jury at October term, 1905, of Durham superior court. The plaintiff, on his examination in chief, testified as follows: "I was injured some time in June 1903; had been at work in the defendant's factory three days before the injury, working in the shipping room helping to load cases of tobacco in a box car which stayed on the side track in a few feet of the shipping room. In the evening, Mr. Andrews, superintendent of the defendant, came to me and told me to go up town and get him some tobacco; when I came with the tobacco he said: 'Go in and help those fellows truck that tobacco up stairs.' I told him that I had never worked on an elevator. He said: 'Hell, you don't want to work, do you?' and I said: 'I don't want to work like that.' He turned and went off and I went to work where he told me. The first load I carried up with Thomas Fleming, second with Howard Smith, and got half way up the building; the tobacco was put on the truck and then pulled on the elevator; it was in sacks laid across the truck; the truck had wheels and was rolled on the elevator; the tobacco was piled on the truck, about as high as my head; I could not look over it; I stood behind the truck, between the truck and the side of the elevator floor; about 12 or 14 inches space was between where I had to stand. [Illustrates the position of his feet, his right foot

being slightly in advance of the left]. I had one hand resting on the tobacco sacks; as the elevator was going up I was looking straight up, and the elevator dropped several inches; something gave me a knock on the left leg and I heard the bone break and my right leg shot out behind me; I fell with my face on the truck and right foot out behind me, and caught the iron rod with my left arm. When the elevator dropped the truck did nothing except to slip to me; there were no blocks on the wheels of the truck—ran it right on and left it so; there were no blocks there to put under the truck. They had me up stairs when I remembered anything, and was then carried to the Lincoln Hospital, suffering intensely; it seemed like I had as soon been dead as living. My right foot was broken in two; heel string in foot pulled loose; left leg broken just above the knee. There is a knot on my right side where I fell up against the truck or something else. I left the hospital in about four weeks; was out something like two weeks and then went back and stayed nearly one month. My right foot is stiff and I limp as I walk. Doctors Manning and Carr attended me at the hospital. Dr. Carr is now dead. I suffered all the time I was at the hospital; my left leg gave me a lot of trouble, and pain in my side under my arm; it was nearly a year before I could walk without a crutch. Before I was hurt I was getting \$6.25. Since I have gotten out of the hospital I have not been able to do regular work from morning to night. I now stay in a restaurant, but do not do regular work." There was other testimony tending to corroborate the plaintiff's statement. Among other witnesses, Charles Fleming testified: "There were 10 sacks of tobacco on the truck, each weighing about 150 pounds." At the close of the plaintiff's evidence the defendant moved to nonsuit the plaintiff, and on an intimation from his honor that he would allow the motion, the plaintiff excepted, submitted to a nonsuit, and appealed.

Manning & Foushee, for appellant. Fuller & Fuller, for appellee.

PER CURIAM. In *Hicks v. Cotton Mills*, 138 N. C. 325, 50 S. E. 703, it is said to be accepted law that an employer of labor to assist in the operation of railways, mills, and other plants, when the machinery is more or less complicated, and more especially when driven by mechanical power, is required to provide for his employes in the exercise of proper care a reasonably safe place to work, and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind and character. And an employer is also required to keep such machinery in such condition, as far as this can be done, in the exercise of proper care and diligence. Citing *Witsell v. Railway*, 120 N. C. 557, 27 S. E. 125, and

Marks v. Cotton Mills, 135 N. C. 287, 47 S. E. 432. Applying these principles to the facts testified to by plaintiff, there was sufficient evidence tending to show a negligent breach of duty on the part of the defendant. Under the doctrine of *res ipsa loquitur* there was evidence to be considered by the jury as to the negligent and defective condition of the elevator. *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493; *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121.

Again, there was evidence to show a negligent placing of the truck on the elevator, without any appliance or contrivance to hold it in position; and, further, there was testimony to be considered tending to show a negligent order on the part of a foreman in directing an inexperienced hand to go on an elevator, under all the circumstances brought out, leaving him only a space of 12 or 14 inches in which to stand, and without any guards or rails or other means by which the plaintiff could protect or maintain himself in a secure position. In case negligence of the defendant is established, and the question of contributory negligence arises, this order of the foreman would be pertinent also in repelling an imputation of that kind. But, so far as now disclosed, there would seem to be very little, if any, evidence of contributory negligence to be considered. There was error in directing a nonsuit, and the plaintiff is entitled to have his cause submitted to a jury. To that end a new trial is awarded.

New trial.

(141 N. C. 320)

STATE v. BARRINGTON.

(Supreme Court of North Carolina. April 10, 1906.)

1. CRIMINAL LAW — PLEA TO JURISDICTION — NECESSITY — LOCALITY OF OFFENSE.

That an offense charged was committed in another state is available under the plea of not guilty.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 636.]

2. SAME—QUESTION FOR JURY.

Under the rule that it is a matter of defense than an offense was committed in another state, and the burden of proving it is on the defendant, evidence held to present a question for the jury in a prosecution for assault with a deadly weapon whether the offense was committed within the state.

Appeal from Superior Court, Richmond County; Moore, Judge.

L. Barrington was convicted of assault with a deadly weapon, and appeals. Affirmed.

There was evidence of the state tending to show that on or about September 23, 1905, defendant made an unlawful assault with a deadly weapon on one Robert Leviner, and that such offense was committed in North Carolina. Prosecutor, as a witness for the state, testified to the assault and that same occurred in North Carolina. Witness further stated that the fight was near the home

of A. J. Milliken, in Richmond county, N. C., and that said Milliken had always been considered a citizen of North Carolina, and voted and listed and paid taxes in North Carolina. On cross-examination the witness testified as follows: "Q. Did the fight occur in North Carolina? A. It has been called North Carolina. Q. Has not the line between the two states been recently run and marked? A. A line they call the South Carolina line has been run lately, but I do not know whether it is the line or not. Before this, it was said that Mr. Milliken lived in North Carolina. Q. According to this line, and if it is correct, then the place where the fight took place is in South Carolina? A. Yes; but I do not know whether the line is right or not." There was evidence on the part of the defendant to the effect that under an act of the General Assembly of North Carolina in 1905 the state line between the counties of Richmond, N. C., and Marlboro, S. C., had been run and marked, and that according to said line the home of A. J. Milliken and the place where the fight occurred was in South Carolina. A copy from the files of the chief executive office in North Carolina of what purported to be a report from two surveyors, one from North Carolina and one from South Carolina, was to the effect that under an act of the Legislature of each state they had run and marked the state line in the locality, and that they were engaged in the work from October 2 to December 12, 1905. No copy of this report was introduced on the trial below, but was filed in the record on motion of defendant's counsel and by consent of the Attorney General. The defendant requested the court to charge the jury that if they believed the testimony they would return a verdict of not guilty. This was refused, and defendant excepted. The court charged the jury among other things, not excepted to, that the courts of North Carolina had no jurisdiction of offenses committed in another state and "if the jury should be satisfied that the offense was committed in South Carolina they would go no further, but return a verdict of 'not guilty.'" To this charge the defendant excepted. Verdict of guilty, and from judgment on the verdict the defendant appealed.

H. H. McLendon, for appellant. The Attorney General, for the State.

HOKE, J. (after stating the case). The authorities of this state are to the effect that the fact that the offense charged was committed in another state is available under the plea of not guilty. They have also established that such fact is a matter of defense and the burden of proving it is on the defendant. *State v. Mitchell*, 83 N. C. 674; *State v. Buchanan*, 130 N. C. 660, 41 S. E. 107. There was no error therefore in the charge of the court below on this aspect of the case. The judge was correct also in refusing to give the defendant's prayer that if the evidence was

believed the jury should render a verdict of not guilty. The copy of the survey, annexed by consent as a part of the record, was not in evidence on the trial, and if it had been the greatest effect that could have been given it would be to hold that the line thereby established was in law the correct boundary line between the states. Where such line was placed by the survey is a question of fact which could only be determined by the jury.

The prosecutor testified on his examination in chief that the fight took place in North Carolina, and the cross-examination did not disclose such a connection between the survey spoken of by the witness and the official survey as to justify the court in ignoring the positive statement of the witness that the offense was committed in North Carolina.

The case was properly submitted to the jury under a correct charge, they have decided the matter against the defendant, and the court holds there was no error.

(124 Ga. 965)

PATTON et al. v. BANK OF LA FAYETTE.
(Supreme Court of Georgia. Feb. 19, 1906.)

1. PLEADING—AMENDMENT—TRIAL TERM.

An unverified plea of non est factum filed at the appearance term may be amended at the trial by allowing the defendant to swear to its averments. It is also proper at the trial term to allow an amendment to a plea to meet objections which have been pointed out by special demurrer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 819.]

2. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED.

In a suit by a corporation against an executor, the agent of the corporation is not incompetent to testify to his opinion as to the genuineness of the signature of the defendant's testator, his opinion being given as an expert and being based upon a comparison of the signature with other writings proved to be genuine.

3. USURY—EVIDENCE.

In an issue of usury, where a sum of money apparently in excess of the legal rate of interest was retained by the lender, it is competent for a witness to testify that part of the same was received in payment of an independent claim, and not reserved as interest upon the loan.

4. SAME.

The taking of interest for a portion of a year, computed on the principle that a year consists of 360 days, or 12 months of 30 days each, is not usurious, provided this principle is resorted to in good faith as furnishing an easy and practical mode of computation, and not as a cover for usury. Prior to the act of August 7, 1903, abolishing grace, in taking interest in advance on discounting a negotiable note payable at a chartered bank it was lawful to include the three days of grace in the computation.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, § 107.]

5. EVIDENCE—NOTE—PROOF OF EXECUTION.

Where the execution of a note is denied by a plea of non est factum, the note will not be received in evidence until some extrinsic evidence of its execution has been submitted. Slight evidence is sufficient to lay the foundation for its admission, but its sufficiency is for determination by the court. While it would

have been better to have omitted any instruction embodying this rule of practice, the charge given does not require a new trial.

6. BILLS AND NOTES—NOTARIES—PROTEST OF NOTE—PECUNIARY INTEREST.

The indirect pecuniary interest of a notary in a note does not render him incompetent to protest it for nonpayment. The certificate of protest by a notary affords prima facie evidence of the facts therein recited. A charge pertinently stating these principles is not erroneous, nor is it rendered so by the court's characterization of the protest by the notary as a ministerial act.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1116, 1122.]

7. TRIAL—OBJECTIONS TO EVIDENCE—EXCLUSION.

The rule of court requires that all objections to evidence be urged and insisted upon at once, and, after a decision upon one or more grounds, no others afterwards urged shall be heard by the court. Where objections were made to evidence when offered and overruled, it was in the discretion of the court to refuse to exclude the evidence on a ground not urged to its admission, and this is especially true where the motion to rule out was made pending the argument and was predicated upon a failure to lay the proper foundation for the evidence sought to be excluded.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by the Bank of La Fayette against I. N. Patton and others. From the judgment, both parties bring error. Affirmed.

This was a suit upon a promissory note, brought by the Bank of La Fayette against the executors of Mrs. Helen A. Nevin, the plaintiff alleging that it had, in the course of its business, discounted the note for C. Rowell, and was the holder and owner thereof. The note was given for the principal sum of \$1,500, was dated October 1, 1902, and was payable 90 days after date to the order of Helen A. Nevin, at the Bank of La Fayette, Ga., with interest at 8 per cent. per annum after maturity. It contained the usual waiver of homestead, was signed by C. Rowell, and purported to have been indorsed by Helen A. Nevin. Attached to the plaintiff's petition was a copy of a protest of the note for nonpayment on January 2, 1903, signed by a notary public. The defendants filed an answer in which they set up the plea of non est factum, and in which they challenged the sufficiency of the notarial protest, in that it did not appear therefrom when or where the note was presented, nor that notice was given to the indorser, nor that the protest was under seal. They also interposed the defense of usury, alleging that Mrs. Nevin's relation to the note (if any) was that of a mere surety or accommodation indorser; that she had no personal dealings with the plaintiff bank, but that C. Rowell, the maker, negotiated the note with the bank, which had knowledge that she was only a surety; that the bank charged Rowell \$40 as interest on the sum of \$1,460 for 90 days, without her knowledge or consent, and that her liability was thereby increased, inasmuch

as the note contained a waiver of homestead and exemption rights, wherefore she and her estate were, by reason of said usury, released from any and all liability. On the trial, which resulted in a verdict in favor of the plaintiff, the cashier explained that the note sued on was given to the bank by Rowell in renewal of one which had fallen due, and that the bank had charged him a "discount" of 8 per cent. on the face of the new note, amounting to \$30. for the 90 days extension of his pre-existing debt. The witness further testified that the bank received from Rowell this \$30, and possibly a protest fee on the other paper, of \$2, making in the aggregate \$32 paid by him when the note in suit was negotiated; but that only \$30 of that amount was received by the bank as interest for the 90 days; and that the payment of the additional \$2 was accepted in satisfaction of the protest fee upon the paper taken up by him. The case comes to this court upon a bill of exceptions sued out by the defendants, in which they except to the overruling of their motion for a new trial, and upon a cross-bill of exceptions in which the plaintiff complains that the court erred in overruling a demurrer to their answer and in allowing an amendment thereto.

Denny & Harris and F. W. Copeland, for plaintiff in error. J. P. Shattuck and McHenry & Maddox, for defendant in error.

EVANS, J. (after stating the facts). 1. The answer of the defendants, as originally filed, was not sworn to, and for that reason the plaintiff demurred to the plea of non est factum. The demurrer came on to be heard at the trial term, and the court, after permitting the defendants to perfect their plea by verifying the answer under oath, overruled this ground of the demurrer. The defect in the plea being one which was amendable, the court properly allowed the defendants to meet the demurrer by swearing to the averments on which they based this defense. *Ward v. Frick Co.*, 95 Ga. 804, 22 S. E. 899; *Rodgers v. Caldwell*, 122 Ga. 279, 50 S. E. 95. It was likewise proper for the court to permit the defendants, by an appropriate amendment to their answer, to overcome the further objection, urged in the plaintiff's demurrer, that they failed to point out wherein the protest of the note was insufficient to preserve the rights of the holder of the note against the indorser.

2. The witness, J. E. Patton, testified, that he was the cashier of the plaintiff bank and owned three-fifths of its capital stock; that he received the note sued on, signed by the maker and indorsed by Mrs. Helen A. Nevin, as the agent of the bank; that by comparison of the signature of the indorser with other signatures of hers admitted to be genuine, and which were in evidence, he was of the opinion that the signature of Mrs. Nevin on the note was her genuine signature. A motion was made to exclude this evidence,

on the ground that Mrs. Nevin was dead at the time of the protest of the note and that the witness was for that reason an incompetent witness to testify as to the genuineness of her signature. The court declined to rule out this testimony. The witness was not incompetent to testify to his opinion as to the genuineness of the signature, his opinion being given as an expert and based upon a comparison of the signature with the other writings proved to be genuine, and he not undertaking to testify concerning any transaction or communication with the deceased. *Cato v. Hunt*, 112 Ga. 140, 37 S. E. 183.

3. The witness Patton was permitted to testify, over the objection of the defendants, that he received with the note sued on \$32, and applied \$30 of the same to interest and \$2 to a protest fee on another transaction. The objection was that this testimony was incompetent until some proof had been introduced of the existence of some other liability besides interest, and that the witness should not be permitted to testify as to any additional liability for a protest fee until proof was properly made of notarial action showing a liability for such fee. Whether or not there was a legal liability for the protest fee of \$2 had no legal bearing upon the issue. Where a sum of money apparently in excess of the legal rate of interest was retained by the lender, it is competent for a witness to testify that part of the same was received in payment of an independent claim, and not reserved as interest upon the loan.

4. The method of the computation or casting of interest has been differently pursued in different jurisdictions. In some states it has been held by the courts of last resort that interest calculated and received upon a note upon the principle of 360 days being a year is usurious. As was held in *N. Y. Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 707: "The statute of usury speaks of years and not of months. Interest is to be at the rate of 7 per cent. per annum; that is, at the rate of 7 per cent. for 365 days; for a legal year is 365 days, the legal half of a year 182 days, and the legal quarter 91 days; the law paying no regard to the odd hours." The principle of the New York case just cited was approved and followed in *Indiana*. *Haas v. Flint*, 8 Blackf. 67. The Supreme Courts of many other states, notably Massachusetts, Louisiana, Virginia, Vermont, North Carolina, Mississippi, and Connecticut, hold that taking interest for a portion of a year, computed on the principle that a year consists of 360 days, or 12 months of 30 days each, is not usurious, provided this principle is resorted to in good faith as furnishing an easy and practicable mode of computation, and not as a cover for usury. *Agricultural Bank v. Bissell*, 12 Pick. (Mass.) 586; *Planters' Bank v. Bass*, 2 La. Ann. 430; *Parker v. Cousins*, 2 Grat. (Va.) 372, 44 Am. Dec. 388; *Bank of Burlington v. Durkee*, 1 Vt. 399; *State Bank v. Hunter*, 12 N. C. 100; *Planters' Bank v.*

Snodgrass, 4 How. (Miss.) 573; *Camp v. Bates*, 11 Conn. 487. This latter conclusion is supported by the reasoning of Lord Mansfield in *Floyer v. Edwards*, 1 Cowper, 112, that it tends greatly to explain a transaction and is of universal usage among banks, merchants, and men of business generally. It is obvious that interest calculated in this manner slightly exceeds the rate per year as fixed by the statute. The taking of this slight excess does not necessarily taint the transaction with usury, as is pointed out by Shaw, C. J., in *Agricultural Bank v. Bissell*, supra. This distinguished jurist said in that case: "But, as the statute prescribes the rate of interest for one year, and so at the same rate for a longer or shorter time, it is obvious that when the interest is to be computed in days or months, it is impossible to follow the prescribed rule precisely, without taking the fraction of a day; and that this is not required is now settled by the whole current of authority. From the impossibility of executing the statute with literal exactness, has resulted the necessity of resorting to an execution *cy pres*, in many cases, where it is intended to conform to the intent and spirit of the statute. So it has been the practice to consider a contract for money payable in months to be payable in calendar months, and to consider a calendar month as the twelfth part of a year, and compute interest accordingly, though they are of different lengths. A note given in February at two months will have 59 days to run and pay 1 per cent. interest, as for the sixth part of a year; but a note given in December at two months will have 62 days to run and pay the same rate of interest. * * * The period of 60 days is one-sixth of a year, as nearly as can be computed without a fraction, and 8 days is the nearest approximation to the tenth part of the month or the one hundred and twentieth part of a year, without fractions of a day." The soundness of this construction of the usury statute has been practically recognized by this court. *Neal v. Brockham*, 87 Ga. 130, 13 S. E. 283. If one-twelfth of the annual interest may be lawfully exacted for the use of money for the month of February, which in ordinary years embraces only 28 days, then it is clear that the calculation of interest is not necessarily predicated on the basis of a year of 365 days. Our statute fixes the rate of interest per annum, and not per month, and there is no greater reason for construing the statute as being susceptible of equal subdivisions into months of unequal days than for permitting the casting of interest for periods of less than a year on the basis of equal subdivisions into months of equal days. It is therefore allowable in bona fide transactions, both because of the facility in computation and the impossibility of exact subdivision of 365 days into proportionable parts of months and days, as well as because of the universality of this method of casting interest, to take interest for 90 days, computed on the

principle that a year consists of 360 days. Only one witness testified on the subject of interest reserved, and from his testimony, as appears in the statement of facts, it is manifest that only \$30 was taken for interest on \$1,500, and there was no intent to take or receive more than the legal rate. Therefore the instruction of the court that: "All the evidence relating to an amount of money paid for the use of this money being that \$30 was paid in advance at the time of giving this note for interest for 90 days, that being exactly the amount at eight per cent. I charge you that that would not be usurious, and you need not consider the plea of usury in this case." was not erroneous on the ground that \$30 is not the exact interest on a note for \$1,500 for 90 days.

Another question is raised by this assignment of error, and that is whether the reservation in advance of the interest for 90 days amounted to the taking of more than the highest legal rate permitted by law, so as to taint the transaction with usury. "Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." Civ. Code 1895, § 2877. Eight per cent. is the legal rate if named in the contract. Civ. Code 1895, § 2878. "It shall not be lawful for any person, company, or corporation to reserve, charge or take for any loan or advance of money, or for forbearance to enforce the collection of any sum of money, at rate of interest greater than 8 per cent. per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever." Civ. Code 1895, § 2886. To take interest at the highest legal rate in advance on a long loan is palpable usury. The outside authorities are almost unanimous, however, that in short time loans it is not usury to reserve the interest in advance. Mr. Tyler, in his work on usury, at page 298, says "the courts uniformly hold at the present day that the interest for ordinary paper having the usual time to run such as is the practice by banks, may be taken in advance, by way of discount, and not subject the paper to the taint of usury. It is obvious, however, that the time the paper has to run must have a controlling effect upon the question. If the note has a short time to run, the interest may be taken in advance; whereas the time may be so lengthened out as to make the taking of the interest in advance palpably usurious." In three cases decided by this court—*Mackenzie v. Flannery*, 90 Ga. 590, 16 S. E. 710; *Union Savings Bank v. Dottenheim*, 107 Ga. 614, 34 S. E. 217; *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468—the rule was stated to be that the reservation of interest in advance on short-time loans would not amount to usury; but in a later case—*Howell v. Pennington*, 118 Ga. 494, 45 S. E. 272—this dictum of these cases was criticised and shown to be

obiter. And in the case last cited it was said that it was not necessary to decide the question, so the court would leave it an open one, as it had remained so far as this court was concerned, up to that time. But whether interest may be reserved in advance on a short-time loan, the record presents facts which demonstrate that no more interest was retained than that allowed by law. The note in suit was negotiable and payable at a chartered bank, and therefore the debtor was entitled to three days of grace. The transaction occurred before the act of August 7, 1903 (Acts 1903, p. 84), abolishing days of grace in this state. As said by Blissell, J., in *Savings Bank of New Haven v. Bates*, 8 Conn. 511: "It is too well settled to admit of dispute that in regard to negotiable notes the days of grace make a part of the original contract. Such a note, payable by the terms of it in 60 days, is in law a note payable in 63 days." A negotiable promissory note payable at a bank does not become due until the last day of grace. *Haug v. Riley*, 101 Ga. 372, 29 S. E. 44, 40 L. R. A. 244. In taking interest in advance on discounting a note, it is lawful to include the three days of grace in the computation. *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 712. The interest on \$1,500 at 8 per cent., for 90 days and grace is \$31; the discount on this amount at the same rate for 90 days and grace is \$30.34. The amount actually reserved was less than the bank might legally have taken; hence there was no usury in the transaction, and the court very properly declined to submit this issue to the jury.

5. Exception is taken to the following charge of the court: "When the defendants come in and plead non est factum, that is, that it is not the deed or the act of their testatrix that casts primarily upon the plaintiff the burden of establishing prima facie that Mrs. Nevin did make this indorsement on this note. That is a question in the first instance that is addressed to the court. The court having heard certain evidence relating to the question, admits this note in evidence before you, but it is still a question of fact with you whether or not you find that Mrs. Nevin did or did not endorse this paper." This charge is alleged to be erroneous because it conveyed to the jury the impression that the court had decided that Mrs. Nevin had endorsed this note, but that they could, if they saw fit, find to the contrary. While we cannot commend this charge as being an accurate statement of the law, we do not think it was harmful to the defendants. When a plea of non est factum is filed in a suit on a promissory note, the note is not admissible in evidence until some proof of its execution has been submitted. Slight evidence is sufficient to lay the necessary foundation for its admission, the sufficiency of such evidence being a matter for determination by the court. The trial judge evidently had this principle in mind when giving the charge excepted to.

It would have been better for him not to have attempted to explain to the jury the rule of law under which the note was received in evidence, since any explanation on the subject would tend to confuse the jury, rather than to enlighten them as to the issue of fact they were called on to decide. *Western & Atlantic Railroad Co. v. Young*, 83 Ga. 517, 518, 10 S. E. 197. But as was said in that case, such a charge does not necessarily require the grant of a new trial. In the present case, the defendants introduced no evidence whatever, nor did they undertake to swear to the plea of non est factum from personal knowledge, but only from information and belief entertained by them in their capacity of legal representatives of their testatrix.

6. The eighth ground of the motion complains of the following charge: "I also charge you as a matter of law that notwithstanding Mr. Patton was an officer of the bank and a shareholder in it, he was authorized to perform these ministerial duties as a notary public, and I charge you that his certificate is prima facie evidence of the facts it recites, that is nonpayment and such notice being mailed as required by law. I charge you that nothing else appearing, it becomes a matter of law not to require you to decide that, but to decide it sharply as a matter of law, and therefore I give you these things in charge under the law." The assignments of error on this charge are: (1) That the cashier of the plaintiff bank being shown to own three-fifths of the capital stock, he was incompetent to protest a paper the title to which was in the bank; (2) that it was not made to appear that the certificate of the notary had been filed in court at the appearance term, or that it had remained there since; (3) that it was not prima facie evidence of any fact recited therein unless it had been so filed and had so remained in court; and (4) that the court erroneously described the notarial protest as a ministerial act, instead of one incident to the exercise of judicial functions. The fact that the notary was a stockholder in the bank and had an indirect pecuniary interest in the note did not render him incompetent to protest it for nonpayment. 7 Cyc. 1055, and citations. The certificate of the notary being in evidence, it afforded prima facie evidence of the facts therein recited. *Hobbs v. Chemical Nat. Bank*, 97 Ga. 526, 25 S. E. 948. That it may not have been filed in court and there permitted to remain, agreeably to the provisions of the Civ. Code 1895, § 5235, simply furnished grounds for objecting to its reception in evidence. Having been regularly admitted in evidence, it was proper for the court to tell the jury what effect the law attaches to a notarial certificate of protest. It would seem that a notary is not, under the laws of this state, vested with any judicial powers. Pol. Code 1895, § 503. But, however this may be, we are unable to perceive how the de-

defendants were prejudiced by the court referring to the protest of a note as a ministerial function.

7. Complaint is made that the court erred in refusing to rule out the protest papers which had been introduced by the plaintiff. The defendants' motion to do so was made after the evidence had closed and pending the argument to the jury, and was based on the ground that it did not appear that the notary's certificate was filed in court at the first term and there permitted to remain until the trial. It appears that when the certificate was offered in evidence, objection to its admission was made on other grounds which the court overruled. His honor directed counsel's attention to the rule of court which provides that all objections to testimony must be urged and insisted upon at once, and after a decision upon one or more grounds, no others afterwards urged shall be heard by the court (Civ. Code 1895, § 5675); and, after counsel had expressed the opinion that this rule applied only to motions for a continuance, declined to exclude the evidence, saying: "This being in the concluding argument, and some of the witnesses having gone, I decline to hear the motion." It is doubtless within the discretion of a trial judge to relax the salutary rule of court just referred to, when necessary to prevent a grave injustice which would be brought about by surprise or mistake on the part of one of the litigants. *Brinkley v. State*, 54 Ga. 374; *Parris v. Hightower*, 76 Ga. 631. But the present case did not call for the exercise of any such discretionary power. By allowing evidence to be introduced without objection, a party does not lose the right to move, at any time before the case is submitted to the jury, to have the evidence excluded. *Blount v. Beall*, 95 Ga. 182, 22 S. E. 52. But he is at liberty to practically abrogate the wholesome rule of court which requires that all of his objections must be urged at one and the same time, by making some of his objections when the evidence is offered, and, afterwards, under the guise of a motion to rule out the evidence, urging other objections thereto which were not in the first instance even hinted at. Furthermore, a distinction is to be drawn between illegal testimony and secondary evidence or other evidence which is legal in itself because it is of probative value, but it is inadmissible until the proper foundation for its reception has been laid. Hearsay testimony has no probative force whatsoever (*Eastlick v. So. Ry. Co.*, 116 Ga. 49, 42 S. E. 499), and its only effect is to prejudice the party against whom it is offered.

Evidence of a secondary nature, the only objection to which is that it was received without the preliminary foundation for its introduction being first laid, stands upon an altogether different footing; and if admitted without objection, it is to be treated as al-

together competent, and the court may properly instruct the jury as to its relevancy and legal weight and effect. *Goodwyn v. Goodwyn*, 20 Ga. 600, 622. If one of the parties consents to the introduction of the copy of a deed in lieu of the original, he is not at liberty to subsequently insist that the court should withdraw the evidence from the consideration of the jury, the plaintiff having acted upon the assumption that the defendant waived all objection to the character of the proof and being, perhaps, unable to supply the primary proof. *Norris v. Milner*, 20 Ga. 563, 565. The plaintiff in this case was, it may be, in some such situation when the motion to rule out the certificate of the notary was presented. Some of the witnesses had departed; it does not appear whether the notary was or was not still accessible. He had stated, while on the witness stand, that he "protested the note sued on," but was not asked whether he had given the notice of protest, as recited in his certificate, that document having been admitted in evidence after the court had overruled all the objections which the defendants had thought proper to urge against it when it was tendered. Had they then presented the objection that the plaintiff had not shown compliance with the requirements of the statute as to filing the certificate and permitting it to remain in court, and the plaintiff was unable to show that these requirements had been met, the opportunity would have been open to the plaintiff of putting the notary on the stand and bringing out the truth concerning the recitals in his certificate of protest. Under the rule of court prescribing when and how objections to evidence must be urged, the defendants had forfeited their right to insist that the certificate should be excluded from the evidence; the plaintiff had a right to act upon the assumption that no further objections to it would be presented, and that it was therefore unnecessary to make any further proof with regard to the dishonor of the note and the giving of notice of protest to the indorser. We cannot but conclude, therefore, that the trial judge properly declined to entertain the motion made by the defendants to withdraw the evidence upon which the plaintiff was thus induced to rely after they had exhausted their efforts to prevent its introduction.

From what has been said, it will be perceived that the sole issue of fact upon which the jury could possibly be called on to pass was that raised by the plea of non est factum, as to which the evidence fully warranted a finding in favor of the plaintiff. The court committed no error of law requiring a new trial, and the verdict should be allowed to stand.

Judgment affirmed. All the Justices concur.

(124 Ga. 578)

GARMANY et al. v. LAWTON.

(Supreme Court of Georgia. Feb. 16, 1906.)

1. CORPORATIONS — MORTGAGE OF CORPORATE PROPERTY—VALIDITY.

As a general rule, directors can give a valid authorization of the making of a mortgage on the property of the corporation only when acting and consulting together as a board duly assembled. But where all of the shareholders of the corporation by their direct act or acquiescence invest the executive officer of the company with the powers and functions of the board of directors, as a continuous and permanent arrangement, there being no board of directors, or, if directors, they being entirely inactive, and the officer discharging all its duties, a mortgage on the personal property of the corporation, made and executed in its behalf by such officer, to secure one who indorsed a note in order to secure a loan for it, and who had to pay such loan, is valid as against the corporation, or a creditor claiming to have obtained a lien by virtue of the issuance and levy of a distress warrant after record of the mortgage, and with knowledge of it, for rent accruing long after the making of the mortgage, although it may not have been authorized by any formal note of the shareholders or directors.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1775.]

2. EVIDENCE—BEST AND SECONDARY.

There was sufficient evidence that no minute books or stock books were kept by the corporation, or, if any were kept, that they were lost, to authorize the admission of parol evidence in regard to the transactions of the company.

3. SAME—PAROL EVIDENCE—RENEWAL OF MORTGAGE NOTE.

Where a mortgage was given to secure a note, and it was provided in the instrument that the payee of the note had agreed to renew it from time to time, it was admissible to show that a note bearing a later date was a renewal of that first given.

4. APPEAL—REVERSAL—IMMATERIAL ERRORS.

Immaterial errors will not require a reversal.

5. COSTS—WHO LIABLE FOR EXPENSES.

Where an equitable petition was filed for the purpose of having a receiver appointed to administer certain property, and a person holding a chattel mortgage on it was made a party, and it was sought to enjoin him from proceeding to levy on the property and bring it to sale, and where, instead of objecting to a receivership, the mortgage creditor filed an application and obtained an order for the receiver to sell the property and bring the fund into court, preserving the rights of any lienholders in respect thereto, and afterwards filed an answer and intervention, in which it was alleged that the amount for which the mortgaged property sold at the receiver's sale was less than the indebtedness due him, and praying that such amount be paid to him, claiming that he was entitled to share pro rata on this indebtedness with the other creditors, in the amount received from other sources, he thus recognized the necessity for the receivership, and sought to share in the benefits arising therefrom, and became liable for a pro rata share of the cost and expenses of the litigation.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by John Lawton against Janie M. Garmany and others. Judgment for plaintiff, and defendants bring error. Affirmed.

This case was by agreement tried before the presiding judge without a jury. He filed an opinion, from which the following summary of facts is taken: "The Savannah District Messenger & Delivery Company was incorporated April 9, 1896, the capital stock being \$10,000, with the right to increase the capital stock to an amount not exceeding \$50,000, in the discretion of the board of directors. This is the only reference to a board of directors. The charter gives the right to mortgage the property of the corporation at any time. The original incorporators conveyed, by deed, the property and franchises of the corporation to C. H. Medlock and H. S. Jaudon, on November 11, 1898. No certificates of stock had been issued at this time. There was never any stock issued to J. B. Floyd. On July 26, 1902, two certificates of stock were issued—one for 50 shares to H. S. Jaudon, the other for 50 shares to C. H. Medlock. Jaudon, Medlock, and L. W. Walker were the directors. Walker never owned any stock. He was a nominal director. Walker moved away from Savannah, and no director was elected to fill his place. In July, 1899, Jaudon moved away from Savannah, and until the time he sold out to Medlock all his interest in the company he received reports from a book-keeper concerning the business done by the company. After negotiating for two or three months, Jaudon agreed to sell out his interest in the company to C. H. Medlock. The sale was consummated on May 8, 1903. On July 26, 1902, C. H. Medlock, to secure his individual indebtedness to I. D. La Roche, made a deed to secure a debt to 50 shares of the capital stock of the Savannah District Messenger & Delivery Company. This was an individual transaction, and is not contended to be a corporate liability. On May 2, 1903, C. H. Medlock, as superintendent and manager, to secure the payment of a promissory note payable to the Citizens' Bank of Savannah, due 90 days after date, for the sum of \$1,500, sold [conveyed] to John Lawton all of the property, charter, franchises, good will, books, and accounts of the Savannah District Messenger & Delivery Company. This mortgage was signed, 'Savannah District Messenger & Delivery Company, by C. H. Medlock, Superintendent and Manager,' in the presence of three witnesses, one of whom was a notary public. The mortgage was not filed for record until September 23, 1904, and was recorded in the office of the clerk of the superior court of Chatham county on the same day. On September 24, 1904, C. H. Medlock suddenly died. On September 27, 1904, W. B. Stubbs was appointed and qualified as temporary administrator upon Medlock's estate, and conducted the business of the aforesaid corporation until October 6, 1904, when he presented a petition to the judge of the superior court of Chatham county, asking for the ap-

pointment of a receiver to preserve and administer the assets of the corporation for the benefit of creditors. The judge signed the order before 10 o'clock a. m., October 6, 1904, appointing the receiver and restraining the said La Roche and Lawton and Horace Rivers, as agent for Janie M. Garmany, their agents and attorneys, and the sheriff and his deputies, from interfering with said corporation or its assets in any way whatever, and from levying or attempting to levy any process thereon. Service of this order was acknowledged on October 6, 1904, by Adams & Adams, attorneys for said Lawton, and by Gordon & Elliott, as attorneys for said Rivers, as agent. The legal evidence shows: There was no stock book; there was no stock issued prior to that issued to C. H. Medlock and H. S. Jaudon; there was no minute book kept; there was no corporate seal, and no record of any corporate action; that from the time Jaudon and Medlock purchased the business, Medlock conducted, as manager, all the business of the corporation, and this was especially true after Jaudon removed from Savannah, and entirely true after Medlock purchased Jaudon's stock in the corporation. The evidence shows that Rivers, as agent, and his attorneys, knew of the contents of the mortgage to Lawton before he sued out his distress warrant. There is no evidence to show whether the levy of the distress warrant was made before or after the receiver actually took charge."

Gordon & Elliott, for plaintiffs in error.
Adams & Adams, for defendant in error.

LUMPKIN, J. (after stating the above facts).

1. A corporation is a legal entity, distinguished from any or all of its stockholders. That one person may own a majority or all of the stock of the corporation does not establish an identity between him and it, so as to make acts by him in his individual name its acts and binding on it. *Newton Manufacturing Co. v. White*, 42 Ga. 148; *Exchange Bank v. Macon Construction Co.*, 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800; *Sparks v. Dunbar*, 102 Ga. 129, 29 S. E. 295; *Waycross Air Line R. Co. v. Offerman & W. R. Co.*, 109 Ga. 827, 35 S. E. 275. "When a corporation in a given matter is empowered to act only through its board of directors, or other select body of its officials, individual or separate action of the members of such board is not sufficient. The agent of the corporation is the board itself acting in its organized capacity, and not its members acting independently of its meetings." *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449, 34 S. E. 176; *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837; *Mitchell v. Rome R. Co.*, 17 Ga. 574 (3). Agents must observe all the formalities required by the charter. *Dobbins v. Etowah Mfg. Co.*, 75 Ga. 243. The power of an agent

to sign notes for his principal must be given in express terms, or be necessarily implied from the nature of the agency actually created. *Exchange Bank v. Thrower*, 118 Ga. 435, 45 S. E. 316. In Maine a by-law providing for a regular meeting of a board of directors has been held merely directory. *Sampson v. Bowdoinham Steam Mill Corporation*, 38 Me. 78. While the rules above stated are correct as general rules, and an agent cannot bind a corporation by executing a mortgage on its property without its authority, unless it ratifies the act, yet the fact that the authority to make a chattel mortgage is not conferred by formal vote at a regular meeting will not in all cases render it void, especially where there has been a practice on the part of the company to transact business otherwise. 1 *Jones on Chat. Mtgs.* (4th Ed.) § 51; *Pin. Chat. Mtgs.* § 106; 1 *Cob. Chat. Mtgs.* § 431; *Kraft v. Freeman, etc.*, *Publ. Ass'n*, 87 N. Y. 628. Where a corporation loosely committed all of its business affairs to a superintendent or general manager, and by a settled course of business he acted for it in all matters, including buying and selling property, and all of the directors and stockholders, with full knowledge of this, held no meetings and took no action, but acquiesced for a considerable length of time in his exercise of authority, if he borrowed money for the company and gave a chattel mortgage on its property, and no objection was made thereto, but his action was acquiesced in, authority to execute a mortgage might be inferred, or, if not original authority, ratification, as against the corporation or its stockholders who so acquiesced. See, on this subject, 10 *Cyc.* 1200; *Martin v. Niagara Falls Co.*, 44 Hun (N. Y.) 131; *Estes v. German Nat. Bank*, 62 Ark. 7, 34 S. W. 85; *Spangler v. Butterfield*, 6 Colo. 356 (4); *Bank of Middlebury v. Rutland & W. R. Co.*, 30 Vt. 160; *Wood v. Corry Waterworks Co.* (C. C.) 44 Fed. 146, 12 L. R. A. 168; *Foot v. Rutland & W. R. Co.*, 32 Vt. 633; *Longmont Supply Co. v. Coffman*, 11 Colo. 551, 19 Pac. 508; *Poole v. West Point Ass'n* (C. C.) 30 Fed. 513.

Some of these authorities are not in accord with the case of *Monroe Mercantile Co. v. Arnold*, cited supra; but they are cited to show the trend of adjudication in the direction of holding that, while action on the part of directors or stockholders may not be performed in the regular and proper method, nevertheless, where an officer is entrusted with the performance of the entire functions of the corporation, and this has become a settled policy, his act in executing a mortgage, acquiesced in by all the directors and stockholders, will be held binding. This is especially true in equity. Judge Thompson in his article on "Corporations," in the *Cyclopedia of Law and Procedure*, says: "Where the shareholders of a corporation, by their direct act or acquiescence, invest the executive officers of the company with the powers and functions of the board of directors as a continuous and per-

manant arrangement, the board being entirely inactive, and the officers discharging all its duties, a mortgage on the property of the corporation, made and executed in its behalf by such officers, is valid, although not authorized by any vote of the shareholders or directors. * * * But in the absence of circumstances of assent and acquiescence such as may afford circumstantial or presumptive evidence of a precedent authorization, then, on principles already discussed, the directors can give a valid authorization of so important a measure as the mortgage of the property of the corporation, only when acting and consulting together as a board, duly assembled." 10 Cyc. 1199; *Cunningham v. German Ins. Bank*, 101 Fed. 977, 41 C. C. A. 609 (8); *Palmer v. Toms*, 96 Wis. 367, 71 N. W. 654; *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176. This affords a reconciliation between what might otherwise seem to be conflicting authority; the general rule being laid down in the latter part of the quotation, and the exceptional cases in the first part of it. In the present case the board of directors and the stockholders held no meetings and were entirely inactive, devolving the whole management of the affairs of the company upon Medlock. And this was not a casual or occasional state of affairs, but was continuous and permanent. Medlock was negotiating with Jaudon, the president, for his stock, and took a formal transfer of it shortly after the mortgage was executed. La Roche, who held the stock issued to Medlock as security, is not complaining. And, as one witness expressed it, Medlock was "the jock, stock, and barrel of the concern—he was the whole thing." Or, as another witness expressed it, "he practically did all the running." Apparently he had exercised the entire functions of the corporation, including buying and selling property. After his purchase of Jaudon's stock, he renewed the note in the name of the corporation more than once. Under this condition of affairs, we think that the mortgage should be held good as against the corporation, and also as against a subsequent creditor, who obtained a lien, if at all, by suing out a distress warrant after the record of the mortgage and with full knowledge of such mortgage. The rent accrued long after the making of the mortgage. Indeed, the landlord's lien only arose upon the levy of the distress warrant. Civ. Code 1895, § 3125. And the evidence leaves it in doubt as to when the levy was made relatively to the time when the restraining order was passed. The judge of the superior court did not err in holding that the lien of the mortgage was superior to that of the distress warrant. See 10 Cyc. 1196; *Antietam Paper Co. v. Chronicle Publ. Co.*, 115 N. C. 143, 20 S. E. 367.

2. Objection was made to the admission of certain evidence in regard to the corporation and its acts, on the ground that the books were the best evidence. It appears, however, from the evidence, that no minute books or

stock books were found, either by the temporary administrator, the receiver, or the purchaser from the receiver. The temporary administrator did testify that he found a sheet of paper which contained a memorandum purporting to be the minutes of some meeting; that it was a small piece of paper, hardly a full sheet, written in pencil; that he thought the piece of paper was among the papers in his office, but could not find it. In another part of the testimony he said that one Chaplain, representing Mrs. Medlock, came to his office, and he handed to Chaplain some personal effects, "some things that were taken out of Mr. Medlock's pocket, and I think I handed him that piece of paper, but I am not sure. I cannot say that I took it to the office. Mr. Chaplain is dead." The court did not err in holding that a sufficient foundation had been laid, and admitting parol evidence in regard to the transactions of the company; the sole objection to the testimony being that the books were the best evidence. The case was submitted to the presiding judge without a jury, to decide both upon the law and the facts, and he found that there was no stock book, no minute book kept, no corporate seal, and no records of any corporate action. Nor was there error in admitting the mortgage of Lawton in evidence. If it had been executed under the common seal of the corporation, a presumption of authority would have arisen. But the absence of a seal was not fatal to it, under the facts already discussed.

3. Where a mortgage was given to secure a note, and it was provided in the instrument that the payee of the note had agreed to renew it from time to time, it was admissible to show that a note bearing a later date was a renewal of that first given.

4. It was error to admit evidence of Lawton in regard to transactions with Medlock, who was deceased, and whose administrator was a party to the case. He was not competent as a witness, even to testify to the delivery of the mortgage to him. But evidence so admitted was not, under the facts of the case, of sufficient materiality to require a reversal. The mortgage in fact was recorded and in Lawton's possession, with the note. It purported to be signed by the corporation, through Medlock as superintendent and general manager. If his evidence had been rejected, we do not think it would have changed the result. The presiding judge added after his signature to the bill of exceptions a note in which he said that most of the evidence referred to was in fact rejected. But the statements in the bill of exceptions already certified cannot be changed by a note following the certificate. Letters are the best evidence of their own contents. But the evidence admitted here to the effect that Medlock had written to Jaudon about buying and selling some goods was not sufficiently material, in view of all of the evidence, to require a new trial.

5. Only one material error was committed. Lawton was made a party defendant to the equitable petition filed by Stubbs, administrator, and injunction was prayed to prevent his proceeding to levy on the property under a foreclosure of his mortgage. A temporary restraining order was granted, and the next day he voluntarily applied for and obtained a consent order directing the receiver to sell the property and to pay into court the fund arising; any liens on the property being preserved on the fund, and the mortgaged property being sold separately. His application was based on the ground that the business could not be properly conducted, that the security for his debt was deteriorating in value, and was of such a nature that there was great expense connected with the keeping of it. He afterwards filed an "answer and intervention," in which he alleged that the amount arising from the sale of the mortgaged property was \$1,050, and that, "after applying the proceeds received from the sale of the mortgaged property, there would still be an indebtedness due the said Lawton in the sum of \$—, and that he was entitled to share pro rata on this indebtedness with the other creditors in the amount remaining from the sale of said property." Where a mortgagee is made a defendant in an action seeking to place the property of the mortgagor in the hands of a receiver, and is involuntarily prevented from foreclosing his mortgage, and does no more than contest the appointment of a receiver, he is not liable for the costs or expenses of the proceeding. In *Bradford's Case*, *infra*, it was held that merely calling the court's attention to the lien did not render the mortgagee liable for costs or expenses, especially where the plaintiffs attacked the mortgage by amendment, and made the mortgagee a party defendant. If the mortgagee comes in and makes himself a party complainant, and sets forth the fact of his mortgage, and voluntarily litigates with the other creditors, he thereby recognizes the necessity for the petition and ratifies the filing of it, and thus becomes chargeable with his proportion of the expenses of the suit. *Lowry Banking Co. v. Abbott*, 87 Ga. 134, 13 S. E. 204; *Lewis v. Edwards*, 92 Ga. 533, 17 S. E. 920; *Central Trust Co. v. Thurman*, 94 Ga. 735, 20 S. E. 141; *Bradford v. Cooledge*, 103 Ga. 753, 761, 30 S. E. 579. When the defendant, Lawton, applied to the court and obtained an order for a sale of the property through the instrumentality of the receiver, and afterwards filed an answer and intervention praying, not only to have the amount arising from the sale of the mortgaged property paid to him, but also to share in any other funds in the hands of the receiver, he voluntarily recognized the necessity for a receiver, and used the equitable method of securing payment. He therefore became liable for his pro rata share of the costs. This error, however, does not require the grant of a new trial; but it is directed that the presiding

judge so modify his decree as to charge the mortgagee with his proper share of the costs and expenses, to be determined by the ratio between the amount realized from the sale of the mortgaged property and the total amount on hand for distribution, not including the stock sold as the individual property of Medlock. It does not affirmatively appear that any of such funds arose from operating the business. No other error requiring correction appears in the record.

Judgment affirmed, with direction. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 1059)

HENLEY v. BROCKMAN.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. LANDLORD AND TENANT — DISTRESS FOR RENT—RETURN.

Though a distress warrant issued by a justice of the peace is made returnable on its face to the justice's court, yet if it be actually returned to the superior court it is sufficient, and the latter court may entertain jurisdiction to try the issue formed by a counter affidavit. *Lamar v. Sheppard*, 10 S. E. 1084, 84 Ga. 561.

2. NEW TRIAL—MOTION — MATTERS REVIEWABLE.

A motion for a new trial is not available for the purpose of calling in question pleadings of the plaintiff or amendments thereto. *Kelly v. Strouse*, 43 S. E. 280, 116 Ga. 874 (6); *Johnson v. Thrower*, 51 S. E. 636, 123 Ga. 706.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 24-28.]

3. LANDLORD AND TENANT—FAILURE TO PAY RENT—DISTRESS—DEMAND.

When rent is due and unpaid, the landlord is entitled to a distress warrant against the tenant without having previously made a demand upon the latter for the payment of the rent.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 1099.]

4. APPEAL — QUESTIONS REVIEWABLE — GROUNDS OF MOTION FOR NEW TRIAL.

"Grounds of a motion for a new trial, which are expressed in terms so vague, general, or indefinite as not to indicate the nature or character of the errors alleged to have been committed, or which embrace utterly superfluous and unnecessary matter, such as lengthy colloquies * * * between counsel and the court, tedious recitals of irrelevant facts, statements taken from the stenographic notes of the trial, and other like things, to such an extent as to bury the point in question under a great mass of entirely needless phraseology and thus render it very difficult, if not impracticable, for this court to ascertain what was really the ruling or other conduct of the court complained of, will not be considered." *Gate City Gas Light Co. v. Farley*, 23 S. E. 119, 95 Ga. 796.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1744.]

5. LANDLORD AND TENANT—DUTY TO REPAIR — LIABILITY OF LANDLORD.

In this state the burden of keeping the premises in repair is generally on the landlord, but if, in any case, the tenant could recoup, as against the rent, damages flowing from patent defects existing at the time of the renting, and as to the existence of which both parties had equal opportunities for informing themselves, he cannot do so where it appears that the landlord was not notified to repair, or that the tenant could, by the exercise of ordinary care and

diligence, have avoided the damage resulting from such failure to repair.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 536, 649, 844, 845.]

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action by Mrs. R. E. Brockman against J. E. Henley. Judgment for plaintiff, and defendant brings error. Affirmed.

J. S. James, for plaintiff in error. E. M. Underwood, for defendant in error.

BECK, J. Mrs. Brockman sued out a distress warrant against Henley for rent. Henley filed a counter affidavit denying indebtedness in general terms. When the case was called for trial, Henley offered to amend his affidavit by alleging that at the time he made the contract of rental "he was induced to sign the contract * * * believing that the farm was in first-class condition and would make a fine yield of cotton and corn, but after defendant had signed said contract and had gone on the place he found it in bad repair," there being several ditches on the place which were filled up and others that were partially filled, and that because of the defective condition of these ditches the yield of the crop was materially diminished by the overflow of the river upon which the farm was situated, damaging the defendant considerably more than the amount of rent distrained for. The court would not allow this amendment and Henley excepted *pendente lite*. The jury returned a verdict for the plaintiff, and the defendant made a motion for a new trial, upon the general grounds, and because the court erred in not dismissing the distress warrant for the reasons therein specified, because the court erred in allowing the plaintiff to amend the original affidavit by striking therefrom the word "about," preceding the amount distrained for, and to amend the distress warrant by striking therefrom the words and figures, "2,347 lbs. of lint cotton or value thereof," between the phrase, "the sum of," and the figures, "281.64," so that the same when amended reads, "the sum of \$281.64"; and by striking, wherever it occurs, "281.64," and inserting therefor "\$234.70." Error was also assigned in the motion because the sheriff levied on certain quantities of cotton, corn, hay, etc., instead of confining his levy to lint cotton, and, further, because the court held that it was not necessary for the plaintiff to have made a demand upon the defendant before bringing the action. The motion contained other assignments of error, which will be elsewhere considered. A new trial was denied, and the defendant excepted.

1-4 All of the questions raised in the motion for a new trial which merit consideration are sufficiently dealt with in the first four headnotes.

53 S.E.—43

5. Now, coming to a consideration of the error alleged to have been committed by the trial judge in disallowing the amendment to the counter affidavit, it may be observed that in the first paragraph of that amendment the defendant alleges that he did not know of the condition of the farm at the time he signed the contract of renting, and that he was induced to sign the same "believing that the farm was in first-class condition," but that after he had signed the contract and gone to the place, he found that it was in bad repair in certain specified particulars. The succeeding paragraphs of the amendment set up the losses alleged to have been sustained by plaintiff in error because ditches were filled up, and because of the overflow of the Chatahoochee river. There is no allegation in the amendment that the plaintiff in the distress warrant represented the farm to be in first-class condition, or that she made any representations whatever in regard to its condition; nor that the defendant did not have equal means with the plaintiff of discovering the condition of the rented premises. Further, in the said amendment it is not alleged to what extent the ditches were out of repair or obstructed, or whether the obstructions could not have been removed by the tenant without any considerable expense, and the damage complained of entirely avoided. And besides this, no notice appears to have been given to the landlord of the alleged defects. Under the common law the burden of making repairs was placed upon the tenant, but that rule is not of force in Georgia. Our Code (Civil Code 1895, § 3123) provides that the landlord must keep the premises in repair. "Under the law of this state, it is presumed that the premises leased are in a condition suitable for the purposes for which they were rented, and if such is not the case, and damage results therefrom to the tenant, the landlord is liable, provided he has had notice of the defective condition of the premises and has failed after a reasonable time to make the necessary repairs, and provided also that the tenant has not been guilty of such negligence as to bar a recovery by him." *Stack v. Harris*, 111 Ga. 150, 38 S. E. 616.

In two very material respects does the plaintiff in error in this case fail to bring himself within the operation of the law changing the rule of the common law in regard to the duty of making repairs, so as to entitle himself to the right to set off or recoup damages as against the landlord's demand for rent. First, he failed to give notice to his landlord of the repairs alleged to be necessary; nor does he show that he was himself not guilty of such negligence as would preclude his right to recover damages or set them off against the landlord's demand for rent. The tenant does not, in the case at bar, contend that his opportunities for discovering the defects in the premises were not as good or better than those of the landlord. The latter, it is distinctly alleged, was a non-

resident of the state, while the former was a resident of the county in which the farm was situated. In the case of *White v. Montgomery*, 58 Ga. 204, it was held that: "It is the duty of the landlord, when he rents a tenement to a tenant at full price, to make it suitable for the purpose for which it is rented, unless the tenant knows as much about its condition as he does." And in *Driver v. Maxwell*, 56 Ga. 11, it was held that: "In this state, the burden of keeping the premises in repair is generally on the landlord, but patent defects existing at the time of the renting, and equally well known to both parties, are not to be amended by him, or at his expense, without a special undertaking." In a very strong dissenting opinion in the *Driver* Case, referring to the rule which imposes upon the landlord the duty to repair after notice, Judge Jackson emphasizes it as an indispensable prerequisite that, "the tenant must give notice to the landlord to repair. The rule, just everywhere, is the more expedient in the farming operations of our people. It becomes all important, in cases of this sort, not to extend or expand the rule one iota in favor of the tenant. As a practical question, it pervades the state in its great agricultural interests everywhere, and it is all-important, in my judgment, so to construe the act as to require the tenant to notice his fences and tell the landlord that they need repair, or hold him responsible for his neglect." It is true that the tenant in the case at bar alleges that he was ignorant of the defects; but they were patent, and we take it, from the pleader's failure to allege knowledge on the part of the landlord, and from the positive allegation that the latter was a nonresident, that the defects were at least as well known to the tenant as to the owner of the premises.

The tenant, immediately upon the discovery of the lack of repair in the matter of ditches, should have given his landlord notice of the same, so that they could have been put in repair and harmful results avoided. Under terms of the contract of renting he had the right of entry upon the premises on the 1st day of January, 1903, and we presume that he went into possession of the lands at that time. In the preparation of the lands for the planting of crops, the tenant had ample opportunity of discovering whether or not the ditches were obstructed, or were in condition to effectuate the purposes for which they were cut. The very slightest diligence would have enabled him to ascertain the exact conditions of his rented farm, as to fences, ditches, and all other accessories to good husbandry; and he had, before commencing to till the land or plant his crops, an opportunity of calling upon the landlord to make repairs, even if the law, under the facts and circumstances of this case, puts the burden on the landlord of repairing the defects complained of in the counter affidavit; and his failure to exercise any diligence in this regard, to discover what was patent to every eye, precludes

him from setting up any claim for damages as against the rent, under the rule that the landlord must keep the premises in repair. And because of his failure to give notice, as well as because "the tenant can not recover for any damages resulting from a failure to repair, which he could by the exercise of ordinary care have avoided" (*Aikin v. Perry*, 119 Ga. 263, 46 S. E. 93), we conclude that, in disallowing the amendment, the trial judge committed no error.

Judgment affirmed. All the Justices concur.

(124 Ga. 1045)

BIGGERS v. EQUITABLE MFG. CO.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. SALES—ACTION FOR PRICE—DEFENSES—WAIVER.

An agreement by one not to plead failure of consideration until certain reasonable conditions relating to the sale of goods, their "warranty and exchange," are complied with, is binding upon the promisor.

2. EVIDENCE—VARYING TERMS OF WRITTEN CONTRACT.

Where a party enters into and signs a written contract, he can not set up as a defense, to a suit thereon, a mere contemporaneous promise made by the agent of the plaintiff that said agent would subsequently affix a printed "slip" to said contract, which would add new and material conditions thereto, and which conditions had not been complied with by the plaintiff. This would be, in effect, to add to and vary the terms of a written contract by parol evidence.

3. SALES—SUIT FOR PRICE—COMPLIANCE WITH CONDITIONS—PROOF.

The plaintiff having brought suit against the defendant upon a written order for goods, on the face of which appear certain conditions, in the absence of distinct averments in the plaintiff's petition that the goods ordered had been delivered and the said conditions complied with, which would require denials or admissions by the defendant in his plea, it would be necessary to show these facts by evidence, before the court would be authorized to direct a verdict for the plaintiff; and in the absence of this proof it was error for the court to direct a verdict.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Flite, Judge.

Action by the Equitable Manufacturing Company against W. E. Biggers. There was judgment for plaintiff, and defendant brings error. Reversed.

W. E. Mann, for plaintiff in error. W. H. Odell and R. J. & J. McCamy, for defendant in error.

BECK, J. The Equitable Manufacturing Company brought suit against Biggers for the price of a lot of jewelry which he had bought from plaintiff under the terms of a written contract which was attached to the petition. The contract contained the following stipulation: "This sale is made under inducements and representations herein expressed and no others. The purchaser hereby waives all right to claim failure of con-

sideration, if goods are not like sample, or not according to order, unless he has exhausted the terms of warranty and exchange." And the terms of the warranty and exchange were as follows: "Any jewelry in this assortment failing to wear satisfactorily will be duplicated free of charge, if returned to us within five years. Jewelry can be exchanged for new jewelry in plated, filled, or solid gold, any time within 12 months from date of invoice." The defendant pleaded the general issue, subsequently adding other defenses to his plea by way of amendment. The last amendment sought to establish that the contract was procured by fraud, and that there had been a failure of consideration. The fraud alleged is as follows: That the agent of the plaintiff came to the place of business of the defendant, and, after having failed to get defendant to sign the contract as it was first presented to the defendant, told him that he (the agent) "had a paper called a slip, which was an unconditional guaranty of \$58 a year profit for three years; in other words, said the agent, 'It is the same as giving you that for standing room for the jewelry case in your store, as we will give you a bond to guaranty you the \$58 a year profit, unconditionally.' Defendant asked to see the slip containing the guaranty and bond, but the said agent told this defendant that he was out of them and that he had none with him, but all there was in the slip was an unconditional guaranty of \$58 a year profit for three years, and that the bond was given to protect the purchaser in the guaranty of said profits, and said we can just put it on here (meaning the paper), and said agent, H. H. Perkins, signed on said alleged contract the following: 'The Equitable Manufacturing Co. hereby agrees to send a bond of \$185 to the South Chattanooga Saving Bank to protect the purchaser in all the conditions of trade, including the guaranty of profits of \$58 a year each year for three years per slip furnished by the Equitable Mfg. Co., H. H. Perkins, salesman.'" The defendant further alleged in the amendment, that he had no opportunity to see the slip, but that the agent "promised to send him one, which he never did, but said, before this defendant signed the paper sued on, 'I have told you all there is in them and have written it here.'" The slip that was attached to the contract was as follows: "Profits guaranteed. We guaranty that the gross profits to the purchaser from the sale of the jewelry purchased hereunder and the jewelry hereafter purchased as hereinafter provided will average \$58 a year from the date of shipment, if the gross profits do not average \$58 we will pay by draft to the purchaser an amount sufficient to make up the deficiency, under the following conditions: First, that the purchaser settle for the goods as herein provided, and if the settlement is made by note, pay the same when due. Second, that the purchaser buy from us from time to time, at

least quarterly, either directly or from our salesman, sufficient new jewelry at the prices named in the order to keep the assortment up in value to the amount of this order. Third, that the purchaser keep a complete and accurate record of all goods sold, which record must show the number of the article sold, the cost price, the price at which it is sold, and the name and post office address of the buyer and that a copy of said record, together with an itemized inventory of the jewelry remaining on hand unsold, be sent [sent?] by registered letter at the end of each year to us. Fourth, that the purchaser keep the jewelry well and tastily displayed in his store, in the show case furnished for that purpose. Fifth, that the purchaser will not sell or dispose of any article of jewelry at a less profit above the cost price as listed on this agreement than is usually made on jewelry."

The plea of failure of consideration was in substance, as follows: That within a reasonable time after the goods were received by the defendant he discovered that they were not merchantable, "and defendant notified the said plaintiff and proposed to ship them back and pay the expenses of so doing, but this was refused by the plaintiff. Said goods soon tarnished, and defendant notified the plaintiff as above set out, but they refused to take them back. Defendant returned some of them, but the goods sent him in place of the ones returned were worse, if possible, than the others. Defendant had no opportunity to send any others back, as the said plaintiff was so busy in trying to get the negotiable notes from this defendant so, as defendant charged and believes, that it might place them in the hands of innocent purchasers to carry out its plan to defraud this defendant, that, when defendant refused to give negotiable notes upon discovering said fraud, that suit was brought on said contract and all opportunities to carry out any further return or exchange of goods were cut off, even if this defendant had been under any obligation to do so. The amended plea was stricken and the jury instructed to return a verdict in favor of the plaintiff, to which orders of the court the defendant excepted.

1. This case has been to this court twice before. 119 Ga. 100, 45 S. E. 962; 121 Ga. 381, 49 S. E. 271. When last decided, the court held: "The right to claim failure of consideration was expressly waived, unless the defendant should exhaust the terms of warranty and exchange as specified on the contract, and there was not even an intimation in the plea that defendant had complied, or made any effort to comply, with such terms." While the plea attempting to set up failure of consideration, which was held to be bad, was amended on the last trial of the cause, it does not, construing its terms most strongly against the pleader, show that the defendant had exhausted the terms of warranty and exchange as specified in the con-

tract. It does not go further than to show that the defendant had returned for exchange a part of the goods, whether a large portion or an infinitesimally small part is left entirely to conjecture; and all of the doubts which are left upon our minds by this indefinite plea would have to be resolved in favor of the pleader before we could hold that he had sufficiently complied with the terms of the contract, to entitle him to the benefits of this plea of failure of consideration; and the established rule for construing pleadings do not permit us to solve these doubts in the defendant's favor.

2. The contract, as it stood when first submitted to the defendant for his signature thereto, contained no reference or representations as to profits that the purchaser could or might make by the sale of the jewelry under the terms of the contract; but on the contrary, as hereinbefore stated, it was expressly stipulated that "this sale is made under inducements and representations herein expressed, and no others." But the salesman, the agent of the plaintiff, added in writing the further stipulation: "The Equitable Mfg. Co. hereby agrees to send a bond of \$185 to the South Chattanooga Saving Bank to protect the purchaser in all the conditions of trade, including the guarantee of profits of \$58 a year for three years per slip furnished by the Equitable Mfg. Co." And for the purposes of this decision, we treat this written agreement as binding upon the plaintiff company. In itself it is nothing more than an agreement to forward a bond binding the plaintiff to protect the defendant in all the conditions of the trade, including the guaranty of profits of \$58 a year for three years, and the defendant, nowhere in the plea that was stricken, alleges or intimates that a bond according to these terms was not furnished, but insists that the agent agreed that a "slip" would be attached to the contract, guaranteeing unconditionally the amount of \$58 per year as profits; whereas, as the defendant contends, the slip which was actually attached contains numerous conditions. As will be observed on reading the plea, the defendant relies, for the purposes of this defense, upon the agreement to attach to the contract signed, a clause containing an "unconditional guaranty;" and to support this contention he must rely upon oral evidence of a parol promise which would vary and add to the terms of a written contract; and a written contract can not be altered in its terms by evidence of this character. There were no misrepresentations as to the actual contents of the instrument signed. The parties signing might have had the contents of the slip written in the face of the contract before affixing their signatures. The defendant did not sign under an emergency. He does not pretend that he did not read the paper, and at the very head of it, in large type, stands the caution: "*This sale is made under inducements and representations herein expressed*

and no others." (Italics ours.) And these words, staring the defendant in the face at the time of entering into the contract, were a caution and a warning that the agent (a mere salesman) had no authority to make stipulations other than those contained in the instrument itself. And the plaintiff company was in position to invoke the well-settled rule that parol evidence will not be admitted to add to or vary the terms of a written contract. See *Bostwick v. Duncan*, 60 Ga. 383; *Walton Guano Co. v. Copelan*, 112 Ga. 319, 37 S. E. 411, 52 L. R. A. 268; *Chicago Building Co. v. Summerour*, 101 Ga. 820, 29 S. E. 291.

3. The plaintiff having brought its suit upon an express contract, which consisted of an order for certain goods, made to it by the defendant, the completion of the contract would depend upon whether or not the plaintiff had delivered to the defendant the goods specified in the order, according to the terms thereof. There was no paragraph in the plaintiff's original or amended petition alleging that the goods had been shipped or delivered to the defendant, nor was there any proof introduced showing that this was true, but, all the pleas of the defendant having been stricken, the verdict was directed by the court. If there had been a distinct averment in the petition that the goods had been delivered and all the conditions of the contract complied with by the plaintiff, the failure of the defendant to deny this in his plea would have dispensed with the necessity of proof; but, no such averment having been made by the plaintiff in the declaration, it was not entitled to a verdict in the absence of proof establishing its compliance with the conditions of the contract sued upon, and a new trial must be awarded.

Judgment reversed. All the Justices concur.

(124 Ga. 963)

HEAD v. MARIETTA GUANO CO.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. APPEAL AND ERROR—DISMISSAL—ASSIGNMENT OF ERRORS.

A bill of exceptions alleged that from a judgment in a justice's court a person not a party sought to enter an appeal in his own name; that the court allowed the appeal to be amended by adding "for the use of" one of the parties; that when the case came on for trial the appellee moved the court to dismiss the appeal, on the ground that it was not made or entered in the name of the adverse party in the justice's court, but by a third party; that another amendment was then offered, striking the name of the original appellant and the words "for the use of," so that the case on appeal should proceed in the name of the party who had been previously added by amendment as a usee; that counsel making the motion stated in his place that he was counsel in the court below; that the original appellant was the agent of the plaintiff in that court and assisted in the trial, that the attorney entered the appeal for the plaintiff, that by reason of the person named being present and participating in the trial the attorney confused the name in his mind, and

by inadvertence wrote the name of such person in the appeal, and that this was the identical case appealed; that "upon this statement by appellant's attorney the court overruled said motion to dismiss said appeal and allowed the plaintiff in *fi. fa.* to amend said appeal a second time by striking from said original appeal and the amendment thereto the words above indicated, and allowed the case to proceed in the name of the plaintiff in execution, to which ruling and allowance of said amendment the claimant excepted, and now excepts and assigns the same as error." *Held*, that the writ of error will not be dismissed for want of sufficient assignment of error in the bill of exceptions. *Phillips v. Southern Ry. Co.*, 37 S. E. 418, 112 Ga. 197.

2. SAME—APPEALABLE ORDERS.

Direct exception may be taken to the refusal of a judgment which, had it been granted, would have been final and have terminated the case in favor of the movant.

3. EXCEPTIONS, BILL OF — INCORPORATING EVIDENCE.

The proper practice is for the bill of exceptions to set out the evidence necessary to be brought up to this court, or to refer to it if there is a brief of evidence filed, or if no evidence was introduced, or the ruling excepted to was the dismissal or refusal to dismiss a case on demurrer, or was of like character, so that no evidence is necessary to an adjudication of it, to so state.

4. SAME.

But where a bill of exceptions shows that a motion was made to dismiss a case, that adverse counsel made a certain statement in his place, which is set out, and that thereupon the court allowed an amendment and overruled the motion to dismiss, to which ruling exception was taken, the bill of exceptions will not be dismissed because it is not stated in terms that no other evidence was introduced, or is necessary to be incorporated in the bill of exceptions, or other reference is made thereto. *Taylor v. McLaughlin*, 48 S. E. 203, 120 Ga. 703.

5. SAME—APPEAL BY STRANGER TO ACTION—AMENDMENT.

Where a case was tried in a justice's court, and a person who was not a party on either side undertook to enter in his own name an appeal from the judgment rendered, and gave bond for that purpose, such an appeal could not be changed into one by a party to the case by first inserting by amendment, after the name of the appellant, the words "for the use of" such party, and afterwards striking the name of the appellant and those words, so as to make it an appeal by the party.

6. SAME.

An appeal having been entered in the manner indicated in the preceding note, on motion of the appellee it should have been dismissed, and the amendment seeking to change the appellant rejected.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Execution issued in favor of the Marietta Guano Company against J. H. Head, in which W. H. Head interposed, claiming the property. There was a judgment finding the property not subject, and Joel Phillips appealed to the superior court. A motion to dismiss the appeal was denied, and the inter- venter brings error. Reversed.

An execution issued from a justice's court in favor of the Marietta Guano Company against J. H. Head. It was levied on certain personal property and a claim was in-

terposed by W. H. Head. The case was returned to the justice's court for trial, and a judgment rendered finding the property not subject. No appeal was entered by the plaintiff in execution, but an appeal was sought to be entered by one Phillips. The case was stated as that of Joel Phillips, Plaintiff in *Fi. Fa.*, v. J. H. Head, Defendant in *Fi. Fa.*, and W. H. Head, Claimant. It was stated that "plaintiff, Joel Phillips, being dissatisfied with said judgment and having paid the cost, now within the time allowed by law demands an appeal to the superior court, and brings —, and tenders him as his security, and the said Joel Phillips as principal and — as security hereby acknowledge themselves bound to the claimant W. H. Head, for the eventual condemnation money in said case, whatever it may be." This was signed by Joel Phillips as principal, and J. R. Griffith as security. In the superior court the attorney for the plaintiff in *fi. fa.* offered to amend the appeal by adding after the words "Joel Phillips," wherever they appeared, the words "for the use of the Marietta Guano Company," so that said appeal should appear on the docket and proceed as "Joel Phillips, for the use of the Marietta Guano Company, Plaintiff in *Fi. Fa.*, v. J. H. Head, Defendant in *Fi. Fa.*, and W. H. Head, Claimant." This amendment was allowed. When the case came on for trial, a motion was made to dismiss the appeal. What then occurred, the ruling of the court, and the exception taken, appear in the first headnote.

W. R. Hutcheson, for plaintiff in error.
Griffith & Weatherby, for defendant in error.

LUMPKIN, J. (after stating the facts). An appeal is amendable. *Civ. Code* 1895, § 5123. Where the clerk of the superior court made a mistake in writing the christian name of an appellant, it was held amendable. *Watkins v. Smith*, 17 Ga. 68. Indeed, great latitude of amendment has been allowed in perfecting appeals which were entered by the proper party, but in an irregular manner. *Hendrix v. Mason*, 70 Ga. 523; *Selma, Rome & Dalton R. Co. v. Gammage*, 63 Ga. 604. But this latitude has never reached the point where it has been held that a party who did not except to a judgment could do so afterward by amendment, or that an appeal by one person could be changed by amendment into an appeal by another. The Marietta Guano Company never appealed at all. The appeal entered did not mention them, nor did Phillips purport to be entering it for them. By mistake Phillips appealed from the judgment against his employer. The security on the appeal never contracted to become security for the Guano Company, but only for Phillips. The amendment left a new appellant, with no bond. It may have been an unfortunate oversight that a person attempted to enter

an appeal who had no authority in law to do so, but it is beyond the reach of amendment, even under our liberal system, to entirely change the appellant. Nor can this be accomplished by first inserting the desired appellant as the usee and then striking the real appellant and leaving the usee to stand alone. See *Morgan v. Mayor and Commissioners of Cohutta*, 120 Ga. 423, 47 S. E. 971; *Arnold v. Wells*, 6 Ga. 380. The writer is aware of but one instance in which this compound method of amendment was proposed, and then it was held not to be permissible. *Norris v. Pollard*, 75 Ga. 358 (4, 5). A somewhat similar misfortune befell eminent counsel in moving for a new trial and bringing the case to this court in *Central Railroad v. Craig*, 59 Ga. 185. A verdict was rendered against the Southwestern Railroad Company. A motion for a new trial was made in the name of the Central Railroad & Banking Company of Georgia. Upon its refusal the movant excepted. The writ of error was dismissed, and an amendment was refused. Later the Southwestern Railroad Company made an extraordinary motion for a new trial, and also filed a bill in equity praying for a new trial; but it was held that there was no good ground for either; although it appeared that the Central Railroad & Banking Company was the lessee of the Southwestern Railroad and was the real party principally interested, and that when counsel made out the motion for a new trial and the bill of exceptions, they were by mistake made in the name of the lessee company instead of the lessor. *Southwestern Railroad Company v. Craig*, 62 Ga. 361.

The questions of practice in this court are sufficiently dealt with in the headnotes.

Judgment reversed. All the Justices concur.

(124 Ga. 939)

BROWN v. TODD.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. POSSESSORY WARRANT—WHEN AVAILABLE.

This case is controlled by the decision in *Owens v. Outlaw*, 30 S. E. 427, 105 Ga. 477, where it was held: "A possessory warrant does not lie unless the defendant acquired possession of the property in dispute in one of the modes set forth in section 4799 of the Civil Code of 1895. Consequently, when upon the trial of such a warrant it affirmatively appeared that the defendant had, without fraud, obtained possession by virtue of a contract with the plaintiff and the only question in issue was whether or not, under the terms of such contract, it was the defendant's right to longer retain possession, it was erroneous to render a judgment in the plaintiff's favor. His remedy, in such a case, was an action of trover, with a requirement of bail, if necessary." *Trotti v. Wylie & Greene*, 77 Ga. 684." See, also, *Allen v. Printup*, 45 S. E. 911, 118 Ga. 630; *Susong v. McKenna*, 48 S. E. 695, 121 Ga. 97; *Wynn v. Wynn*, 68 Ga. 820.

2. SAME—CASES DISTINGUISHED.

The present case is distinguishable from those of *Meredith v. Knott*, 34 Ga. 222, *Hillyer v. Brodgen*, 67 Ga. 24, *Wynn v. Harrison*, 35

S. E. 643, 111 Ga. 816, and *Sheriff v. Thompson*, 42 S. E. 738, 116 Ga. 436. In those cases there was an agency, and possession by the agent was construed to be possession by the principal. Wrongful taking from the agent's possession, or refusal on his part to deliver possession to his principal on demand, was held to be a tortious deprivation of the principal's possession. In *Wynn v. Harrison* a father permitted his minor son to use a chattel for a particular purpose, and the same principle was applied.

3. POSSESSORY WARRANT—REVIEW—CERTIORARI—POWER OF COURT.

The power conferred upon the judge of the superior court, upon the hearing of a certiorari from the ruling of a magistrate in a possessory warrant case, to remand the case or give final judgment and direction therein, as he may see fit (Civ. Code 1895, § 4807), has no application to a case in which possessory warrant is not the proper remedy.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Action by D. J. Brown against J. J. Todd. From a judgment for the latter, the former brings error. Reversed.

Thos. A. Brown, for plaintiff in error. J. Z. Foster, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(124 Ga. 866)

BATTISE v. STATE.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. CRIMINAL LAW—RECEPTION OF VERDICT—REMARKS OF JURY—NEW TRIAL.

Upon the trial of a criminal case, a verdict, finding the accused guilty, was regularly returned by the jury and duly received and published in open court. Then, after a short pause, the judge asked the accused and his counsel if they had anything to say why the sentence of the court should not be imposed, to which they replied, "Nothing." The judge then proceeded in the presence of the jury, which had not left the box, to pronounce the sentence, and in doing so expressed an opinion as to the guilt of the accused under the evidence. Before the sentence was concluded, counsel for the accused asked and obtained permission to poll the jury. Upon the polling, the fact was discovered that some of the jurors had agreed to the verdict under a misapprehension of the charge of the court as to a material point in the case. The jury were then recharged and sent back to the jury room to again consider as to their verdict. Subsequently the jury returned a verdict similar to the one first returned. Held that, under the circumstances, the expression of opinion by the trial judge was not cause for a new trial.

2. SAME—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence was not sufficient to require the grant of a new trial.

3. HOMICIDE—EVIDENCE.

There was ample evidence to support the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Ben Battise was convicted of murder, and brings error. Affirmed.

Ben Battise was convicted of murder, with a recommendation to life imprisonment. He

moved for a new trial, on the grounds that the verdict was contrary to the evidence, contrary to law, etc.; that during the trial the judge, in the presence of the jury, expressed his opinion as to what had been proved; and because of newly discovered evidence of an alibi. The motion was overruled and he excepted. The alleged newly discovered evidence upon which a new trial was asked was contained in the affidavits of Sam Butler and Robert Lambry. The substance of these affidavits was as follows: On the night of the homicide Butler and Lambry were at the hall, in the little village of Nickerson, in which the deceased—according to the testimony in the trial of the case—was killed. Lambry got there about 7 o'clock that night and Butler about half past 8 o'clock. About half past 10 o'clock, or some time between 10 and 11 o'clock, they left the hall together, "in order to catch the ebb tide that night to go to Coffee Bluff to cast for shrimp on the low tide early the next morning." When they got to the road, out in front of the hall, they both saw Ben Battise, the accused, as he passed them, going on toward another little settlement called Twin Hill, and they shortly afterwards went on towards Twin Hill themselves; Battise being then about 50 yards ahead of them. When they got about 200 yards or more from the hall, and while Battise was still within 50 or 75 yards ahead of them, and alone, they heard pistol firing back in the direction of the hall. They went on home, and did not stop or go back to the hall, and Battise soon turned off, in the direction of his home, from the road and disappeared. Up to the time they left the hall, there had been no shooting of any kind. Each deposed that he was not related to Ben Battise, either by blood or marriage, and had only been living at Twin Hill, where Battise lived, a few months; Butler testifying that he had only been living there about four months and Lambry that he had been living there only about three or four months. Butler knew Battise "by sight, having seen him in the river, and around Twin Hill after coming there to live." Lambry "did not know Ben Battise prior to coming to Twin Hill," but got acquainted with him afterwards, and "did not know [him] very well, but knew him by sight and to speak to him." Neither Butler or Lambry attended the trial or were subpoenaed in the case. The first time that Lambry said anything to anybody, except Butler, "about seeing Ben Battise down the road when the shooting occurred was to Henry Battise after the trial of Ben Battise." And Butler told Henry Battise about it after the trial. The accused made an affidavit that he did not know of this evidence until after he had filed his motion for a new trial; and his counsel deposed that neither of them knew of it until after the trial. J. F. Peck made a written statement, not under oath, that Robert Lambry had been employed by him for about a year, and he had found him

honest and reliable. Augustus Oemler made oath that he knew Sam Butler, who had worked for him in his oyster factory for several seasons, and he knew him to be honest, reliable, and trustworthy. In reply to the affidavits of Butler and Lambry, the state submitted the affidavit of Paul Wright, a brother of the deceased, who deposed: He knew Sam Butler and Robert Lambry, and they were both, at the time of the trial, residents of Twin Hill, which "is a small settlement about a mile from Nickerson, the scene of the homicide; that all the residents of Twin Hill are well known to each other and are generally recognized as being very clannish, and are nearly all kin to each other, or related by marriage to each other. Robert Lambry was, at the time of the trial of Ben Battise, engaged to marry the first cousin of Ben Battise, and since the said trial he has been married to Battise's relative." Sam Butler "is also married to some distant relative of Battise." All "the residents of Twin Hill met and discussed frequently the Battise case and trial, and * * * they acted in concert in raising funds for the defense of Battise"; his defense having been "made a community matter." "Deponent knows that subscriptions for the defense of Battise were taken in Twin Hill, and even entertainments given at Twin Hill, the proceeds of which went to the defense of Battise."

The circumstances under which the judge expressed his opinion as to what had been proved are stated by the judge, in his opinion overruling the motion for a new trial, as follows: "The jury having notified the judge, through the bailiff, that they had agreed upon a verdict, were brought into the courtroom, the prisoner and his counsel being present. The name of each juror was called by the clerk. The jury were then asked if they had agreed upon a verdict in the case, to which assent was given. The clerk was then directed by the judge to receive and read the verdict. The verdict as written upon the indictment, dated and signed by one of the jurors as foreman, was then read aloud by the clerk in the presence of the court, all the jurors, the defendant, and his counsel. It was then noted upon the judge's calendar. There was then a short pause, after which the judge, addressing the defendant and his counsel, asked if they had anything to say why the sentence of the court should not be pronounced, to which they replied 'nothing.' The judge then, preparatory to sentence, directed the defendant to stand up, but afterwards, because of his physical condition, permitted him to remain seated, and proceeded to pronounce sentence. It was during this pronouncement that the language complained of was used. The court said to the defendant in passing sentence: 'The people of your race are given too much to taking human life without stopping to think about the consequences. The evidence shows that this kill-

ing was absolutely unnecessary; certainly absolutely unnecessary so far as you are concerned, and it ought to be a lesson to the people of your race out in that section that you are put away for life—confined the balance of your days in the penitentiary—because you did something you had no right to do. You senselessly and causelessly took the life of this man. The sentence of the court is, therefore, that you be taken hence to the common jail of Chatham county by a guard to be detailed by the sheriff; that you be there detained until demanded by a guard from the penitentiary; that you be then taken to the penitentiary edifice of Georgia, and there, or at such other place as the Governor of this state may from time to time.' Defendant's Counsel to Court: 'Is it too late to have the jury polled?' The Court: 'It is a little out of the ordinary, but the court will permit it to be done.' The first seven jurors, when asked by the clerk the question, 'Is this your verdict?' answered in the affirmative. The eighth juror, when asked said question by the clerk, answered, 'This is my verdict under charge of the court.' The court said to the juror: 'Is it your verdict based upon the charge of the court and the evidence in the case?' By Said Juror: 'You charged that if he fired into the crowd he would be guilty.' Defendant's Counsel to Court: 'I ask that the jury return and reconsider their verdict.' By Another Juror: 'I understood your charge was that if he shot into the crowd he would be guilty.' * * * By Another Juror: 'I understood you to say that if he shot into the crowd the man was guilty, whether he intended to kill the man or not.' By the Court to the Jury: 'I charged the jury that the jury must be satisfied, beyond a reasonable doubt, that Battise shot the bullet that killed the deceased before he would be guilty of the offense of murder—applying the rules given the jury.' By the Court to the First Juror: 'Do you desire to be recharged?' By the Juror: 'Yes, sir; on one point.' By the Court: 'On what point?' By Juror: 'If he fired into the crowd whether he would be guilty or not. I understood you to charge that if he shot into the crowd he would be guilty.' Court to Jury: 'It would not be proper for the court to tell the jury that he was guilty, or not guilty of murder. That is a question for the jury to determine under the evidence and the charge of the court.' After some further explanation upon this point, the court recharged the jury upon the law of murder, and stated to them that before they would be authorized to convict the accused of the offense of murder, they must be satisfied, beyond a reasonable doubt, that he fired the shot which killed the deceased, which instruction was repeated to them more than once, in response to questions asked by jurors. After recharging the jury, the court directed them to return to their room and again consider their

verdict. Subsequently the jury again returned a verdict, which was similar to the first one.

Shelby Myrick and G. Noble Jones, for plaintiff in error. W. W. Osborne, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. (after making the foregoing statement of facts). 1. Civ. Code 1895, § 4334, declares that a new trial shall be granted where the judge, during the progress of the case, or in his charge to the jury, expresses or intimates his opinion as to what has or has not been proved, or as to the guilt of the accused. That, the judge in the present case, in proceeding to sentence the accused, expressed an opinion that he had taken the life of the deceased, which the accused denied, and that he was guilty, there can be no doubt. Whether the case was legally in progress at the time of the expression of such opinion, and whether the right to poll the jury then existed, are questions we deem it unnecessary to decide, under the view we take of the case. His honor, the trial judge, at the instance of counsel for the accused, recognized that his right to poll the jury still existed, by permitting the poll to be taken, and that the case was not terminated, but was still in progress, by recharging the jury and directing them to return to their room for the purpose of making a verdict. So, dealing with the case as the judge considered it, we have, after mature deliberation, reached the conclusion that the expression of opinion by the judge, under the circumstances, is not cause for a new trial. The reason for our conclusion is, that when the judge inquired of the accused and his counsel if they had aught to say why the sentence of the court should not be pronounced upon the accused in accordance with the verdict, the accused and his counsel replied they had nothing to say. Clearly, we think, by this response, the judge was induced to believe that the right to poll the jury would not be demanded. He was led to believe that the trial had terminated. And the judge, thus misled by the accused and his counsel, was naturally put off his guard and expressed an opinion, when otherwise he would not have done so. The situation which confronted the judge, the parties to the case, and the counsel engaged therein, when the request of the accused, that the jury be polled, was made, was one for which the accused and his counsel, and not the judge, were responsible. After the first verdict had been received by the clerk of the court from the foreman of the jury and publicly read in open court, and the judge had asked the accused and his counsel if they had anything to say why the sentence of the court should not be imposed upon the prisoner, and they had replied, "Nothing," the judge had the right to assume that all that remained to be done to terminate the

case, so far as that trial was concerned, was to impose the sentence of the law upon the prisoner, in accordance with the verdict of the jury. He had the right, under such circumstances, to regard the connection of the jury with the case as being at an end, and was, therefore, under no duty to the accused to carefully refrain from expressing or intimating an opinion as to the facts disclosed by the evidence or as to the guilt of the accused. If the judge erred, it was because he was mistaken in believing that the connection of the jury with the case was at an end, and for this error the accused and his counsel were responsible; and the accused cannot take advantage of an error which was the result of what he himself did. Notwithstanding the broad and mandatory language of section 4334 of the Civil Code 1895, there are exceptions to the imperative general rule there laid down. For instance, it has been held not to be a violation of the provisions of that section for the trial judge, upon a motion for a nonsuit, to express his opinion, in the presence of the jury, as to the sufficiency of the evidence to support the action. *Perry v. Butt*, 14 Ga. 699. So, when "objection is made to evidence offered, the judge has a right, if he deems proper, to give the reasons for his decision on the objections; and such reasons so given, if pertinent to the objections made, do not constitute such an expression of opinion as to violate the Code section above cited." *Oliveros v. State*, 120 Ga. 237, 242, 47 S. E. 627, and cit. These cases were followed in *Central R. Co. v. Harper* (decided February 16, 1906) 53 S. E. 391, where it was held: "In ruling on the motion to dismiss because of the mental incapacity of the plaintiff to sue without a next friend or guardian, the remarks of the judge, assigning his reason for the ruling and the reference of the issue thus raised to the jury, were neither expressions of opinion upon the facts nor upon the credibility of the plaintiff who had testified as a witness." If an expression of opinion by the trial judge as to what has or has not been proved does not require the grant of a new trial under the circumstances in the cases cited, we think it very clear that under the circumstances of the present case, the expression by the judge of his opinion as to the guilt of the accused was not cause for a new trial.

2. It seems that the alleged newly discovered evidence was not, perhaps, merely "impeaching, cumulative, or corroborative," as the trial judge considered it; but, in our opinion, it was not sufficient to require or cause the grant of a new trial. The homicide occurred in a hall in Nickerson. Moses Green, a witness for the accused, testified on the trial: "At half past 8 o'clock Battise [the accused] got some ice cream and said he had to go home, get a nap, and catch the tide. He said he was going to leave the entertainment, get a nap, and catch the tide.

I think he went home. I judge that from what he told me." In his statement to the jury, the accused said: "After a little while Moses Green came by and gave me some cream, and I told him, 'I think I will go home, I am sick to-night, and get a nap, so that I can catch the tide.' So I left there. When I walked out and crossed the bridge near Brown's gate, coming towards there I heard lamentation of men, but I kept on towards home. I did not know anything about the shooting until Estella came home and told me about a lot of shooting down at the hall." Davis Battise, a brother of the accused, testified in his behalf as follows: "I saw him [the accused] in the early part of the night after I first got there [the hall at Nickerson]. At the time of the shooting I did not see him in the hall. I did not get there until 11 o'clock; the shooting took place about 12." So, it seems from the testimony of Moses Green and the statement of the accused, that the latter left the hall about half past 8 o'clock; while according to the affidavits made by Butler and Lambry, the accused left the hall about half past 10, and according to the testimony of the brother of the accused, he was at the hall after 11 o'clock. The accused, in his statement, said he heard no shooting at all, yet Lambry and Butler testify that while they were some 200 yards away from the hall, they heard firing in that direction, and the accused was then only 50 or 75 yards down the road from them. According to the testimony of all the witnesses, there were a number of shots fired at the hall when Ben Wright was killed, and if the accused was within 250 or 275 yards of it, it seems strange that he did not hear it. Moreover Butler and Lambry say, in their affidavits, that they lived at Twin Hill, the same settlement where the accused resided; that they knew him; that he passed them at the road, just in front of the hall, and they recognized him. If this were true, why is it that the accused did not see them, for they say that nobody was in the road except themselves and the accused. If the accused saw them, then, he must have known that they knew that he was not at the hall at the time of the shooting, and could have had them subpoenaed before the trial, for the purpose of proving the alibi by them which they subsequently to the trial testify to, in support of his motion for a new trial. When all of these circumstances are considered in connection with the affidavit of Paul Wright, we do not, as we have said, think the alleged newly discovered evidence was sufficient to require the grant of a new trial.

3. As several witnesses testified that they saw the accused shoot the deceased without provocation, the evidence was amply sufficient to support the verdict rendered.

Judgment affirmed. All the Justices concurred, except ATKINSON, J., not presiding.

(124 Ga. 1014)

TOWALIGA FALLS POWER CO. v. McELROY et al.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. WATERS AND WATER COURSES—EASEMENTS—GRANT—CONSTRUCTION.

A. conveyed to B. a narrow strip of land lying on the Towaliga river, and "also all the water privileges in all the land owned by [the grantor] in Towaliga river, and to hold [the grantee] or his assigns harmless against any damage that might accrue by use of said water privileges." In taking the conveyance B. was acting for the owner of the site for a water power, about a mile down the river, who contemplated the erection of a dam to utilize this power. B. subsequently conveyed to the owner of the site for the water power the land and water privileges which had been conveyed to him by A. *Held*, that the grant of the water privileges was an easement appurtenant to the use of the land conveyed, whether used separately or in connection with other land of the grantee. In the construction of the nature and extent of the easement, the court will look to the intention of the parties, not only as appearing from the instrument itself, but also from the circumstances surrounding the transaction, the situation of the parties, the condition of the property at the time, and the configuration of the surrounding country.

2. SAME—FLOWAGE—EXTENT.

The easement of flowage gives to the owner of the water power the right to flood the land of subsequent purchasers from the grantor of the easement, with notice of the grant, only to the extent which would be consequential to the erection of a dam of the height in contemplation of the parties at the time of the grant.

3. SAME.

Under the evidence submitted at the interlocutory hearing, it was proper for the court to preserve the status until the issue of fact was determined by a jury.

(Syllabus by the Court.)

Error from Superior Court, Monroe County;
E. J. Reagan, Judge.

Action by J. P. McElroy and others against the Towaliga Falls Power Company. There was judgment for plaintiffs, and defendant brings error. Affirmed.

The Towaliga Falls Power Company is a corporation which owns and controls the water power at High Falls, on the Towaliga river, in Monroe county, and has there constructed its plant for generating electricity by water power, to be used for lighting towns and cities and supplying motive power to street-car lines and serving the public generally. Under its charter it is given the right to exercise the power of eminent domain in acquiring rights of way or easements over and upon private property, so far as is necessary in carrying out the objects for which it was organized and incorporated. Some seven years since, it commenced the construction of a dam at High Falls, extending across the Towaliga river; and the structure, which has lately been completed, is 25 feet in height. A mile or more up the river lie lands which in 1896 constituted a single tract owned by W. F. Watkins. In November of that year, he made to W. H. Phinazee a deed covering 25 acres of this tract, the portion

conveyed being a narrow strip lying along, and bounded on the south, by the Towaliga river, and extending westward to a small tributary known as "Watkins' Creek," beyond which the tract of land then belonging to him ran for some distance, with an unbroken frontage on the north bank of the river. In 1898 Watkins conveyed to Mrs. Pearl McElroy another portion of this tract, bounded on the west by the creek and lying north of the 25-acre strip sold to Phinazee, and some 250 yards distant from the river. Her husband, Jno. P. McElroy, is now in possession of another portion of the tract, also north of the strip sold to Phinazee and east of the creek, and some half a mile from the river, which Phinazee has obligated himself, by a bond for titles, to convey to him, and which he now claims, under Watkins, as the original owner.

The present proceeding was instituted August 28, 1905, by McElroy and his wife, to enjoin the Towaliga Falls Power Company from backing the water in the river over and upon the lands above mentioned, as having in the year 1896 constituted part of an entire tract belonging to Watkins, but which the plaintiffs assert they subsequently purchased. In their petition they allege, that the defendant company had "shut down" its dam, and that the water was rising and beginning to run out of Watkins' creek over and upon their premises, and, unless the company was enjoined, the water would continue to rise, and would eventually cover and ruin the whole of the 75 acres to which they claimed title, the same being bottom land but valuable for cultivation. In its answer the defendant averred, that only a small portion of the plaintiffs' land would be covered with water, and that the plaintiffs purchased the same with full knowledge that the company had previously bought of Watkins the right to back water over and upon these lands, of which he was at the time the owner. In this connection the company asserted that in the year 1896 Seaton Grantland and J. D. Boyd, who were then contemplating utilizing the water power, procured W. H. Phinazee to purchase the 25-acre strip above mentioned, so that it might be covered with water, and also to buy the water privileges in all other lands owned by Watkins along the Towaliga river and secure from him a waiver of any claim for damages arising from the use of such water privileges, it being at the time well understood that these water privileges should embrace the right of backing water on his lands, and that the damages in contemplation were such as might be caused by the backwater incident to the erection of a dam at High Falls to utilize the water power at that point. The defendant further averred that it had acquired all the rights thus conveyed by Watkins to Phinazee, through successive conveyances from him to Boyd and Grantland, and from them to it, they being the promoters

of the enterprise and having organized the company for the purpose of building a power plant and exercising the water privileges granted by Watkins and others owning land along the river. By way of equitable estoppel, the defendant averred that ever since 1896 it has been known, by everybody living in the vicinity of High Falls, that the promoters of the enterprise contemplated the organization of a corporation for the purpose for which the defendant was chartered, that a large plant would be installed at that point, and that a large dam would likely be built; that over seven years ago the work was actually begun, which fact was known to the plaintiffs and all the people in that section, and many thousands of dollars have been expended by the company in the building of a 25-foot dam and in the construction of its power plant; yet the plaintiffs have stood by, have made no complaint, nor given any warning of their contemplated suit, till the plant is practically complete, and the company contemplates the use of the water power, which is essential to the operation of its plant and cannot be utilized without a dam of that height; and that the granting of an injunction would render practically valueless its plant, upon which it has spent about \$150,000. The defendant also offered to give bond to satisfy any judgment for damages which the plaintiff might obtain in the event it should be adjudged that the water privileges set up as matter of defense did not cover the lands belonging to the plaintiffs, and they should suffer any special injury by reason of water being backed upon their premises in operating the plant in the manner proposed.

On the interlocutory hearing the fact was developed that the company's only claim of right to back water upon the lands of the plaintiffs was based upon a somewhat indefinite grant of water privileges, embraced in the deed from Watkins to Phinazee in 1896. This deed, after reciting that the grantor conveyed 25 acres of land on the north side of Towaliga river, and giving the boundary lines of the premises conveyed, set forth the further fact that the grantor thereby undertook to grant: "Also all the water privileges in all the land owned by W. F. Watkins in Towaliga river, and to hold the said W. H. Phinazee, or his assigns, harmless against any damages that might accrue by use of said water privileges." The instrument did not state what use of these "water privileges" the grantee contemplated, or for what purpose the 25-acre strip lying along the river was purchased, or in terms confer upon him the right to back water upon any of the other lands of the grantor. The evidence introduced in behalf of the plaintiffs tended to show that they had notice, at the time they purchased the lands occupied by them, that the promoters of the power company contemplated the erection of a power plant at High Falls, a mile or more down the river; but the plaintiffs bought

under the impression that the dam to be erected at that point was in no event to be over seven feet high, which was the general understanding in the neighborhood at the time the promoters of the enterprise undertook to secure the necessary water privileges from owners of land along the river. This understanding grew out of express representations to that effect made by their agents at the time the water privileges were secured by them, and, in at least one instance, it was expressly stipulated that the dam should be only five feet in height, and this stipulation was inserted in the grant of water privileges obtained from one of the landowners, Ben Edwards. An affidavit by Watkins, who was the grantor under whom the company claims its water privileges in the lands of the plaintiffs, was also offered in evidence, wherein he deposed: "At the time of this sale to Phinazee it was understood, as stated, that the dam was to be five feet high, and in no event over seven feet high. A dam seven feet high would not flood the McElroy lands, except in big rains. It was never deponent's intention to sell Phinazee any water privileges on any of the lands which belong to the McElroy lands, nor did Phinazee intend or expect to buy any such privileges." Other evidence was submitted to show that a seven-foot dam at High Falls would not flood the plaintiffs' lands, and that it was not until several years after the purchase of water privileges that the promoters began to talk about erecting a 25-foot dam. There was no evidence introduced by the defendant company which was in direct denial of the plaintiffs' contention that the agents of the promoters of the corporation represented that the proposed dam would not exceed seven feet in height, and secured the desired water privileges upon that understanding. Phinazee testified that, at the instance of the promoters, he approached Watkins in the year 1896, with the view to getting an option on such of his lands as were liable to be overflowed by a dam which the promoters contemplated building at High Falls, but that Watkins declined to give the option; that afterwards he submitted a proposition to sell the land wanted by them, and, knowing the object of the purchase, executed the deed dated November 24, 1896; and that the "water privilege as specified therein was fully understood to mean the right to erect a dam at the Falls, and land was of no use and of no value without said water privilege." One of the promoters, Grantland, testified that before securing the water privileges from Watkins, they had purchased the water-power at High Falls, and his land was only needed in order to secure the right to flow backwater thereon; and "as to the height of dam, though various heights were discussed and talked about, nothing definite was arrived at or agreed upon until competent civil engineers had made surveys, and upon

the report the height of dam was fixed at 25 feet." One of the civil engineers, who was employed by the promoters to develop a plan for utilizing the water power at High Falls and fixing the height of the dam to be constructed, testified that under his direction a survey was made in the summer of 1902, and that he fixed the height at 25 feet, as "no lower dam would be practical or feasible at this point."

On the conclusion of the evidence, and after hearing the argument of counsel, the presiding judge passed the following order: "Upon considering the application for an injunction, it is ordered that the injunction prayed for be and the same is hereby granted, and the defendant, its agents, and employés, are enjoined from raising the water on the lands of the plaintiffs beyond the point when the restraining order was granted; this injunction to stand until the defendant institutes proceedings to condemn said land and prosecutes the same to a verdict as provided for in such instances, then this injunction to cease. It is further ordered that said condemnation proceedings are not to affect the questions of their rights to the water privileges claimed by defendants in their answer in said land, but the same may be passed upon in term time upon trial of this case. Said proceedings to condemn shall be ancillary to this proceeding." This order is excepted to by the power company, on the grounds, that (1) the evidence did not authorize the granting of an injunction, the defendant showing by deed a grant of the right to back water upon the lands in controversy, of which grant plaintiffs had notice, and they being, moreover, estopped by their conduct from contesting such right; (2) because the defendant had charter power to condemn land on which to flow backwater, and having shown a bona fide claim of right to back water on the plaintiffs' land, and having offered to give bond to protect their interests or deposit in court such a sum of money as was necessary to afford them protection, an injunction should not have been granted; (3) because the court, having acquired jurisdiction of the subject-matter, should have settled the entire controversy by submitting the issues of fact to a jury, instead of requiring the defendant to resort to the statutory proceeding to condemn plaintiffs' lands, thereby estopping itself from setting up its claims of water privileges and its defense of equitable estoppel upon the plaintiffs, as well as causing defendant to suffer damages by being unable to operate its plant pending the litigation; and (4) because the plaintiffs failed to show any joint cause of action against the defendant company, each being the owner of a separate and distinct parcel of land, and there being no joint ownership of the premises which they seek to enjoin the defendant from overflowing.

Cabaniss & Millingham, Y. A. Wright, and Lloyd Cleveland, for plaintiff in error. Robt. L. Berner, for defendants in error.

EVANS, J. (after stating the facts). The deed from Watkins to Phinazee conveyed a narrow strip of land lying on the Towalliga river, and "also all the water privileges in all the land owned by W. F. Watkins in Towalliga river," with the stipulation that the grantor was "to hold the said W. H. Phinazee or his assigns harmless against any damage that might accrue by use of said water privileges." The land and the easement conveyed by this deed by successive conveyances passed to the Towalliga Falls Power Company. Subsequently to the conveyance from Watkins to Phinazee, Watkins sold the remainder of his tract north of the Towalliga river and east of Watkins' creek to Mrs. McElroy, one of the plaintiffs, and to Phinazee, who afterwards sold it to Mr. McElroy. The first conveyance by Watkins to Phinazee was duly recorded at the time of the second conveyance, so that the plaintiffs, when they acquired the title, had notice of the easement passing under the first deed, and bought subject to it. *Willoughby v. Lawrence* (Ill.) 4 N. E. 356, 56 Am. Rep. 758. So that, in the determination of the question presented by the record, the plaintiffs are entitled to such rights only as W. F. Watkins would have had in the land, had he not parted with the title to it.

In determining the nature and extent of an easement created by an express grant, recourse may be had to all of the attendant circumstances at the time of making it, construed in connection with the language of the grant. 10 Am. & Eng. Enc. Law, 411. It is apparent from the instrument itself, that it was not the intention of the parties to create merely an easement in gross. This intent is manifest from the stipulation that the grantor was to hold the grantee "or his assigns" harmless against any damage that might accrue by the use of the water privileges granted, and the water privileges were to extend to all the lands owned by the grantor in Towalliga river. While the precise nature of the water privileges is not defined, it is evident that they were to appertain to the use either of the land conveyed by the instrument when used separately, or in connection with other land of the grantee. "The right is appurtenant, and not in gross, when it appears that it was granted for the benefit of the grantee's land." *Jones on Easements*, § 36. The use of the water privileges would be of no practical advantage to the grantee were the deed to be considered as granting an easement in gross; but if the language employed reasonably implies the use of the water privileges in connection with the lands of the grantee, then it may become a substantial and valuable

property right appurtenant to the grantee's land. In other words, the deed pertinently suggests that the easement of water privileges is to be appurtenant to a dominant estate owned by the grantee. In the construction of such a grant the courts will look to the intention of the parties, not only as appearing from the instrument itself, but also from the circumstances surrounding the transaction, the situation of the parties, the condition of the property at the time, and the configuration of the surrounding country. *Smith v. Thayer*, 155 Mass. 50, 28 N. E. 1131. All of these things are to be supposed as being in the contemplation of the parties at the time, and may be considered in ascertaining the true intent and purpose of the parties to the instrument at the time of its execution. The record discloses that at the time of the conveyance of the narrow strip of land along the river and the grant of the easement, certain promoters had in contemplation the construction of a dam about one mile down the river at the falls. These promoters attempted to procure from the grantor an option on an easement of flowage rights on his land. The grantor refused to give such an option, but did sell and convey to them the small strip of land, together with an easement of the water privileges on all of his lands in Towaliga river. At the time of this conveyance, the grantor supposed that it was the understanding that a dam was to be erected at the falls with a height of seven feet. It further appears that the promoters obtained from another riparian owner an easement of the water privileges, with a stipulation that the dam was not to exceed five feet in height. One of the promoters admitted that at the time of this conveyance there were several discussions as to the height of the dam, but said that nothing definite was arrived at or agreed upon until competent civil engineers had made surveys, upon whose report the height of the dam was fixed at 25 feet, but these surveys were made several years after the execution of the conveyance. Under this evidence the judge could well arrive at the conclusion that the intention of the parties was to grant an easement of flowage on all of the land of the grantor in Towaliga river which would result from the construction of a dam of the height in contemplation of the parties at the time of the conveyance, and he was authorized to find from the evidence submitted that this height was seven feet.

The plaintiff in error contends that the dam of the power company was in process of construction during a long period of time, and that the plaintiffs knew that large sums of money were being expended in its erection, and that the application for injunction was not made until a dam to the height of 25 feet had actually been constructed and the water turned in the basin, and that the delay of the plaintiffs, affected with this knowledge,

amounted to an estoppel of their right to complain as to the backing of water on their land, consequential upon the construction of a dam of this height. The plaintiffs, on the contrary, while admitting a general knowledge of the construction of a dam at a point upon the river a mile below their land, contend that, as they were not civil engineers, they had no opportunity or means of knowing that a dam of this height would back water upon their land, and that as soon as the water was turned in the basin and the backwater began to invade their lowlands, they immediately applied to the court to prevent the overflow of their lands. We do not understand that an individual owner of property is estopped because his neighbor or another person a mile distant from him shall erect a valuable improvement, with his knowledge, for the full enjoyment of which improvement it would be necessary to invade his premises. No man has the right, without license or authority, to enter upon another's property, solely because such an appropriation is necessary to the enjoyment of improvements on his property, erected with the knowledge of the owner of the premises sought to be invaded. If, in the construction of its grants of water privileges, aided by extrinsic evidence, it shall appear that the power company bought the right to back water on the plaintiffs' lands, in such a case, the plaintiffs, having bought with notice of the power company's rights, could not complain. However, if the extrinsic evidence limited the application of the easement to the erection of a dam of a certain height which would not have the effect of submerging the plaintiffs' lands, the power company would have no right to injure the plaintiffs' premises by the construction of a dam of greater height. An estoppel presupposes that the person sought to be estopped has done some act or made some declaration upon the faith of which the party invoking the estoppel has acted to his prejudice or detriment. *Perkins Lumber Co. v. Thomas*, 117 Ga. 441, 43 S. E. 692. The facts of the present case do not involve the doctrine of estoppel.

The terms of the interlocutory order were as favorable to the plaintiff in error as the facts justified. The effect of this order is to preserve the status of the parties until the extent of the easement claimed by the power company under the deed from Watkins to Phinazee can be judicially ascertained. The order further stipulated that the power company might anticipate this judicial ascertainment of its right to back water, by instituting condemnation proceedings in advance of the trial, and that such condemnation proceedings were not to affect its contention as to its water privileges set up in its answer, but that the proceedings of condemnation should be ancillary to the petition and answer before the court.

The foregoing disposes of all the questions included in the case which were argued in the briefs.

Judgment affirmed. All the Justices concur, except BECK, J., disqualified.

(124 Ga. 909)

FT. VALLEY KNITTING MILLS v. ANDERSON.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DECLARATION—SUFFICIENCY.

The declaration set out a cause of action, and there was no error in overruling the demurrer thereto.

2. SAME—EVIDENCE—QUESTION FOR JURY.

Nor was there error in refusing to grant a nonsuit.

3. TRIAL — INSTRUCTIONS OUTSIDE THE ISSUES.

It was error for the court to charge the jury that the defendant, as a part of its defense, contended certain things which in fact were outside of its contention and not relied on by it; and such incorrect statement was not cured by the fact that near the close of a charge of considerable length the presiding judge again stated to the jury that the defendant contended certain things less in extent than the former statement, but which he did not withdraw or modify, so that the jury might be left to understand that both statements were correct.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596, 718.]

4. SAME.

There being no contention in this case that the master failed in his duty as to using ordinary care in selecting fellow servants, or that it knowingly retained incompetent servants, it was error to charge as to those matters.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Action by Raleigh Anderson against the Ft. Valley Knitting Mills. There was judgment for plaintiff, and defendant brings error. Reversed.

Raleigh Anderson, by his next friend, Mrs. Lula Anderson, brought his suit for damages against the Ft. Valley Knitting Mills for personal injuries alleged to have been caused by the negligence of the defendant company. The petition alleged as follows: Anderson was an infant of 13 years, inexperienced and ignorant of the dangers incident to the operating of machinery, and these facts were well known to the defendant company. On March 7, 1904, he was in the employ of the defendant company, having been engaged to work in its knitting mill in Ft. Valley, Georgia. The defendant company, knowing of the tender age and inexperience of the boy, put him to work at a ponderous and dangerous machine used in its factory for pressing finished garments, and did so without informing him of the dangerous character of the machine, and without instructing him or directing him in the work so that he might do it with reasonable safety to himself. The machine was composed in part of a number of rollers or cylinders which were made to

rapidly revolve about and in an opposite direction to a large cylinder, which was kept heated to a very high temperature. Garments were fed to this complicated machine, to be pressed by being drawn between the rollers. The plaintiff was assigned to the work of feeding this dangerous machine. The danger of it though well known to the defendant, was latent and not obvious to a youth of tender years, and the defendant was negligent in putting the child to work at it. The petition further alleged, that while at work at this machine the right hand of Raleigh Anderson was caught and his hand and arm were drawn between the rollers and injured. Consequent pain and suffering and loss of capacity to labor and earn money were alleged. The defendant demurred to the petition. The judge overruled the demurrer, and the defendant tendered his exceptions pendente lite. After evidence was offered for the plaintiff, the defendant moved for a nonsuit, which was refused. To the order overruling the motion for a nonsuit the defendant filed exceptions pendente lite. A verdict was found in favor of the plaintiff for \$500. A motion for a new trial was made by the defendant. In the first ground of the amended motion for a new trial it is claimed that the court erred in charging the jury as follows: The defendant contends that he (the plaintiff) was not employed to operate the machine, that he was employed to take up from a table upon which the garments, that had been smoothed or ironed out from the machine, fell, and place them in boxes, counting and preparing them in that way for shipment, and that it was not part of his duty to place his hand upon any part of that machine or on any of the work, or on any of the garments that came through that machine, but that in doing so he did an act outside the line of his duty, an act which he had been warned not to do, and which he was of sufficient age and capacity to appreciate and realize he should not do, contending, therefore, that they are not guilty of any negligence whatever, the defendant contending that they warned him of the dangerous character of the machine, the defendant contending further that the machine was one that was heated by steam, that it was red hot, and he had sufficient mental capacity to know that it would be dangerous for him to put his hand upon that machine because it would be dragged into the rollers, thereby rendering himself liable to injury, and that the necessity of putting his hand upon any of the work did not exist, and that there was no such necessity, but that, on the contrary, in that connection his only duty was, if the garment did not come through the machine, that he should call the attention of the operator feeding the machine to the fact, and that it was the duty of the operator feeding the machine to stop the machine and get the garments out of it." The motion was overruled, and the defendant excepted.

Mathews & Riley, for plaintiff in error.
John P. Ross, for defendant in error.

LUMPKIN, J. (after stating the facts).

1. The demurrer was based on two grounds: (1) that no cause of action was set out; (2) that it appeared from the declaration that the plaintiff was wanting in due care, and that his injury resulted from his own negligence. Both grounds were properly overruled.

2. There was no error in refusing to grant a nonsuit.

3. The real defense set up by the defendant being, in brief, that there was no concealed danger about the machine, and that the plaintiff necessarily took a manifest risk; that he had been instructed as to the proper and safe way to operate the machine, and it has been specially pointed out that there was no necessity, in doing the work, to place the hands very near the roller, the charge complained of in the first ground of the amended motion incorrectly stated the issues. The theory of the defense here stated had a tendency to impress the jury with the fact that the defendant set up and undertook to establish more than it actually contended; and this was hurtful error. Nor do we think this was cured by some reference to the issues, in the closing part of the charge. In giving his instructions to the jury the judge erroneously stated that the defendant contended certain things. In the latter part of the charge, which was of considerable length, he told the jury that they would understand, as he had stated to them, that the defendant contended certain things, but did not refer to the former recital otherwise, or negative the previous statement that the defendant also contended other things. This was not enough to cure the error, or bring the case within the rule that the charge taken as a whole may be looked to in order to determine whether there was hurtful error in a part complained of, and if not, that no reversal will be necessary. *Morrison v. Dickey*, 119 Ga. 698, 46 S. E. 863.

There was also error in referring to the duty of a master as to using ordinary care in selecting fellow servants and as to not retaining them after knowledge of incompetency. Such a charge tended to divert the minds of the jury from the real issues. Standing alone, it may not have been sufficient to require a new trial; but coupled with other errors it must have that result.

Judgment reversed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 894)

HODNETT et al. v. DOUGLAS et al.

(Supreme Court of Georgia. Feb. 19, 1906.)

WRIT OF ERROR—PARTIES TO BE SERVED.

Persons who as parties to a motion for a new trial are interested in sustaining the judgment complained of therein are essential

parties to a bill of exceptions assigning error upon the overruling of such motion; and if such parties are not duly served, the writ of error will be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by W. C. Hodnett and others against J. W. Douglas and others. Judgment for defendants, and plaintiffs bring error. Dismissed.

W. F. Brown and W. C. Hodnett, for plaintiffs in error. S. W. Harris, S. Holderness, and W. C. Wright, for defendants in error.

FISH, C. J. W. C. Hodnett, W. F. Strickland, E. M. Allen, Richard George, and others filed their equitable petition, in the superior court of Carroll county, against J. W. Douglas, H. C. Rabun, Mrs. E. L. Rabun, J. T. Libby, J. H. Teare, and C. H. Simpson, for an accounting, cancellation of deeds, injunction, and a receiver, and for general relief. C. H. Simpson was the only one of the defendants who filed an answer. The case coming on to be heard at the October term, 1899, counsel agreed that the controlling issue in the case was as to the validity of a certain judgment in attachment, previously rendered in the city court of Carroll county, in favor of J. W. Douglas against the Boston & Kennesaw Mining Company, a foreign corporation. After hearing evidence on this issue, the court directed a verdict finding such judgment to be void. Thereupon the plaintiffs made a motion for a new trial, all of the defendants in the case being named as respondents in such motion.

On October 31, 1899, service of the original motion was acknowledged by "S. Holderness, attorney for respondents, C. H. Simpson, J. W. Douglas, and Mrs. H. C. Rabun."

On November 23, 1899, an agreement was entered into, which, after a statement of the case, in which the names of all the plaintiffs were set out as movants, and the names of all the defendants as respondents, was as follows: "We, the counsel for the parties in the above stated case, having agreed to settle said case, hereby agree to continue said motion until the April term, 1900, of Carroll superior court. And we further agree that the rights and status of the parties remain as they now are, and that the motion for a new trial be had during the April term, 1900, of Carroll superior court, in the event that the case is not settled. W. C. Hodnett, Atty. for Movants. S. Holderness, Atty. for Respondents."

On December 4, 1899, during the October adjourned term of the court, the following order was granted: "The continuance in the above-stated case is hereby granted as agreed upon by counsel. It is ordered and adjudged by the court that the movants have until the hearing of said motion to amend the motion for a new trial, and file a brief of the evidence, without prejudice. It is further

ordered and adjudged by the court that H. C. Rabun, who has been too sick to be served, be served with a copy of the motion for a new trial, and a copy of the order or rule nisi thereon; and that the nonresident respondents, J. F. Libby and J. H. Teare, who were represented on the trial of said case by Attorney S. Holderness, be served by serving a copy of the motion for a new trial and a copy of the order or rule nisi thereon on said Attorney S. Holderness if he still represents them. If not, let them be served by publication."

The following entry of service was made by the deputy sheriff, March 16, 1900: "I have this day served a copy of the within motion for a new trial, and a copy of the rule nisi; and a copy of the order giving time in which to make out and file a brief of evidence, and a copy of the agreement to continue the case, and a copy of the order continuing the case, personally on S. Holderness, the attorney of record for J. H. Libby and J. H. Teare, as provided by the second rule in equity as set out in section 5693 of the Code of 1895, said attorney having represented the defendants on the trial of said case."

The following entry of service by the sheriff appears, as of date March 17, 1900: "I have this day served a copy of the within motion for a new trial, and a copy of the rule nisi; and a copy of the order giving time in which to make out and file a brief of evidence, and a copy of the agreement to continue the case, and a copy of the order continuing the case, personally on H. C. Rabun."

On January 25, 1904, the following agreement was entered into:

"We agree to continue the motion for a new trial in the case of W. C. Hodnett et al. against J. W. Douglas et al. from the 2d day of February, 1904, until the 8th day of February, 1904, to be heard at Carrollton, Ga., instead of at La Grange, Ga. W. C. Hodnett, Movants' Atty.

"Agreed to without prejudice. S. Holderness, Respondents' Atty."

The motion for a new trial was heard November 21, 1904, and overruled January 14, 1905. Movants filed a bill of exceptions, in which all of the respondents in the motion were named as defendants in error. The following entry was made upon the bill of exceptions:

"I have this day served personally on S. Holderness of Carrollton, Ga., the attorney of record for the defendants in error, a copy of the within bill of exceptions and writ of error. This 15th day of February, 1905. A. D. Hagan, Dept. Sheriff."

Upon the call of the case in this court, counsel for defendants in error moved to dismiss the writ of error, on the ground that the record shows that no proper service of the bill of exceptions was made as to H. C. Rabun, Emma L. Rabun, J. F. Libby and J. H. Teare, defendants in error, "the record

disclosing that the only service had in said case was made by the sheriff serving a copy of the original bill of exceptions on S. Holderness as counsel of record for the defendants in error, the record in said case, together with the bill of exceptions, showing that said S. Holderness was not of counsel for the above-named parties." The record fails to show that either of the above-named persons filed an answer or other pleading in the court below, and further fails to disclose that either of them, or S. Holderness, did any act indicating that Holderness was counsel for either of them, save the acknowledgment of service of the original motion for a new trial, which he signed as attorney for "Mrs. H. C. Rabun." The record shows Mrs. Emma L. Rabun to be the wife of H. C. Rabun, and we, therefore, think it sufficiently appears that S. Holderness was her counsel.

Does the record show that Holderness was not the attorney of record for Libby, Teare, and H. C. Rabun, so that service upon him of the bill of exceptions, as attorney of record for respondents, by the deputy sheriff, would not be effective as service upon them? Or does it show that he was not attorney of record for one of them, which would render the service made upon him by the deputy sheriff of no effect as to such person? As, in our opinion, relief of a substantial nature was prayed against each of them, it was necessary that the bill of exceptions should be served upon all of them. As we have seen, Holderness acknowledged service of the original motion for a new trial for only three of the respondents, Simpson, Douglas, and Mrs. Rabun. Subsequently, November 23, 1899, he signed an agreement as "Atty. for Respondents," the agreement being written under a caption in which the names of all the respondents were set out, and in this agreement was the statement, "We, the counsel for the parties in the above-stated case, have agreed to settle" the same, agree to continue the motion, "the rights and status of the parties [to] remain the same as they now are." The mere fact that Holderness signed this agreement as "Atty. for Respondents" is not, in our opinion, sufficient to show that he then represented any other respondents than the three for whom he had already acknowledged service. It seems clear that it was not then considered that he represented Libby, Teare, and H. C. Rabun, as an order was taken a few days thereafter, December 4, 1899, providing that they be served with the motion, the order reciting that Holderness had represented Libby and Teare on the trial of the case, and providing that they be served by serving him, if he still represented them, but, if not, then they should be served by publication.

The taking of this order is inconsistent with the idea that Holderness on November 23, 1899, being then the attorney representing Libby, Teare, and H. C. Rabun, had,

as such, signed the agreement for a continuance of the motion for them. This order, in so far as it provided for service upon Libby and Teare by serving Holderness, as their counsel, was conditioned upon the ascertainment by the movants, or the officer making the service, of the fact that Holderness still represented Libby and Teare. There is nothing whatever in the record which even indicates that Holderness ever represented Teare or Libby, except this recital in the order of December 4, 1899, continuing the motion for a new trial and ordering service thereof to be perfected upon them and H. C. Rabun. And, save this recital there is nothing which even indicates that Teare ever became a party defendant to the case, as there is neither entry of service nor acknowledgment of service of the original petition as to him, and he filed no answer or other pleading in the case. If he was not a party, then, of course, there was no necessity to serve him with the bill of exceptions. If this mere recital in the above-mentioned order can be considered as sufficient record evidence that Teare had made himself a party to the case, and that Holderness was attorney of record for him, then, it seems, from the decisions of this court which we will presently cite, that service of the bill of exceptions upon Holderness, as attorney of record for the respondents, would be sufficient service thereof as to Teare. There is in the record an entry by the sheriff of service of the original petition upon Libby, by leaving a copy of the same at his most notorious place of abode. He appears then to have been a party defendant to the case; and as substantial relief was prayed against him, it was necessary to perfect service of the bill of exceptions upon him. There is no record evidence of any answer or plea filed by him through Holderness as his attorney, or otherwise. Whether service of the bill of exceptions upon Holderness as attorney of record for respondents was good as a service thereof upon Libby depends, as in the case of Teare, upon whether the mere recital in an order by the judge continuing the motion for a new trial and ordering service of the motion upon named parties, that Holderness represented Libby in the trial of the case, is sufficient evidence that Holderness was attorney of record for Libby.

Presumably this order continuing the motion for a new trial, and directing service of the motion to be made on H. C. Rabun, Libby, and Teare, was granted by the judge upon the ex parte application of counsel for movants, on the presentation of the previous agreement of counsel for such continuance, as it was the movants alone who were interested in having service of the motion perfected upon all of the respondents, and it is customary for such orders to be both prepared and presented to the judge by the counsel who procure them. If the recital

in such an order that a named attorney on the trial of the case represented certain parties defendant can, in the absence of any evidence of record that such parties, or either of them, ever filed any pleading of any character in the case, be taken as sufficient evidence that such attorney was the attorney of record for each of these parties, then, under the decisions of this court rendered in *Clark v. Pigeon Roost Mining Company*, 29 Ga. 29, and *Barfield v. McCombs*, 89 Ga. 800, 15 S. E. 666, the service by the deputy sheriff of the bill of exceptions upon Holderness as attorney of record for respondents would be effective as service upon Libby and Teare. In the case first cited it was held that service of a bill of exceptions upon counsel who procured the decision brought up for review was good service upon the defendant in error, although such counsel claimed that he had ceased to be counsel for the defendant in error before he was served, it being held that, under the statute prescribing service upon attorneys, he could not, for the purpose of receiving service, cease to be counsel. This ruling was followed in the second case cited, where it was held: "Service of the written notice of a certiorari upon counsel who represented the party in the justice's court when the trial excepted to was had, is sufficient though the counsel may have been settled with and discharged."

But whether there would be any merit in the motion to dismiss the writ of error if it were confined to an alleged failure to serve Teare and Libby with the bill of exceptions, we are clearly of opinion that the motion to dismiss must be sustained because of the failure to thus serve H. C. Rabun. We think it clear that the record shows that Holderness did not represent H. C. Rabun. As we have seen, Holderness did not acknowledge service of the motion for a new trial for him, but after the acknowledgment of service by Holderness for Simpson, Douglas, and Mrs. Rabun, an order was taken that H. C. Rabun be served, and, as we have also seen, this order was taken subsequently to the agreement for a continuance of Nov. 23, 1899. The last agreement for a continuance of the motion for a new trial, dated January 25, 1904, was signed by Holderness as "Respondent's Atty." This would indicate that he only represented one of the respondents, and certainly does not indicate that he represented all of them, including H. C. Rabun, upon whom it had been previously deemed necessary to order that personal service of the motion should be perfected. As H. C. Rabun was not a mere nominal party to the case, but was a party defendant against whom substantial relief was prayed, and is named in the bill of exceptions as one of the defendants in error, and the record fails to show that he was served with, or acknowledged service of, the bill of exceptions, we are

constrained to sustain the motion and dismiss the writ of error. See *Cameron v. Sheppard*, 71 Ga. 781; *Orr v. Webb*, 112 Ga. 806, 38 S. E. 98, and cases cited.

Writ of error dismissed. All the Justices concur.

(124 Ga. 922)

GLORE et al. v. SCROGGINS.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. WILLS—CONSTRUCTION—NATURE OF ESTATE.

A testator devised his property as follows: "I will and bequeath to my wife, Rhoda E. Gloré, all the property, real and personal, during her lifetime or widowhood, for her to give to our children as they arrive of age as she may be able, keeping a memorandum so as each child shall be equal, that I may die seised and possessed. I will and do appoint and constitute Rhoda E. Gloré, my wife, my executrix to this my last will and testament." There were several children. *Held*, that the will created an estate for life or during widowhood in the wife, with remainder to the children.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1399, 1404.]

2. EXECUTORS—SALE OF LANDS—AUTHORITY.

The will conferred no power of sale upon the executrix, and a deed made by her, without proper order of the court, under a sale made at a place not authorized by law, though purporting to be made by her as executrix, did not convey a fee-simple title, but only her life estate.

3. REMAINDERS—ACTION FOR POSSESSION—PRESCRIPTION.

The remaindermen, not being entitled to possession until after the death of the life tenant, could not bring suit to recover the land until that time, and prescription did not commence to run against them until then.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Remainders, §§ 12, 13.]

4. JUDGMENT—PARTIES—JOINT OR SEVERAL JUDGMENT—JOINT PLAINTIFFS—EVIDENCE.

Where a joint action at law, not involving any equitable proceeding, is brought by several plaintiffs to recover land, and there is no prayer for a several recovery, under former rulings of this court it cannot be sustained, except by proof showing a joint right of recovery in all of the plaintiffs.

5. TRIAL—NONSUIT.

Where, in such a case, it appeared from the evidence introduced by the plaintiffs that one or more of them was not entitled to recover, there was no error in awarding a nonsuit.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 414, 423.]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by J. A. Gloré and others against Jane Scroggins. Judgment for defendant, and plaintiffs bring error. Affirmed.

Gloré and others brought their action against Mrs. Scroggins to recover certain land. They alleged, that George W. Gloré was the owner of the land, and died in 1863 (?), testate; that they were remaindermen under the will and also were his heirs, and represented and owned the interests of all the heirs; that the life tenant under the will had sought to convey the land; that the

purchaser under her had taken possession, and that she had died in 1903. The plaintiff prayed to recover the land and mesne profits. The defendants denied that they obtained only a life estate by the conveyance under which they claimed, and asserted that a fee-simple interest was conveyed to them. They also pleaded that they had a prescriptive title. On the trial, at the close of the evidence on behalf of the plaintiffs, the court granted a nonsuit, and they excepted.

Greene & Gaun and W. A. Morris, for plaintiff in error. Spears & Harris and J. Z. Foster, for defendant in error.

LUMPKIN, J. (after stating the foregoing facts). 1. Between two things so widely different as a tub and a will a certain analogy is disclosed in the trite and homely saying that, "every tub must stand upon its bottom." This idea was expressed by Jackson, Chief Justice, when he said: "Every will is a thing to itself. It is emphatically not only *sui juris* but *sui generis*. Its terms are its own law, and the application of that law by construction of itself—of the statute which the testator himself enacted, to the contestants for its bounty, is the plain duty of the court." *Olmstead v. Dunn*, 72 Ga. 855, 856. The learned jurist, of course, meant where the provisions of the will were not contrary to law or public policy. In *McGinnis v. Foster*, 4 Ga. 378, Lumpkin, J., delivering the opinion said: "It has been said that no case upon a will has a brother, such is the endless diversity of language employed by persons in the final disposition made of their effects." Certain general rules or principles for the guidance of the courts in construing wills may be laid down. But in the application of those rules the particular language of the will itself, and sometimes the surrounding circumstances, must play an important part. Among the rules which may aid us in the present investigation, we mention a few. "In the construction of all legacies, the court will seek diligently for the intention of the testator, and give effect to the same, as far as it may be consistent with the rules of law." Civ. Code 1895, § 3324, and cases cited in notes thereto; 30 Am. & Eng. Enc. Law (2d Ed.) 661; *Cook v. Weaver*, 12 Ga. 47. "The natural and reasonable presumption is that when so solemn and important an instrument as a will is executed the testator intends to dispose of his whole estate, and does not intend to die intestate as to any part of his property, which presumption is overcome only where the intention of the testator to do otherwise is plain and unambiguous, or is necessarily implied." 30 Am. & Eng. Enc. Law (2d Ed.) 668. If the will creates a life estate but clearly does not dispose of the reversionary interest, it will pass by inheritance to the heirs of the testator. *Haralson v. Redd*, 15 Ga. 148; *Oliver v. Powell*, 114 Ga. 598, 599, 40 S. E. 826. "The law favors vested remainders; and it

is an established rule, that the court never construes a limitation into an executory devise, when it can take effect as a remainder, nor a remainder to be contingent, when it can be taken to be vested." *Vickers v. Stone*, 4 Ga. 461, 463; *McGinnis v. Foster*, 4 Ga. 382; *Fields v. Lewis*, 118 Ga. 573, 575, 45 S. E. 437; Civ. Code 1895, § 3104; *Jossey v. Brown*, 119 Ga. 765, 47 S. E. 350; *Hudgens v. Wilkins*, 77 Ga. 556. Where there are divesting clauses, especially of a remainder, they are to operate so as to vest the estate indefeasably at the earliest possible period. *Sumpter v. Carter*, 115 Ga. 893, 896, 42 S. E. 324, 60 L. R. A. 274. "An estate may be created during widowhood and such estates shall be subject to the same rules as life estates." Civ. Cod. 1895, §§ 3108, 3089. For a will which was held to create an estate for life only on much less clear language than that under consideration, see *Crowley v. Crouch*, 114 Ga. 135, 39 S. E. 904. "Devises for the life, or during the natural life, or during or for the lifetime of the devisee, and other expressions of similar import are effective limitations of a life estate, notwithstanding other provisions of the will, which, if standing alone, might show a purpose to pass a greater estate." 30 Am. & Eng. Enc. Law (2d Ed.) 747. On this subject see also, 1 *Jarman on Wills* (5th Am. Ed.) 686; *Brant v. Virginia Coal Co.*, 93 U. S. 328, 23 L. Ed. 927; *Mansfield v. Shelton*, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285; *Chase v. Ladd*, 153 Mass. 126, 28 N. E. 429, 25 Am. St. Rep. 614; *Schouler on Wills* (3d Ed.) § 560; *Mart. Conv.* (2d Ed.) § 585.

The item of the will of George W. Gore which we are called upon to consider reads as follows: "I will and bequeath to my wife, Rhoda E. Gore, all the property, real and personal, during her lifetime or widowhood, for her to give to our children as they arrive of age as she may be able, keeping a memorandum so as each child may be equal, that I may die seised and possessed. I will and do appoint and constitute Rhoda E. Gore, my wife, my executrix to this my last will and testament." The testator and his wife had children. The entire will is not sent up in the record, and the presiding judge certifies that this item is the only material portion of it. That it is inartificially drawn is apparent. Three possible constructions have been suggested: First, that the wife was made a trustee for the children, and that by the expression, "for her to give to our children as they arrive of age as she may be able, keeping a memorandum so as each child shall be made equal," a trust was created in favor of the children; second, that a life estate or estate during widowhood was created in favor of the wife of the testator, but no disposition was made of the reversionary interest; and third, that a life estate was created for her with a remainder to the children.

The first construction above suggested would not be in harmony, we think, with the

evident purpose of the testator. It seems clear that he desired to make provision for his wife. If the clause quoted transformed her into a mere trustee, the purpose indicated would not be effectuated. Moreover, if it were intended that she should be simply a trustee, the words, "during her lifetime or widowhood," would have no effect, and would be mere surplusage. A trustee can, of course, be such only during her lifetime. Section 3162 of the Civil Code of 1895 reads as follows: "Precatory or recommendatory words will create a trust if they are sufficiently imperative to show that it is not left discretionary with the party to act or not, and if the subject-matter of the trust is defined with sufficient certainty, and if the object is also certainly defined, and the mode in which the trust is to be executed." The words "for her to give," etc., in the will construed in connection with the balance of the item, are not such precatory or recommendatory words as will create a trust under this section. It is left discretionary with her to give off to the children as she is able, and it is not declared what she shall give off, whether the entire share of each child or only a part. Had the intention been apparent that the wife should hold or use the property for the benefit of the children during minority, a trust would have been created, although the words were not mandatory in form. Thus in *Hunter v. Stembridge*, 12 Ga. 192, the following words, used by the testator in relation to his wife, were held to create a charge which equity would enforce. "And I also allow my son Henry to give her a support off my plantation during her lifetime." See, also, *Maxwell v. Hopple*, 70 Ga. 152. We do not think that this item created a trust in favor of the children of the testator. Nor did it confer on them an absolute right to demand the delivery to them of a share upon arriving at 21 years of age. The widow was to have an estate for life or during widowhood, and could not be compelled to divide up the property among the children to the destruction of that estate, though she had power to give off or advance to the children arriving at age, as she was able. The second possible construction, namely, that the will conveyed a life estate to the wife, but made no disposition as to the reversionary interest, is also objectionable. The general presumption against partial intestacy is strengthened here by the fact that the testator declared that he willed and bequeathed all of the property, real and personal, of which he might die seised and possessed. As already noted, he also authorized the widow to give property to their children as they should become of age, as she might be able. Clearly he did not intend that the widow might give property to the children to be held by them merely during her life or widowhood. Further, he directed that if she should give property to the children, she should keep a memorandum so that each child should be made equal.

This idea of giving to the children and equalizing them is inconsistent with the view that no other estate was created beyond an estate in the testator's wife during life or widowhood. It is certain that the testator intended to create a life estate, or an estate during widowhood, in the wife. It is equally certain that he contemplated that the property should ultimately go to their children, share and share alike, and that the estate created for the children was not a mere life estate. This leads inevitably to the acceptance of the third construction, that the intention of the testator was to create an estate for life or during widowhood for his wife, with remainder to their children. The expression, "for her to give to each child," etc., was intended to confer upon her the power to give property to the children as they should arrive at age, as she might be able to do so, keeping an account so that in the final division the children should be made equal.

2. Under the foregoing construction of the will of George W. Gore his wife took only an estate during life or widowhood in the land now involved in controversy, and had no power to convey a fee-simple estate. The will conferred no power of sale on her as executrix. A mere provision for dividing an estate does not include a power to sell it. It appears that she made a deed reciting that an order had been granted by the court of ordinary authorizing her as executrix to make the sale, and that it was made after due advertisement, before the courthouse door. The deed purported to be made by her as executrix. It recited however, that the order was granted at the August term, 1864, of the court of ordinary of Cobb county; while it appears from the family record of births and deaths that the testator did not die until August 30th. No record of any order could be found in the ordinary's office, and the uncontradicted evidence showed that the sale did not take place before the courthouse door, but on the premises some miles distant in the country. Under this state of facts, the deed did not convey title as an executor's deed, but being signed by Rhoda E. Gore, it conveyed whatever interest she had in the property, which, as we have seen, was a life estate.

3. The remaindermen, not being entitled to demand possession until after the death of the life tenant, could not bring suit until then (except for such property as she may have given off to them), and no prescription commenced to run against them until that time. She died in November, 1903, and the suit was filed in 1905. So that no prescription title had ripened.

4. 5. The suit was a joint one at law, and there was no prayer for a several recovery. This being so, the action could not be sustained except by proof showing a joint right of recovery in all the plaintiffs. One of them gave a receipt dated very soon after the sale, stating that he had "received from the exec-

utrix the sum of \$100 in full payment of specific legacy bequeathed to John A. Gore, son of said deceased." As no other legacy to him appears in this record, the receipt apparently had reference to his share as a remainderman. True, he testified that he received no money but did receive a horse some time before he gave the receipt; but he nowhere negatived the fact that the receipt spoke the truth, and that he had received full payment of his legacy. In addition to this, he was asked, "Don't you know that your sister and Hiram [another legatee] got their part of that money paid for the land?" To which he answered: "They got it in something. They didn't get it in money. Hiram got something, and sister got some things in the house." It appears that the witness and another legatee were present when the sale was made. If they were so and received some of the proceeds, they could not repudiate it because of irregularity, and recover the land from the purchaser. Further than this the purchaser does not seem to be in a position to set up an estoppel. At least, there was evidence from which a jury might have found that he was not a bona fide purchaser without notice of the defect in the title, and that he was not misled into making the purchase in reliance on the conduct of the plaintiffs.

The suit being joint, and the evidence as contained in the record before us indicating that some of the plaintiffs were not entitled to recover, a nonsuit was properly awarded. *Medlock v. Merritt*, 102 Ga. 212, 29 S. E. 185.

Judgment affirmed. All the Justices concur.

(124 Ga. 1026)

SOUTHERN RY. CO. v. CHATMAN.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. RAILROADS—INJURY TO TRESPASSER—VARIANCE—INSTRUCTIONS.

Where suit was brought for a personal injury alleged to have occurred while the plaintiff was crossing the tracks of a railway at a public street crossing in a city in South Carolina, and it was alleged that the employees of the railroad company were negligent in the manner in which they caused an engine and car to approach and pass over such crossing at an unsafe rate of speed, without keeping a proper lookout, and without giving any signal or warning of approach, it was error to so charge the jury as to leave them to infer that under such a declaration a recovery might be had if the injury did not occur at or near a public crossing, but in a railroad switching yard, although the plaintiff may have been a trespasser there, if the defendant's employees could have discovered his presence by the use of ordinary care, or that a recovery might be had if the plaintiff, when injured, was swinging upon a switch engine of the defendant in its switching yard, provided the defendant's employees could have discovered him by the use of ordinary care.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1238.]

2. SAME—DUTY OF EMPLOYEES.

As a general rule, the agents of a railroad company operating one of its trains are

not required to anticipate the presence of a trespasser upon its tracks or property, and the duty of using ordinary care and diligence does not arise until his presence there becomes known.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1238, 1239.]

3. SAME—CHILDREN.

This general rule applies as well to children as to grown persons.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1239.]

4. NEGLIGENCE—CARE REQUIRED OF MINORS.

In determining what ordinary care requires in reference to children, the fact of their apparent size, age, and inability to protect themselves is proper for consideration by the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 9.]

5. RAILROADS—CHILD ON TRACK.

As to a child of tender years, no presumption arises that it will appreciate danger and will act with the discretion of an adult in getting out of the way of an approaching train, and persons in charge of a railway train are not authorized to act on such a presumption.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1239, 1232.]

6. SAME—DUTY TO TRESPASSERS.

The general rule that as to a trespasser upon a railway track the duty of observing ordinary care and diligence for his protection does not devolve upon the company's agents in charge of a train until his presence upon its track becomes known to them does not relieve the company under all circumstances from anticipating the presence of a trespasser upon its track and from taking proper precautions to prevent an injury to him. Where the circumstances are such that the employees of the company in charge of one of its trains are bound, on a given occasion, to anticipate that persons may be upon the track at a certain place, they are under a duty to take such precautions to prevent injury to such persons as would meet the requirements of ordinary care and diligence. *Bullard v. Southern Ry. Co.*, 43 S. E. 30, 116 Ga. 644.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1238, 1239.]

(Syllabus by the Court.)

Error from City Court of Gwinnett; E. W. Boine, Judge.

Action by Willie Chatman, by his next friend, Susan Moon, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Willie Chatman, a minor, by his next friend, Susan Moon, brought suit against the Southern Railway Company, alleging as follows: In the city of Greenville, S. C., the defendant's line of track crosses, just above the depot, a public street known as Riley street. On January 1, 1904, the plaintiff, a minor 10 years of age, was passing over said public crossing in the exercise of all due care, and while upon it was run over by a switch engine of the defendant and his leg was crushed. The defendant was alleged to have been negligent in the following particulars: That the engine and train of cars were negligently being run at a speed of 15 miles per hour over said crossing, that the

employees in charge of them negligently failed to keep a proper lookout ahead, that they failed to stop after plaintiff's presence upon the crossing was discovered, and that they failed to give any signal or warning by bell, whistle, or otherwise while approaching the crossing or passing over it. There were allegations as to the extent of the injury. It appears that an amendment was filed, which is not contained in the record, but which is stated in the charge of the court to have changed the allegation that the plaintiff was run over by a switch engine to one that he was run over by a car of the defendant attached to one of its engines. The defendant put in issue the substantial allegations of the plaintiff. The jury found for the plaintiff \$1,000. The defendant moved for a new trial which was refused, and the defendant excepted.

S. J. Winn, D. K. Johnston, and Jno. J. Strickland, for plaintiff in error. Arnold & Arnold, Walter E. Ormond, N. L. Hutchins, Jr., and Harvey Hill, for defendant in error.

LUMPKIN, J. (after stating the above facts). 1. The charge of the court in this case is not free from error. The suit was based on allegations that while the plaintiff, a boy 10 years of age, was passing over the tracks of the defendant at a public street crossing in the city of Greenville, S. C., and was in the exercise of due care, a car attached to an engine ran over and injured him; that the defendant's employees were negligent in causing the engine to be run over the crossing at a speed of 15 miles an hour, in failing to keep a proper lookout, in failing to stop after his presence upon the crossing was discovered, and in failing to give any signal or warning while approaching the crossing. On the trial the evidence on his behalf tended to support his allegations. The evidence for the defendant tended to show that the place where the injury happened was not at or near any public crossing, but in its yards, where there were a number of tracks, and where switching was done; that its employees did not know of, and had no reason to anticipate, the presence of the plaintiff at that place; and that, while they did not know just how he was injured, he admitted to the physicians who attended him that he was swinging on the engine when he was hurt. There was some conflict in the evidence as to whether people did frequently cross the tracks at that point. While in the early part of the charge the court said to the jury, "If the plaintiff is entitled to recover, he must recover upon the acts of negligence alleged in this declaration and the amendment," yet, when asked to charge that if the plaintiff was not hurt at the crossing, but somewhere else in the defendant's yard, he could not recover under his petition, the court added words which

were calculated to lead the jury to believe that it made no difference "whether the crossing be a legally established public crossing, or a place where people frequently cross the tracks of the defendant." He also stated to the jury, "Now, before the plaintiff can recover at all, some duty which the company owed the plaintiff must have been violated." He then immediately charged that if the plaintiff was a trespasser upon the tracks, and the place was not one frequented by people in crossing, but he was there of his own free will and accord, without invitation of the company, and that the company was not aware of his presence, "or could not have been, by the exercise of ordinary care," it owed him no duty except not to injure him willfully or wantonly. At another part of the charge he instructed the jury that if the plaintiff was swinging or attempting to swing on the cars or engine, without the knowledge of the employees connected with the train, he would be a trespasser, and they would be charged with the duty only not to willfully and wantonly injure him; but "if his presence could by the exercise of ordinary care have been known, then the company would owe the plaintiff that degree of care which I have defined to you as being ordinary care. Now, gentlemen of the jury, these are the questions that have to be determined by you." Thus, in spite of the limitation expressed in the beginning of the charge, the judge indicated to the jury that a recovery might be had if there was a breach of duty on the part of the company toward the plaintiff, and then charged them as to the duty of the company in regard to trespassers in its switching yard, and to a boy swinging upon its engines or cars in such yard. It thus became quite possible for the plaintiff to make one case by his declaration, and recover on an entirely different state of facts.

2. The injury involved in this case occurred in South Carolina, and therefore the law applicable to it is to be determined without reference to any local statute of this state. No statute of South Carolina was pleaded or shown, and we must look to general principles and decisions not dependent upon statutes in particular jurisdictions. The English decisions afford little aid, as railroads are of comparatively recent origin, and laws were early enacted in that country on the subject of trespassing upon railway tracks. St. 3 & 4 Vict. c. 97, § 16. The general rules in regard to trespassers on railroad tracks and the liability of the company for injuries to them have given rise to no little differences of opinion and conflict of decisions. Some of this, however, appears to have resulted from the want of a clear apprehension of the difference between general announcements of a rule and the application of it to the facts of particular cases, or from a failure to consider whether with a change of circumstances the general doctrine does

not also undergo modification. Not only the courts, but the text-writers, exhibit a lack of harmony on the subject. Generally speaking, the rule has been stated to be that a person who owns or controls property owes no duty to a trespasser upon it, except not to willfully or recklessly injure him. Thus it has been held that an owner or occupier of land who makes an excavation not adjacent to a street or place of public passage is not bound to so guard it as to prevent injury to persons who come upon the land without invitation, express or implied, and that this is true even as to trespassing children. *Savannah, Florida & Western Ry. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314. This was a case of a trespasser, pure and simple, between whom and the owner of the property no relation of duty existed, and is an illustration of the statement of the general rule. It has been said that a similar rule applies to railway tracks. *Baldwin's Am. Ry. Law*, 233; 2 *Wood on Railroads* (Minor's Ed. 1894), § 320. In the latter authority it is said: "A railway company owes no duty to a trespasser upon its tracks or premises other than that which every person owes to another, and that is to refrain from inflicting upon him a willful or malicious injury." Nevertheless in the same connection it is said: "But if a person can be easily seen lying upon the track, in season to stop the train, the company is not warranted in running him down simply because he has no business there, but is bound to use due care to stop the train, and prevent the injury if possible. The duty of the company in such cases exists when the trespasser is first discovered and the engineer becomes aware that he is ignorant of the approaching danger; and if, after becoming aware of the trespasser's presence, the engineer fails to exert every effort possible to prevent the injury, the company must be held liable. So, also, in cases where persons have long been accustomed to use the track of the company for a passageway at certain localities, the company is charged with notice of such usage, and is under obligation to keep a careful lookout at such places, even though the parties thus using the track do so without authority, and are really trespassers." And again: "The same rule prevails as to persons trespassing upon railway bridges, and other parts of the road where they have no right to be, and where the company has no reason to expect that persons will go." It will thus be seen that, after the broad language used in setting out the general rule, cases are stated where a duty arises to use care and a corresponding liability arises from a failure to do so.

In 3 *Elliott on Railroads*, 1257, it is said: "What we have already said concerning the limited duty to trespassers applies to trespassers upon a railroad track. It is generally, and, we think, correctly, held that a railroad company is not bound to keep a lookout

for trespassers upon a track. But some authorities hold that it must keep a lookout for trespassers as well as others. And in some jurisdictions the rule is modified so as to require the company to keep a lookout in cities and other places where trespassers or licensees may reasonably be expected. * * * Although there is a clear distinction between negligence and willfulness, yet a reckless and wanton disregard of consequences, evincing a willingness to inflict injury, may amount to willfulness, although there is no direct proof of actual intention to inflict the injury complained of." In 2 Beach on the Law of Railways, 970, it is said: "The railway's employees must use reasonable efforts to prevent injury to persons seen crossing or walking upon the track, whether they be using the track under the company's license or acquiescence, or whether they be trespassers." In 2 Shearman and Redfield on Negligence (5th Ed.) § 483, after referring to the rule that a plaintiff may recover, notwithstanding his contributory negligence, if the defendant, after becoming chargeable with notice of the plaintiff's danger, failed to use ordinary care to avoid the injury to him, it is said: "It is universally agreed that this rule applies to all cases in which the defendant or his agent is actually aware of the plaintiff's danger. Thus, a locomotive engineer or motorman, after becoming aware of the presence of any person on, or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track; that is to say, ordinary care with respect to anticipating injury, before it becomes imminent, and the utmost care and diligence of which he is personally capable, after he knows that it is imminent." In section 484 it is said: "The rule stated in the last section, however, does not cover the whole ground. The defendant is responsible, not only for what he actually knows, but for that which he is bound to know. It is clear that the frequent statements that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'willful,' or 'wanton,' or even grossly negligent, are not sound. No courts have in actual practice adhered to this imaginary rule. It has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which had previously stated it. Nothing more is really meant by the courts using these phrases than a want of ordinary care, after becoming actually aware of the plaintiff's peril."

Judge Thompson, after stating that recent judicial decisions have for the most part been converging towards certain lines of argument, bringing their conclusions into harmony with the theories on which nearly all of them proceed when dealing with the subject of the care required by the owners or occupiers of real property towards persons going

thereon, and stating the general rule on that subject, says: "But such persons take the premises as they find them, and must look out for their own safety, subject, however, to the rule that the owner or occupier will not be held blameless if he injures them through negligence after discovering them in an exposed position on his premises, or if he inflicts upon them while there a wanton or malicious injury." In section 1713 it is said: "This doctrine is that where a trespasser or bare licensee exposes himself to the risk of being run over upon a railway track or in a railway yard, and is killed or injured, there can be no recovery against the railway company unless it is made to appear that the accident was the result of willful misconduct, or of negligence or recklessness so gross as to amount, in theory of law, to willful misconduct." But he held the opinion that "where the public for years have been accustomed to cross the track of a railway company upon a well-defined path, with the acquiescence of the company, although without its express license, a license to do so will be presumed, and persons so crossing to and fro are not, in a strict sense, trespassers, but are licensees, and the company is bound to take reasonable precautions to avoid injuring them." Section 1725. Some courts, including the Supreme Court of this state, have held that mere walking on a railroad track, though continued for a considerable time and known to the company, does not create a license, but enters into the circumstances and situation to be considered by the jury in determining whether the railroad company exercised due care. Section 1726 of the work just above referred to reads as follows: "It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track, where people may be expected upon the track in considerable numbers, as, for example, in a city where the population is dense, even between streets where the track has been extensively used for a long time by pedestrians, or where the roadbed is constantly used by pedestrians, or at a bridge in a thickly settled community, which the public in considerable numbers have used for years. At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals such as will apprise them of the danger of an approaching train, and to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any persons thereby injured, subject, of course, to the qualification that his contributory negligence may bar recovery."

In 23 Am. & Eng. Enc. Law (2d Ed.) pp. 746, 747, after stating (page 735) the general proposition that the obligation of a railroad company to trespassers is to abstain from wantonly and willfully injuring them, the text proceeds as follows: "Though a railroad company is the absolute owner of its track and has the right to its full and unmo- lested use, it is nevertheless liable for injury resulting from the ordinary movements of its trains to a person on or near its track, though a trespasser, where the injury is willfully or wantonly inflicted; and the rule is often stated that a railroad owes no duty to one wrongfully on its tracks, except to refrain from wantonness or willfulness, or such gross negligence as amounts to wantonness. * * *

This latter proposition, as interpreted by the majority of the decisions, however, is but equivalent to saying that a railroad is not required to anticipate the presence of a trespasser on or near its tracks, and is under no duty to exercise care and diligence until his presence and peril are discovered. The duty of exercising reasonable care to avoid injuring a trespasser does not necessarily arise at the moment he is seen by the railroad's employes, but at the moment the peril of his position becomes known, or at least should become known by the exercise of reasonable care, after the discovery of the person's presence on the track." As to places where the track runs through cities or other populous districts where persons are in the habit of crossing or walking on the tracks, see page 754. In South Carolina it has been held that "a railroad company owes no duty to a trespasser on its tracks, except not to do him any wanton or reckless injury." *Smalley v. Southern Ry. Co.*, 57 S. C. 243, 35 S. E. 489; *Hale v. Columbia, etc., R. Co.*, 34 S. C. 292, 13 S. E. 587. It is recognized, however, that there is a modification of the rule in cases of persons on a railroad track who from age or misfortune cannot take care of themselves, and in cases of little children. *Mason v. Southern Ry. Co.*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826.

From an examination of the text-writers referred to above, and the many cases cited by them, it will be seen that there is not perfect accord, and that, indeed, the expressions used by the same writer at different times does not always seem to be in perfect consonance. In our state the rule as to trespassers has not always been expressed in similar language. Thus in *Western & Atlantic R. Co. v. Bailey*, 105 Ga. 100, 31 S. E. 547, it is said: "It may be also stated as a general rule, that the company owes no duty to a trespasser upon its track, except to do him no willful or wanton injury." See, also, *Grady v. Georgia R. Co.*, 112 Ga. 608, 37 S. E. 861 (where a person was passing between two cars in a railroad yard); *Kendrick v. Seaboard Air Line Ry.*, 121 Ga. 775, 49 S. E. 762. In the last-mentioned case the rule is stated to be that

ing on its tracks the duty not to hurt him willfully or negligently after his presence becomes known to its servants in charge of one of its trains." In the opinion it is said: "But, when the company was charged with knowledge of the presence of a trespasser on its track, it immediately owed the trespasser the duty of exercising ordinary care and diligence to prevent injury to him." Reference is also made to Civ. Code 1895, § 2321. And see, on this subject, *Western & Atlantic Railroad v. Melgs*, 74 Ga. 857, *infra*; *Central Railroad v. Brinson*, 70 Ga. 245, 246, 253, 254; *Central Railroad v. Denson*, 84 Ga. 774, 11 S. E. 1039. In *Holmes v. Central R. Co.*, 37 Ga. 593, the expression used was "all reasonable care and diligence," and it was held that a request to charge that the plaintiff could not recover unless the defendant was guilty of gross negligence was properly refused. That case involved the killing of a slave at a point 70 or 80 yards from a public crossing, but on a part of the track much used by foot passengers to make a short cut from one public road to another, which was known to the defendant's agents. In *Atlanta & Charlotte Air Line Ry. Co. v. Gravitt*, 93 Ga. 370, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145, it is said: "The duty to observe all ordinary and reasonable care and diligence towards such persons arises when his presence becomes known to the engineer, and not before." In *Hambricht v. Western & Atlantic R. Co.*, 112 Ga. 36, 37 S. E. 99, it is said: "As to a trespasser walking upon the track of a railroad, the duty of observing ordinary care and diligence for his protection does not devolve upon the company's servants in charge of a train until his presence upon the track becomes known to them." See, also, *Hall v. Western & Atlantic R. Co.*, 123 Ga. 213, 51 S. E. 311. In *Nashville, Chattanooga, etc., Ry. Co. v. Priest*, 117 Ga. 767, 45 S. E. 35, it was held that, the plaintiff being a trespasser upon the premises of the defendant, it owed her no duty of protection until her presence was discovered, although she was a child of tender years, and it was said that after she was seen by the defendant's employes it did not affirmatively from the declaration that the conduct of any of them "was so grossly negligent as to indicate a willful and wanton disregard for her safety." This was said of a child who climbed on a railroad car, and jumped down when told to get off by an employe, on the approach of an engine. In *Ashworth v. Southern Ry. Co.*, 116 Ga. 635, 43 S. E. 36, the expression "wantonly or willfully" is again used in the preliminary statement of the general rule, but it is clearly shown that such a rule "does not relieve the company, under all circumstances, from anticipating the presence of a trespasser upon its property and from taking proper precautions to prevent injury to him." In *Bullard v. Southern Ry. Co.*, 116 Ga. 644, 43 S. E. 39, it is said: "Where a number of persons habitually, with the knowledge and without the disapproval

of a railroad company, use a private passageway for the purpose of crossing the tracks of the company at a given point, the employees of the company in charge of one of its trains, who are aware of this custom, are bound on a given occasion to anticipate that persons may be upon the track at this point; and they are under a duty to take such precautions to prevent injury to such persons as would meet the requirements of ordinary care and diligence." In *Crawford v. Southern Ry. Co.*, 106 Ga. 870, 33 S. E. 826, the subject of the duty to use ordinary care as to a trespassing child at a place where her presence should have been anticipated is discussed fully; and section 2321 of the Civil Code of 1895 is also cited. Under the decision in *Nashville, Chattanooga, etc., R. Co. v. Priest*, supra, this court is committed to the doctrine that, unless there be something to put the company on notice, or to cause it to anticipate the presence of a childish trespasser, it is no more required to keep a lookout for the presence of such a trespasser than for a grown person, though this view is not universally adopted. See, also, 23 Am. & Eng. Enc. Law (2d Ed.) 747; 2 Thomp. Neg. §§ 1808, 1809, et seq.

It is impracticable in the course of an opinion to undertake to harmonize or discuss at length the different views or the language employed in expressing them. A few suggestions, however, may be made. Negligence has been defined in various terms. One very comprehensive definition is to be found in *Black's Law Dict.* (word "Negligence"), as follows: "Negligence: The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances." *The Nitroglycerine Case*, 15 Wall. 536, 21 L. Ed. 206; *Blythe v. Birmingham Waterworks*, 11 Exch. 784. Another definition is that "negligence is the unintentional failure to perform a duty implied by law, whereby damage naturally and proximately results to another." 21 Am. & Eng. Enc. Law (2d Ed.) 457. In the notes various other definitions are given. An owner of property is not ordinarily required to anticipate that trespassers will come upon it, and to prepare its property for them, or guard against possible injury to them. Hence arises the general statement of the rule as to liability only for wanton, willful, or reckless injury, looking at the trespasser as such solely, and without reference to the existence of any relation creating a duty. The duty not to willfully or recklessly injure another may be said to be due from all men to all men. So, with reference to a railroad, not at public crossings, stations, or other places where people have a right to go, and in the absence of invita-

tion or license, express or implied. But, when a trespasser on a railroad track is seen by the agents running the train to be in a position of peril, the duty of exercising ordinary care exists. The duty to exercise such care where they are bound to anticipate the presence of people on the track will be mentioned later. *John L. Hopkins*, in his work on the *Law of Personal Injuries* (section 87, p. 138), says: "The agents of the company may presume that no one will become an active wrongdoer, and violate the right of the company by trespassing on the track, and they may act on that presumption. They must exercise ordinary care with reference to the condition contemplated by law, a condition which consists of the performance of legal duties and the observance of legal rights by all persons. This condition may be styled normal, and it continues until the agents of the company know, or have reason to suppose, that a human being may be on the track at a particular place. When that occurs a new condition is made up, and from it spring new duties. * * * If it be simply a trespass, with nothing of legal significance connected with it and preceding it, the relation of the company to the trespasser begins when he is discovered. Prior to that time, as there is no duty of anticipating his wrongful act, there is no reason for precautionary measures. When he is discovered, the condition with which the company has to deal is made up, and an ever-present rule of law requires that ordinary care appropriate to that condition shall be used. As a general rule it is an exercise of ordinary care to presume that the trespasser is in full possession of his senses, that he will appreciate his danger, and that he will act with discretion and get out of the way. On this presumption the engineer may act until he discovers that the passenger is not likely to escape the peril. When that occurs, the condition changes to one of increased danger, and ordinary care as to it requires increased caution to avoid the calamity. If the trespasser was known by the engineer to be deaf, or the engineer could see that he was drunk, or disabled, or helpless, or that he was on a high trestle or in other position from which he could not extricate himself, the presumption would not arise, and increased care should be exercised accordingly." *Id.* p. 140. "Railroad engineers should observe more caution in running at places where they know persons are likely to be on the track than elsewhere, even if those persons are trespassers, and especially is this true when the company has at least tacitly consented to this otherwise unauthorized use of its property by the public." *Western & Atlantic Railroad v. Meigs*, 74 Ga. 857, 865. After a child of tender years is discovered upon the track, the presumption that it will use discretion like a grown person arises; but it is to be considered rather like a person known to be helpless or disabled,

or at least its size and apparent age are to be considered in determining what ordinary care requires of the engineer. "Due care on the part of a child of tender years is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation." Hopk. Pers. Inj. § 87.

From the foregoing discussion it will be seen that the charge of the court was erroneous in several particulars. It treated a switching yard at a distance from a street crossing as being practically the same as such crossing, if people frequently passed over the tracks there. It placed upon the company the duty of using ordinary care to discover a trespasser upon its tracks, even if it were at a place not frequented by people in crossing, and with nothing to cause it to anticipate the presence of any person there, and of using ordinary care to know whether the plaintiff was swinging on its engine or cars in its switching yard.

There were other exceptions, for want of sufficient fullness in certain charges; but it does not appear that requests were made of the court to charge more fully on those subjects. It is unnecessary to discuss the statutes of this state, as the injury occurred in another state.

Judgment reversed. All the Justices concur, except ATKINSON, J., not presiding.

(124 Ga. 1068)

MCCONNELL v. STUBBS et al.

(Supreme Court of Georgia. Feb. 21, 1906.)

1. PLEADING—AMENDMENT—TIME OF ALLOWANCE—AFTER REFERENCE.

In a case which was referred to an auditor, where an issue was made by the pleadings and the evidence, and was passed on by the auditor, there was no error in allowing, after the filing of the report, an amendment which introduced no new issue, but simply adjusted the prayer of the petition more specifically to the finding of the auditor and the evidence submitted to him.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 663.]

2. REFERENCE—AMENDMENT OF PLEADINGS—RE-REFERENCE.

If further consideration by the auditor became necessary, a motion to re-refer the case to him could be made. But where the only motion for a re-reference was based, not on any desire to introduce further evidence, or to make further defense, or because of any change in status arising from an amendment which had been made, but solely on the ground that the auditor had not taken the oath prescribed by statute at the proper time; and where an answer was filed to the motion, alleging that counsel for both parties had distinctly waived the taking of the oath by the auditor before beginning the hearing, and that he acted on such agreement in respect to the delay in so doing; and where the court heard evidence on the subject (which is not brought to this court), the refusal of a re-reference furnishes no ground for a reversal.

3. PARTNERSHIP—ACCOUNTING—RIGHTS OF PARTNERS.

While ordinarily, in the absence of an agreement to that effect in the contract of partner-

ship, a partner is not liable on an accounting, subsequently to a dissolution of the firm, for a depreciation in the value of the manufacturing plant which is the subject of the partnership, but the loss caused by the depreciation must be borne by the partnership, under the contract involved in this case and the circumstances disclosed by the evidence the plaintiffs were entitled to an accounting for one-half of the net profits as of the date fixed in the contract for them to retire and receive such profits.

4. SAME—RECOUNPMENT.

Where partners had a common interest in the assets, business, and profits of the firm, but on a proceeding for an accounting under the contract between them, one partner sought, by way of recoupment, to have a deduction made from the amount of the claim of the other in the profits, on account of neglect or refusal to discharge certain duties, whereby the interest of the firm suffered damage, and extra expenses were incurred, such recoupment could be set up, but the deduction could not go beyond the amount of damage proved.

5. APPEAL—EXCEPTIONS TO AUDITOR'S REPORT.

Several of the exceptions to the auditor's report are not sufficient in form, but from an examination of the entire record no error requiring a reversal appears.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by S. J. Stubbs and another against J. C. McConnell. There was judgment for plaintiffs, and defendant brings error. Affirmed.

S. J. Stubbs and F. B. Stubbs brought their equitable petition against J. C. McConnell, alleging in substance as follows: On March 17, 1902, plaintiffs entered into an agreement with McConnell, forming a limited partnership for the manufacture and sale of lace leather. The contract attached to the petition provided, that they agreed to enter into a limited partnership; that McConnell, in consideration of the furnishing by the other parties of \$5,000, to be used in buying new machinery, making improvements on buildings, and paying for hides, tanning, and materials, agreed to put in the building which he then had, and the ground which it occupied, together with all the machinery, tools, and other articles on hand belonging to him, "for one-half of the net profits of the business for not less than 12 months. At the expiration of the 12 months, if the parties of the second part desire to discontinue the partnership, the party of the first part agrees to give them four promissory notes for \$1,250 each, with interest at 8 per cent. per annum. The first to be due in three, the second in six, the third in nine, and the fourth in 12 months from date; but reserves the right to pay the money instead. Party of the first part agrees to keep books, invoices, and have cashier of Cornelia Bank check out for the same. And to further secure party of the second part, said company agrees to insure said plant for not less than \$5,000, to be paid to said S. J. and F. B. Stubbs as their interest may ap-

pear. It is also agreed and understood that said business shall be holden and responsible for said \$5,000 put into the company by said parties of the second part." McConnell agreed to superintend the manufacture of the leather, and the other parties agreed to furnish the \$5,000 as soon as it could be used advantageously in the business, and to look after the purchase of plenty of "number 1 spready hides." They further agreed to sell or cause to be sold all the lace leather manufactured by the company to the best advantage and to the best of their ability, without any cost to the company in buying hides and selling leather except actual travelling expenses. They were to have one-half the net profits of the business for the 12 months. McConnell reserved the right to pay back to them the entire \$5,000 in 90 days from the date of the contract with interest at 8 per cent. They reserved the right to put in \$25,000 more capital and carry out a certain contract referred to as having been drawn by one Wade and signed by McConnell, at any time after the expiration of 90 days and during the 12 months. The allegations of the petition continued thus: Plaintiffs furnished the \$5,000 which was used in the business. McConnell put in the building, machinery, etc., and the new machinery and material purchased with the \$5,000 also went in as partnership assets. The business was put into operation. McConnell represented to them that he had obtained a patent on a process for manufacturing lace leather; that he had already manufactured a quantity of it; that it had found ready sale at remunerative prices; and that he gave to plaintiffs the names of certain customers with whom he had established a trade, and represented that the leather was of good quality and readily marketable. They relied upon these representations in entering into the partnership and investing their money. But although as soon as the leather was manufactured they made every effort to sell it, and visited a number of cities, and offered it to various dealers in such leather, it proved impossible to find a market for it. Nearly all the former customers of McConnell, to whom he had referred them, denounced the leather as unfitted for the use for which it was intended, and refused to buy it. Being submitted to various tests, it was found inferior and unsuitable for the use for which it was intended. They thereupon, to avoid unnecessary expense, declined to undertake further the sale of the leather, but authorized McConnell, upon his assurance that he could sell it, to proceed to do so. Acting for the firm, he had already manufactured several thousand dollars worth of the leather, and has since manufactured a large quantity of it, and according to his statement to the plaintiffs, has sold over \$11,000 worth of it. Plaintiffs are willing to account to the firm for the cost of selling it, less a reasonable amount allowed for travelling expenses. At the ex-

piration of the 12 months provided in the contract, plaintiffs notified McConnell that they desired to discontinue the partnership, and demanded that he give them the notes as the contract provided, but he refused to do so. They claimed the right to one-half the net profits and to withdraw their \$5,000, and that the assets should be bound "and plaintiffs say their right is now perfect and their said claim is matured." McConnell has taken entire control of the plant, machinery, accounts, assets, and profits of the business, and is continuing to run it at great risk to them and to the assets, without their consent. He is collecting accounts due the firm and applying the money as he sees fit. He refuses to come to any settlement with plaintiffs, or to pay them their half of the net profits of the business; "or their \$5,000, or the amount due them as aforesaid." On information and belief they charged McConnell to be insolvent. They pray that he be required to account to them for their interests in the business and assets; that they be paid one-half the net profits of the business "and the amounts due them by said firm as aforesaid"; that their lien for \$5,000 be enforced against the assets; that a receiver be appointed and McConnell be enjoined from collecting the assets; that an auditor be appointed; that the partnership be declared dissolved; and for general relief.

The defendant admitted the making of the contract and the furnishing by plaintiff of the \$5,000 as agreed, but denied that it was used as provided for in the contract. They admitted the putting into the business of the plant, tools, etc., and the \$5,000, but denied that the property belonged to the partnership, "as there is now no partnership." They denied the allegations of the plaintiffs in regard to the impossibility of finding customers for the leather, and in regard to its character, but alleged that the plaintiffs themselves violated the contract, and failed, and refused to, sell the leather as they had agreed. He admitted the allegations in regard to the manufacture and sale by him of leather. He denied that the business was being run at the risk of the plaintiffs. He admitted that he refused to pay the amount which they claimed, and denied that it was correct, or that he owed them anything, and denied insolvency. By way of cross-petition he alleged that the plaintiffs violated the contract, willfully abandoned the business, and refused to buy hides or sell or have sold the products of the factory; that of the \$5,000 which they were to contribute to the capital they used \$1,500 in buying a car load of hides, which were almost worthless, resulting in a loss of at least \$1,000. "And defendant submits that they are not now, nor since said abandonment [have] been in copartnership with him; that by said abandonment, plaintiffs dissolved their relations with defendant." He alleged, that by reason of the failure of the plaintiffs to comply with their contract, he lost at

least \$5,000 in profits, and was forced to employ a man to do traveling at a cost of about \$2,500 per year; that he suffered injury from their conduct, and prayed a judgment against them.

No receiver was appointed, but the case was referred to an auditor, who made an accounting between the parties and found that the plaintiff should recover of the defendant \$5,000 principal, with interest from March 17, 1903; that up to that date there was a net profit of \$2,402.38, of which one-half would belong to the plaintiffs; that they were chargeable with the necessary commissions paid for having the leather sold, but as the amount was paid from the firm assets, they were due to the defendant one-half of it; and also that another item should be deducted, leaving a balance due of \$117.04 as the plaintiffs' share of the profits of the business. He also found for the plaintiffs certain other items which it is not material to mention. The defendant filed a number of exceptions of law and fact, all of which were overruled. The plaintiffs amended their petition by praying specifically that they should have judgment for the \$5,000 with interest from March 17, 1903. The defendant moved to recommit the cause, but did not allege that he desired to introduce any additional evidence, or to make further defense, and asked it solely on the ground that the auditor was not sworn until the day he filed his report. To this motion the plaintiffs answered that the defendant's counsel had expressly waived the taking of the oath by the auditor before the hearing of the case, stating that the oath could be taken by him at any time; that both sides waived the taking of the oath before the auditor should proceed with the hearing, and that he did take the oath in accordance with their agreement. After hearing evidence on the subject (which is not before the Supreme Court), the judge overruled the motion to recommit; and having disapproved all the exceptions, he entered a decree in favor of the plaintiffs. The defendant excepted.

J. B. Jones, for plaintiff in error. H. H. Dean and H. H. Perry, for defendants in error.

LUMPKIN, J. (after stating the facts).

1. The contract was not in dispute. The plaintiffs claimed that they were entitled to have the \$5,000 repaid to them. The defendant denied it. The issue was fully made in the pleadings and the evidence, and the auditor passed on it, and found in favor of the plaintiffs. The amendment introduced no new issue, but simply adjusted the prayer of the petition more specifically to the finding of the auditor and the evidence submitted to him. There was no error in allowing such an amendment. *Sterling Electric Co. v. Augusta Telephone Co.*, 124 Ga. 371, 52 S. E.

541; *Milner v. Mutual Benefit Ass'n*, 104 Ga. 101, 30 S. E. 643.

2. There was no error in overruling the motion to recommit the case to the auditor. It was not based on the ground that defendant desired to introduce further evidence or make further defense, but on the ground that the auditor had not taken the oath at the proper time. It was alleged in an answer filed by plaintiffs to the motion that this was distinctly waived by agreement of counsel for the respective parties, and that he acted on the agreement in delaying the taking of the oath. The court heard evidence on the subject and overruled the motion.

3. Ordinarily, "in the absence of an agreement to that effect in the contract of partnership, a partner is not liable, upon an accounting subsequently to a dissolution of the firm, for a depreciation in the value of the manufacturing plant which is the subject of the partnership; but the loss caused by the depreciation must be borne by the partnership." *Houston v. Polk*, 124 Ga. 103, 52 S. E. 83. In the present case under the contract the partnership was only to last for one year, unless continued in the manner provided for by it; and it declared that the plaintiffs should have one-half of the net profits during the 12 months of its continuance. They contended that they elected to terminate the partnership and have their money returned to them, together with one-half of the net profits, as the contract provided. The defendant did not contend that there was a continuing partnership after that time so that the property, assets, and business were those of an existing firm. He also asserted that the partnership had terminated, but claimed that he owed the plaintiffs nothing, and in fact was entitled to a judgment against them. He retained all of the property in his hands and denied any right on their part. Under such circumstances the auditor did not err in holding that the plaintiffs were entitled to an accounting for one-half of the net profits as of March 17, 1903, the date fixed by the contract. On this subject see *Miller v. Freeman*, 111 Ga. 663, 36 S. E. 961, 51 L. R. A. 504; *Laswell v. Robbins*, 39 Ill. 219; *Brown's Appeal*, 89 Pa. 139.

4. The failure of the plaintiffs to sell the leather did not result, under the facts disclosed in the evidence, in totally destroying all rights on their part for an accounting. But the consequent additional expenses should be charged against them. 2 *Bates on Partnership*, 780; *Stegman v. Berryhill*, 72 Mo. 307; *Funk v. Leachman*, 4 Dana (Ky.) 24; *Water Lot Co. v. Leonard*, 30 Ga. 560 (4); *Lewis v. Chisholm*, 68 Ga. 40 (2). In *Tutt v. Land*, 50 Ga. 340 (5), it was said: "When one partner seeks, by way of recoupment, to have a deduction made from the amount of the claim of the other in the

profits, on account of fraud or neglect, or acts of disloyalty to the partnership, whereby the interest of the firm suffered damage, such deduction cannot go beyond the amount of damage proven." On page 353, Trippe, J., in delivering the opinion, said: "But it cannot be the rule that one partner can set up that the other has been false to duty, and thereby he can claim all the assets, capital and profits. He may recoup or claim for damages; but must show what the damages are."

5. Several of the exceptions to the auditor's report are too general in character, or fail to sufficiently set out or specify the evidence relied on to support them. But from an examination of the entire record we are of the opinion that no error was committed which requires a reversal.

Judgment affirmed. All the Justices concur, except ATKINSON, J., who did not preside.

(124 Ga. 929)

ATLANTA, K. & N. RY. CO. v. McKINNEY.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. COVENANTS—COVENANT TO SUPPLY WATER—CONSTRUCTION.

The purchaser of the water rights upon a parcel of land covenanted with the vendor, who was the owner of an adjacent lot, to "carry and convey sufficient water to the residence [of the covenantee] for the ample use and accommodation of said residence and its occupants." *Held*, that the covenant to supply the residence with water ran with the land, and bound the successor in title of the covenantor.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 65.]

2. COVENANTS—CREATION—PERSONS BOUND—GRANTEE IN DEED.

Where lands are conveyed by indenture to a person who does not sign the deed, yet if he enter upon the land and accept the deed in other matters, he will be bound by covenants contained in it.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Covenants, §§ 69, 70.]

3. SAME—CONSTRUCTION.

Covenants are to be so construed as to carry into effect the intention of the parties, which is to be collected from the whole instrument, and the circumstances surrounding its execution.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 20.]

4. SAME.

Applying this rule of construction to the instrument in the present case, the covenant was that the water to be supplied by the covenantor was to be water derived from the water rights which were the subject-matter of the agreement between the parties.

5. DEED—REQUISITES—SEAL.

Under the provisions of Civ. Code 1895, § 3599, a seal is not an essential requisite to a deed.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 99, 103.]

6. COVENANTS—SEAL.

The instrument containing a covenant need not be under seal.

7. LIMITATION OF ACTIONS—PERIOD—ACTION ON COVENANT.

A right of action by the covenantee against the successor in title of the covenantor, upon a covenant running with the land, which is contained in a deed not signed by the covenantor, is barred in six years from its breach.

8. SAME.

The petition set forth a cause of action for the breach of a continuing covenant, but upon the trial the plaintiff will not be allowed to recover for a period exceeding six years preceding the filing of the suit.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Action by M. McKinney against the Atlanta, Knoxville & Northern Railway Company. A general demurrer to the petition was overruled, and defendant brings error. Affirmed.

McKinney brought suit against the Atlanta, Knoxville & Northern Railway Company, and alleged: On September 13, 1886, Andrew W. Green conveyed to petitioner the exclusive right to the use and control of all the springs and branches upon a described lot of land in Fannin county, for the purpose of being used on an adjacent lot of land. On November 12, 1888, petitioner conveyed to the Marietta & North Georgia Railroad Company the right to the use of water from the branches and springs on the said lot of land, for the purpose of supplying its water tank at Blue Ridge, Ga., "in consideration of the fact that said Marietta & North Georgia Railroad Company shall carry and convey sufficient water to the residence of said McKinney for the ample use and accommodation of said residence and its occupants." It is further alleged that the Atlanta, Knoxville & Northern Railway Company purchased all the property, rights, and franchises of the Marietta & North Georgia Railroad Company at a receiver's sale, and became thereby bound by all the conditions of the above-described deed, and that for more than four years and ever since the purchase of the Marietta & North Georgia Railroad the defendant has been continuously using the water conveyed in the above-described deed, and that neither the defendant nor its assignor ever carried water to the residence of petitioner. Petitioner claimed, as damages for the breach of the covenant, \$500 as the cost of conveying the water to his residence as contemplated in the deed, and the value of the use of the water at the rate of \$25 per year since November 12, 1888, the date of the covenant. The defendant demurred generally to the petition, and specially to that portion seeking damages for the cost of conveying the water to the petitioner's residence. The special demurrer was sustained, and the general demurrer overruled. To the judgment overruling the general demurrer the defendant excepted.

Clay & Blair and Wm. Butt, for plaintiff in error. J. Z. Foster, O. R. Dupree, and Thos. A. Brown, for defendant in error.

COBB, P. J. (after stating the foregoing facts). The right of action of the petitioner depends upon whether or not the covenant to convey water to his residence is a covenant running with the land. If it is a real covenant, he may recover for its breach against the assignee of the covenantor. If it is only a collateral or personal covenant, he has no cause of action. The determination of a question of this character is usually one of some difficulty. "All covenants are either real or personal. Those so closely connected with the realty that their benefit or burden passes with the realty are construed to be covenants real; all others are personal." 11 Cyc. 1052. "Whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied." *Id.* 1081. "Covenants, in order to run with the land, must, however, relate to the interest or estate, so that their performance or non-performance will effect the quality, value, or mode of enjoyment of the estate." 8 Am. & Eng. Enc. L. 139. These definitions are founded directly upon *Spencer's Case*, 5 Coke, 16, 1 *Smith's Leading Cases* (9th Ed.) 174, or upon authorities derived therefrom. The rule as there laid down is as follows: "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land and shall bind the assignee although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time the demise is made, it cannot be appurtenant or annexed to the thing which hath no being." In the case of *Atlanta Con. St. Ry. v. Jackson*, 108 Ga. 638, 34 S. E. 184, Mr. Chief Justice Simmons said: "To constitute a covenant running with the land, the covenant 'must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.' 1 Ballard, Real Prop. § 491. In 2 Kerr on Real Prop. § 1218, it is said: 'Of the covenants in a lease, some run with the land, while others are binding only upon the person. . . . In order that it may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be a privity between the contracting parties.'" In the present case the thing demised was the right to the use of water from springs and branches upon a certain lot of land for the purpose of supplying a water tank. The covenant, the breach of which is alleged, was the agreement to convey a part of the water to the residence of the plaintiff. Under the rules above laid down, we think it is clear

that this is a covenant running with the land. It measures up to every test suggested. It not only relates to the interest or estate conveyed; it is inseparably annexed to and a part of it, a charge upon it. It affects the nature, quality, and value of the thing demised. It qualifies its mode of enjoyment; it restricts its use. It is inextricably woven into the manner in which the grantee shall enjoy the thing demised. "A covenant by a lessor to supply houses with water at a rate therein mentioned for each house also runs with the land, and for a breach of it the assignee of the lessee may maintain an action against the reverser." 1 *Taylor's Land & Tenant*, 380, citing *Jourdain v. Wilson*, 4 B. & A. 266. See, generally, upon covenants, the following authorities: *Notes to Gibson v. Holden* (Ill.) 56 Am. Rep. 151; notes to *Geiszler v. De Graaf* (N. Y.) 82 Am. St. Rep. 664; *Bronson v. Coffin* (Mass.) 11 Am. Rep. 335; *Winfield v. Henning*, 21 N. J. Eq. 188; *Kellogg v. Robinson* (Vt.) 27 Am. Dec. 550; *Gilmore v. Moblle & Montgomery Ry. Co.* (Ala.) 58 Am. Rep. 627; *Perkins Mfg. Co. v. Williams*, 98 Ga. 391, 25 S. E. 556; *Ga. So. Ry. v. Reeves*, 64 Ga. 492; *Howard Mfg. Co. v. Water Lot Co.*, 53 Ga. 689. In the case of *Cooke v. Chilcott*, L. R. 3 Ch. Div. 694, it is said: "A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect pump or reservoir, and to supply water from the well to all houses built on the vendor's land. Held, that both the benefit and burden of the covenant ran with the land, and that the case was not within the second resolution of *Spencer's Case*." See, also, *Shaber v. St. Paul Water Co.*, 30 Minn. 179, 14 N. W. 874.

The second rule in *Spencer's Case* is stated: "But when the covenant extends to a thing which is not in being at the time the demise is made, it cannot be appurtenant or annexed to the thing which hath no being," and this rule was urged as a sufficient reason for holding that the covenant in the present case was not one running with the land. This rule has been severely criticised by various courts of this country and of England. See *American notes to Spencer's Case*, 1 *Smith's Leading Cases* (9th Ed.) 186 et seq.; *Alkin v. Albany, Vermont & Canada R. Co.*, 26 Barb. (N. Y.) 294; *Masury v. Southworth*, 9 Ohio St. 350. And see, also, *Willcox v. Kehoe*, 124 Ga. 484, 52 S. E. 896. But in the present case the facts do not make out a covenant extending to a thing not in esse. The demise is of the right to convey water from certain springs and branches to a water tank. The covenant is to convey a part of such water to the plaintiff's residence. The covenant extends to the water to be conveyed to the plaintiff's residence. The water is the subject-matter of the covenant. The manner of conveying it is not even specified. The fact that the machinery for so conveying the

water was not in existence does not bring the covenant within the second rule of Spencer's Case. There is an element of futurity in every covenant; a covenant is a promise to do. The manner of its performance is, of course, contemporaneous with its performance, and it is immaterial whether the means upon which the manner of its performance is dependent be or be not in existence at the time the covenant is made. Another objection urged against the alleged covenant was that the deed of conveyance was a unilateral contract, and that no undertaking of the grantee in the deed, the covenantor in the present case, could be construed to be more than a simple contract, as he neither signed nor sealed the instrument. Unquestionably, in some jurisdictions, this would be a good objection. It has been held that the mere acceptance of a deed poll will not bind the grantee therein as a covenantor. See 8 Am. & Eng. Enc. Law, 65, and cit.; contra, 11 Cyc. 1045, and cit. But this question is not open in this state; this court having adopted the rule stated in Taylor on Landlord and Tenant, § 245. "It [a covenant] can only be created by a deed, but may be by a deed poll (the party named in the deed) as well as by indenture, but where lands are conveyed by indenture to a person who does not seal the deed, yet if he entered upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in it." *Georgia Southern Railroad v. Reeves*, 64 Ga. 494.

Another contention of the defendant was that the language of the instrument should not be construed as a covenant to supply to the plaintiff's residence water derived from the water rights conveyed to the defendant, but that, under the instrument, the defendant might supply water from any locality whatever. If this construction were correct, the covenant would undoubtedly be collateral, personal, and independent of the land; but we do not think it a fair construction of the deed. "Covenants are to be so construed as to carry into effect the intention of the parties, which is to be collected from the whole instrument and from the circumstances surrounding its execution." 11 Cyc. 1051, and citations; *Peden v. Chicago Ry. Co. (Iowa)* 35 N. W. 424, 5 Am. St. Rep. 680. The covenant in question reads: "The said M. McKinney, for and in consideration of the fact that said Marietta & North Georgia Railway Company shall carry and convey sufficient water to the residence of the said McKinney for the ample use and accommodation of the said residence and its occupants, then and in that event the said M. McKinney grants, sells, and conveys unto said Marietta & North Georgia Railway Company the right to the free and unrestricted use of water for the supplying of the railroad water-tank at Blue Ridge, in said county, with ample and sufficient water for their use from all the springs and branches for the use of said company,"

etc. It seems to us apparent that it was the intention of the parties that the water conveyed to the plaintiff's residence should be from the springs and branches which were the subject-matter of the agreement. The grantor reserves what might be said to be the first lien upon the water, and it is only after the needs of his residence are satisfied that the defendant is given the unrestricted use of the branches and springs. It would be unreasonable to hold that the intention of the parties expressed in this instrument was that the water furnished to the plaintiff was to be derived from another locality, and conveyed by separate machinery to the plaintiff's residence.

The instrument containing the covenant recites that it is given under the hand and seal of the grantor, and it is properly witnessed, but after the signature there appears no seal—neither a scrawl, nor the usual "[L. S.]." It was contended that the instrument was not a sealed instrument, and that no covenant could arise except under seal. Some device must follow the signature which is intended as a seal, to constitute the instrument a sealed instrument. *Ridley v. Hightower*, 112 Ga. 479, 37 S. E. 733, and cit. Can a covenant be created in this state by a writing not under seal? The requisites of a deed in this state are declared by the Code to be as follows: "A deed to lands in this state must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser or some one for him, and be made on a valuable or good consideration. The consideration of a deed may be always inquired into when the principles of justice require it." Civ. Code 1895, § 3599. Seals are a relic of that period when men, as a rule, could not write. For an historical treatise upon seals, see the learned opinion of Mr. Chief Justice Lumpkin in the case of *Lowe v. Morris*, 13 Ga. 147. When signatures became common acquisitions, a seal was supposed to import a solemnity to the act of signing and a deliberation upon the contents of the instrument. The law still maintains this fiction in many instances, notably in the application of statutes of limitation. As a matter of fact, what is commonly used as a seal in Georgia is a printed word, or the letters "L. S.," which are already upon the blank form of the instrument. Hence we have the anomaly of an instrument sealed before its provisions are written, or even known; and the supposed solemnity attendant upon the signing vanishes, as does the serious deliberation upon its contents. But the custom of sealing was so firmly fixed in the common law that we have inherited the superstition of its necessity. This finds expression in many opinions where it has been said, but always as obiter, that signing, sealing, and delivery are necessary elements in a deed. In no case in the reports of this court, so far as the writer has been able to find, has it been held, where the point was

raised, that a seal is necessary to the validity of a deed. See, in this connection, *Vizard v. Moody*, 119 Ga. 923, 47 S. E. 348. In the absence of such a holding, we think the section of the Code quoted above is controlling, and that no seal is necessary to convey an estate or interest in lands in Georgia. It follows that if a deed is valid in the absence of a seal, a covenant not under seal is binding as a covenant. "An express covenant can only be created by deed, which, in order to effect the validity of the covenant, must itself be valid and binding." 11 Cyc. 1044.

The demurrer also raises the objection that the action was barred by the statute of limitations. To determine this question it is necessary to ascertain when the cause of action arose. And this depends upon when the covenant was broken. A right of action for the breach of a covenant accrues at the time of the breach, which may be, but is not always, the time of the execution of the instrument containing the covenant. In the case of covenants of title which are broken as soon as made, if broken at all, the right of action accrues immediately upon the execution of the instrument containing the covenant. When the covenant runs with the land, the right of action accrues at the breach, whether that occur at the time of the execution of the instrument or subsequently. 11 Cyc. 1134. The covenant in the present case was to supply the residence of the plaintiff with water from the water supply referred to in the instrument. It was not a covenant to erect appliances necessary for that purpose. If so, there would have been a breach of the covenant after the lapse of a reasonable time for the erection of suitable appliances, and the statute would have begun to run from that date. But the covenant was to supply the water from day to day and from year to year. It was a continuing covenant. After the lapse of a reasonable time for the covenantor to provide suitable means for conveying the water to the residence of the plaintiff, an obligation arose on the part of the covenantor to supply the water. Its failure to do so was a breach of the covenant. The plaintiff's right of action would accrue from day to day and year to year, as long as the failure continued, and the fact that a portion of the claim of the plaintiff would be barred by the statute of

limitations would not prevent him from recovering for that part which had not become barred at the time the suit was filed. In *Shaber v. St. Paul Water Co.*, 30 Minn. 184, 14 N. W. 874, *Berry, J.*, in dealing with a case involving a covenant similar to the one under consideration, said: "These are therefore continuing covenants, and for that reason, and because they run with the land, the damages for their breach accrue to him who holds the property when the breach occurs, or, in other words, to the person injured, and to him the right of action therefore necessarily belongs. *Jeter v. Glenn*, 9 Rich. Law (S. C.) 374. In this respect they are analogous to covenants for quiet enjoyment and warranty, which inure to the protection of the owner for the time being of the estate which they are intended to insure. *Rawle on Covenants*, 352, and citations."

It now becomes necessary to determine what statute of limitations would bar the right of action. The instrument creating the covenant not being under seal, the period of limitations applicable to specialties, 20 years, would not apply. The only other provisions of the statute of limitations that could possibly be applicable are the ones which relate to simple contracts in writing, fixing the period of limitations at six years, or the one fixing the limitation for an action upon a breach of a contract not under the hand of a party, or upon an implied assumpsit or undertaking, at four years. Civ. Code 1895, §§ 3767, 3768. The limitation of four years is applicable to a cause of action arising out of a transaction where there are no writings. In the present case there is a writing, but it is not under the hand of the person sought to be charged, nor of its predecessor in title. But it is a contract in writing, and the defendant is bound by its terms. It is more nearly analogous to a simple contract in writing than it is to a verbal undertaking. The period of limitation would be six years, instead of four. The judge properly overruled the demurrer, because the petition set out a cause of action. But upon a trial the plaintiff will not be allowed to recover for a breach extending for more than six years before the filing of his suit.

Judgment affirmed. All the Justices concur.

(60 W. Va. 55)

DEEPWATER RY. CO. v. D. H. MOTTER & CO. et al.

(Supreme Court of Appeals of West Virginia. Jan. 30, 1906. Rehearing Denied June 2, 1906.)

1. INJUNCTION—PROSECUTION OF ACTION.

An action of assumpsit by a railroad contractor against a railroad company to recover for work of construction under contract will not be enjoined at the company's instance merely because a number of creditors of such contractor have garnished the company.

2. EQUITY—JURISDICTION—RELIEF GRANTED.

It is not an infallible rule that equity, having jurisdiction for one purpose, will give full relief on all matters involved, though some be proper for a court of law. If a trial of such legal matters by jury is essential to relief, or peculiarly more appropriate for trial by jury than by a judge, equity will decline jurisdiction as to those matters, leaving the parties to their legal remedies. The facts of each case must determine as to this.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 103-114.]

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County.

Bill by the Deepwater Railway Company against D. H. Motter & Co. and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. N. Campbell and Brown, Jackson & Knight, for appellant. Simms & Enslow, for appellees.

BRANNON, J. Under a contract with the Deepwater Railway Company, D. H. Motter & Co. did work in the construction of that company's road, and brought an action of assumpsit in the circuit court of Fayette county against said company for recovery of their demand, the amount of which and the right to any amount were in great dispute between them. A number of creditors of Motter & Co. brought divers suits before justices and in court against them, sued out attachments, and garnished the railroad company as a debtor for such construction work of Motter & Co. In this condition of things the railroad company filed a bill in chancery against Motter & Co. and those various creditors, to enjoin said creditors from going on with their suits and proceedings in garnishment against said railroad company until a determination should be had in the chancery suit of the validity of the proceedings and demands of said creditors of Motter & Co. and their order and priority, and what sum was owing by the railroad company to Motter & Co. available for the payment of the creditors, and to enjoin Motter & Co. from prosecuting their action of assumpsit against the railroad company, and to settle the account between Motter & Co. and the railroad company and all matters in the case. An injunction was awarded, which was afterwards dissolved so far as it enjoined the prosecution of the action of assumpsit, and from this partial dissolution of the injunction the railroad company has appealed.

Clearly the demand of Motter & Co. is legal in character, triable by a jury in a law court in the action of assumpsit, and under the Constitution, Motter & Co., are entitled to such trial, unless we can see some plain reason why equity should deprive them of it. As between the railroad company and Motter & Co. a law court can give adequate and full remedy by testing whether any amount is due to Motter & Co., and, if so, how much. They have a right to have that amount determined by verdict and judgment, as such judgment would be conclusive, not only between the railroad company and them, but as between Motter & Co. and their creditors, as to the fund liable for debt. *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924. Say that the railroad company could sue the conflicting creditors in equity to settle their rights as to the fund in its hands, still that fact cannot disable Motter & Co. from sustaining a suit at law. The fact that these creditors on various claims are pursuing the railroad company is a matter between them, not between the company and Motter and Co., and cannot put it in the power of the company to exclude Motter & Co. from their proper chosen tribunal. It is this right of Motter & Co. to have their demand passed on by a jury that must be the dominant factor. We must not ignore that right. The law forum's relief, as between the company and Motter & Co., is full and adequate to fix their rights. When we are met by the plea that it is not adequate between the company and the creditors of Motter & Co., we answer, that is another matter, and that the action of the circuit court leaves the injunction in force as to that.

Avoidance of multiplicity of suits cannot give equity jurisdiction to stop the action against Motter & Co. The many suits against them would not give them a place in equity, as we held in *National Tube Co. v. Smith* (W. Va.) 50 S. E. 717, and under High on Injunction (4th Ed.) § 65, and *Id.* (3d Ed.) § 57, that "the fact of different suits having been brought, each having a distinct object, founded on distinct and separate grounds, brought by different persons, does not constitute such a multiplicity of suits as to bring the case within the rule to warrant an injunction." But, there being one fund in the railroad company's hands claimed by numerous conflicting creditors, I doubt the application of that law to prevent the company from assembling in one injunction suit those creditors. However, that cannot authorize the railroad company to shut out Motter & Co. from a jury trial. (The court does not decide as to that.) And as between the company and Motter & Co. all questions of amount, fraud in the contract, and estoppel by reason of the contract's making the engineer's estimate final, can be heard at law. The case of *Nease v. Insurance Co.*, 32 W. Va. 283,

9 S. E. 233, is much relied upon by the railroad company. Jurisdiction in it was based on a statute. Besides, that was a suit by a sheriff holding several executions, claimed to be liens on a fund in the hands of an insurance company, to which there was a conflicting claim by an assignee of the party who was the execution debtor and the insured party. The sheriff sued for the execution creditors to settle conflicting claims on a common fund. Creditors are not suing here. The insured was not suing the insurance company to recover his demand. There was no question as to injunction against a prosecution of an action at law. The injunction was to prevent payment of the fund to the insured party or his assignee until the conflicting claims could be adjudicated. As to the argument that the law court cannot give full relief: It may not by the way of trying numerous actions by creditors against Motter & Co.; but it can give full relief between the railroad company and Motter & Co. The question of jurisdiction is between them.

It is argued upon such cases as *Hotchkiss v. Fitzgerald Plaster Co.*, 41 W. Va. 357, 23 S. E. 576, that equity, having jurisdiction for one purpose, disposes of all matters involved in the case, though some be of legal cognizance; that, having jurisdiction to pass on the conflicting claims of creditors, it can pass on the matters involved between the railroad company and Motter & Co. The proposition, broadly stated in the books, is a valuable rule of equity, but not of universal application. It is true where the rights arise out of the same transaction; but here the rights between the railroad company and Motter & Co. arise out of the contract between them, whilst rights, as between Motter & Co. and the creditors, grow out of other contracts and transactions. The main point of litigation is between the company and Motter & Co., growing out of a given transaction having no relation to the rights of Motter & Co.'s creditors against them; the rights of those creditors against the company being merely incidental, and the garnishments being given only as a reason for enjoining the action at law. The rule is not infallible. Should it be applied to deprive one of a jury trial in a matter to which a jury trial is peculiarly fit? In cases of discovery, Story says: "If the proper relief be by an award of damages, which can be ascertained by a jury, there may be strong reason for declining the exercise of jurisdiction, since it is the appropriate function of a law court to superintend such trials. And in many other cases, where a question arises purely of matters of fact to be tried by a jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be declined. Thus, if a bill seek discovery of a contract for the sale of goods and chattels, or a wrongful conversion of goods, and the breach of the contract, or conversion of the goods, is properly remediable in damages, to be ascertained

by a jury, the relief seems properly to belong to a court of law. * * * And, thirdly, where the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, the jurisdiction will be declined, or if retained, will be so subject to a trial at law." Story's Eq. §§ 72, 73. The Virginia court said that, so far from the rule being inflexible, "where the remedy at law is more appropriate than in equity, or where the verdict of a jury is proper, the jurisdiction will be declined, or, if retained, will be held subject to a trial at law. It is impossible to lay down any general rule without running counter to some plain exception or well-recognized modification." "The facts of each case must determine whether equity will go on and decree against all the parties, or leave the parties to their appropriate remedy at law." *Walters v. Bank*, 76 Va. 12. I have taken for granted, for argument, that there is jurisdiction as to the creditors; but we do not decide it.

I doubt whether under section 4, c. 131, Code 1899, the court could have the damages assessed by a jury, and therefore the allowance to proceed with the action was right; and we affirm the order.

(60 W. Va. 59)

WILLIAMSON v. MUSICK.

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1906. Rehearing Denied
June 2, 1906.)

1. APPEAL—DECISIONS REVIEWABLE—ELECTION CONTESTS.

This court has jurisdiction, upon writ of error, to review the final order of a circuit court in an election contest for a county office, where it is shown that the value of the office is greater than \$100.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 189.]

2. ELECTIONS—ELECTION CONTEST—CONSTITUTIONAL LAW—APPEAL.

The part of chapter 80 of the Acts of the Legislature of 1901 (Acts 1901, p. 80) which provides for an appeal by either party from the final order or decision of the county court in an election contest for a county or district office to the circuit court, and a trial de novo in that court, is constitutional.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 247, 317.]

3. SAME—RETURNS—REJECTION.

Before the certificate return of the result of an election made by the commissioners of election can be rejected on the ground of fraud in the conduct of the election, it must appear that the proceedings in the conduct thereof were so tainted with fraud as to change the result, or that the truth cannot be deduced from the return.

4. SAME—IRREGULARITIES.

Irregularities in the conduct of an election are generally to be disregarded, unless the statute declares that they shall be fatal to the election, or unless they are such in themselves as to change, or to render it impossible to ascertain, the result.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 197.]

5. SAME.

As a general rule, when the true result of a legal election has been ascertained, or can

be ascertained, by the officers charged with the performance of the duty, no irregularity, mistake, or even fraud, committed by any of the officers conducting the election or by any other person, will render the election void.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 197–205.]

6. SAME—CERTIFICATE—RETURN—CONCLUSIVE—NESS.

Where, upon the trial of an election contest for a county office, it appears that the ballots cast at an election precinct have been tampered with after the return by the commissioners of election, and that part of the ballots are void because one poll clerk had signed thereon the names of both poll clerks, and that the remainder of the ballots are not void for want of proper signing by both poll clerks, and that the certificate return of the result of the election made by the commissioners thereof is not otherwise impeached, the ballots will not prevail over the certificate return as evidence of the result of the election at that precinct.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 298, 299.]

Poffenbarger and McWhorter, JJ., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Mingo County.

Proceeding by H. H. Williamson against E. E. Musick to contest the election of sheriff. Judgment for contestant, and Musick brings error. Reversed.

Sheppard & Goodykoontz, Harry Scherr, Mollohan, McClintic & Mathews, Charles E. Hogg, S. U. G. Rhodes and Williams, Scott, & Lovett, for plaintiff in error. H. K. Shumate, Stokes & Bronson, Holt & Duncan, and J. L. Stafford, for defendant in error.

COX, J. H. H. Williamson and E. E. Musick were opposing candidates for the office of sheriff of Mingo county at the general election held on the 8th day of November, 1904, for the term beginning January 1, 1905. After the election, the returns were canvassed, resulting in favor of Williamson. A recount was demanded by Musick, resulting in his favor, and a certificate of election was issued to him. Notice of contest was given by Williamson, and a counter notice by Musick. A trial of the contest was had before the county court, resulting in favor of Musick. An appeal was taken by Williamson to the circuit court of Mingo county, resulting, upon trial, in his favor. Musick brings the case here for review by writ of error.

Williamson moves to dismiss the writ of error, on the ground that this court is without jurisdiction. It is contended that election contests for county offices are purely statutory, and that no provision has been made by the statute for review by this court. There is much authority outside of the state sustaining this contention. 15 Cyc. 435, notes 99 and 2. While this is true, we do not consider that it is an open question in this state. In the case of Dryden v. Swinburn, 15 W. Va. 234, Judge Green delivered the opinion of the court. The ninth

point of the syllabus holds: "The record showing that the office of the clerk of the circuit court of Kanawha county is of greater value than \$100, the Supreme Court of Appeals has appellate jurisdiction by writ of error to review the decision of the circuit court in such a case." Also, in the case of Dryden v. Swinburne, 20 W. Va. 89, Judge Green again delivered the opinion. The fourth point of the syllabus holds: "In a contest about an office before the county court or other inferior tribunal, the decision of such tribunal may be reviewed by the circuit court by writ of certiorari; and the decision of the circuit court may be reviewed by the Supreme Court of Appeals by writ of error." Following those cases, this court, in numerous contested election cases, has taken jurisdiction by writ of error. See Halstead v. Rader, 27 W. Va. 806; Ralston v. Meyer, 34 W. Va. 737, 12 S. E. 783; Alderson v. Comra, 32 W. Va. 454, 9 S. E. 863; Elbon v. Hamrick, 55 W. Va. 236, 46 S. E. 1029; Snodgrass v. Wetzel Co. Ct., 44 W. Va. 56, 29 S. E. 1035; Davis v. Brown, 46 W. Va. 716, 34 S. E. 839; Fowler v. Thompson, 22 W. Va. 106; Dial v. Hollandsworth, 39 W. Va. 1, 19 S. E. 557; and Doll v. Bender, 55 W. Va. 404, 47 S. E. 293. Under the former practice, review by the circuit court was by writ of certiorari to the decision of the county court in such case; but this has been changed by statute. This makes no difference as to the question of jurisdiction by this court. It will be observed that the constitutional provision (section 24, art. 8) uses the word "cases" in relation to election contests for county and district offices. We therefore consider it settled that this court has jurisdiction by writ of error to review the final order of a circuit court in an election contest for a county or district office, where it appears that the value of the office is greater than \$100. It does so appear in this case.

The contestee raises the question of the constitutionality of that part of chapter 80, of the Acts of the Legislature of 1901 (Acts 1901, p. 76) which provides for an appeal by either party in such case to the circuit court, and for a trial de novo in that court. It is contended by contestee that the clause of section 24, art. 8, of our Constitution, in relation to county courts, which provides that "they shall, in all cases of contest, judge of the election, qualification and returns of their own members, and of all county and district officers, subject to such regulations, by appeal or otherwise, as may be prescribed by law," prevents the passage of a statute providing for a trial de novo by the circuit court in such case of election contest. The part of said clause reading "subject to such regulations, by appeal or otherwise, as may be prescribed by law," was added by the amendment which went into effect on the 1st day of January, 1881. It is contended that the added words mean

nothing more than that a review for error may be provided for by statute, and that the county court is still the judge of an election contest for a county or district office. The statute under consideration does not take away the jurisdiction of the county court, in the first instance, to hear such contest. It simply provides for regulation by appeal to the circuit court, and a trial de novo. The word "appeal," when used in practice, is defined by Mr. Bouvier as follows: "The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial." See, also, Elliott on Appell. Juris. § 15; Powell on Appell. Juris. § 10. The words of the constitutional provision are very broad, permitting such regulation, by appeal or otherwise, as may be prescribed by law. We are clearly of the opinion that the constitutional provision does not deny the Legislature the power to pass a statute authorizing an appeal and a trial de novo in the circuit court, in such case of election contest.

We come now to the merits of this controversy. The parties and their attorneys have aided the court materially in narrowing the scope of the controversy. The real controversy now presented relates to but one election precinct, being precinct No. 3 in Magnolia district of Mingo county, known and referred to in the proceedings as "Matewan Precinct." The first ground of contest contained in the notice of the contestant is, in substance, that the election at Matewan Precinct is null and void, by reason of fraud, trickery, corruption, and irregularity in the conduct thereof. Under this ground, the notice sets out numerous specifications, designated by the letters of the alphabet from "a" to "y," inclusive. This ground of contest does not specify individual votes which the contestant claims to have been cast by persons not entitled to vote, and does not specify votes rejected which should have been received. This ground goes to the validity of the poll at that precinct, and not to the legality of individual votes. The circuit court sustained this ground of contest, and held the election at Matewan Precinct void. The contestant offered evidence tending to prove the following, under this ground, in relation to Matewan precinct: That the place of holding the election established by law was the H. S. White storehouse; that the election of 1900 was held in the H. S. White store-room, part of said house; that the election of 1904 was held in the same house; that the house had been so changed that the entrance to the election room was from a different street; that the election was held in two office rooms, on the first floor, in 1904; the commissioners remaining in one room and the booths being placed in the other, with the door between the rooms open while the voting took place; that R. W. Buskirk and T. G. Burgess acted as poll clerks; that before the election commenced J. H. Green was named

by a voter or voters of his political party for poll clerk, and was voted for by persons present; that R. W. Buskirk was also named, and voted for by persons present; that after such voting Buskirk "jabbed his pistol down in his pocket and said, 'By God, if I don't be poll clerk, nobody else would be'" (only one witness saw the pistol); that both Green and Buskirk entered the election room; that of the two election commissioners of the same party to which Green and Buskirk belonged, one voted for Green and the other for Buskirk; that the commissioner of the other political party decided the contest by administering the oath to Buskirk; that in some instances the poll clerks offered to assist voters in making out their ballots; that Burgess on one occasion marked a ballot improperly, which by direction of the voter was corrected; that in some instances the poll clerks acted separately and not in the presence of each other in assisting voters to make out their ballots; that on one occasion one of the poll clerks had a ballot in his hand while the voter had another; that in a few instances the poll clerks electioneered voters; that no vote was changed by the electioneering; that, while a challenger was allowed to challenge persons offering to vote, time was not given to ask such persons all the questions which the challenger or one of the commissioners desired to ask; that in some instances challenged persons were allowed to vote without making the statutory affidavit; that at one time one of the challengers saw a pistol on a shelf at an election booth, and two guns standing in a corner of the booth room (no other witness is produced who saw them); that a challenger went into the booth room with a commissioner, where they took a drink of whisky; that at one time during the election a candidate for a district office and another person were seen in the booth room, not voting; that one of the commissioners served a short time after the polls opened, and then went home; that the remaining commissioners chose another of the same political party as the one who went home; that the person so chosen, being sworn, acted during the remainder of the election; that the commissioner who went home, assigning a reason therefor, said: "I could not have anything transacted according to law, and I didn't think, without trouble or something, they wouldn't hear to anything that was law"; that previous to the election one of the commissioners made a wager on the result of the election (the persons who testify to this do not know whether the wager was recalled before election day or not, and it is conclusively shown by contestee's evidence that the wager was recalled by the commissioner before election day, and that the money placed by him in the hands of the stakeholder was returned before election day); that the ballot box furnished to the commissioners of election had a hole in the top of it, other than

the place for the insertion of the ballots; that some of the ballots were placed in the box through this hole, because of difficulty in inserting them through the place intended therefor; that one of the commissioners, after Buskirk was sworn, ordered Green to go out of the election room, and threatened to arrest him if he did not do so; that the commissioner who served a short time in the morning came back in the afternoon to vote, and was told by a poll clerk that he had no right to vote, or words to that effect; that this remark was made in a jocular way; that he was told by one of the commissioners that the remark was a joke, and was asked to vote, but did not do so; that the ballots counted by the commissioners on the morning of the election did not agree with the statement of the clerk by whom they had been sent. The foregoing, outside of the fact that some of the ballots voted had been signed by one poll clerk for both, which will be noted in another connection, are all the matters which we consider material under the first ground of contest. The evidence of contestant as to many of these matters is rebutted by contestee's evidence, or explained by it; but we have mentioned those matters which the contestant's evidence alone tends to prove.

The object of an election, in a popular form of government, is to obtain a free, fair, and untrammelled expression of the will of the people with whom the elective franchise has been placed. Every qualified voter has the right to freely cast one ballot, and to have that ballot express his choice, and to have it counted as cast. Without the freedom and purity of the ballot, the experiment of self-government fails. When it becomes apparent that an election is a subversion, rather than an expression, of the will of the people, or that the result is attended with such uncertainty that it may not be ascertained, the election should be set aside. Elections being necessary to the existence of a popular form of government, the policy of the law is to uphold them when it can be done consistently with legal principles. "In election cases, however, before a return can be set aside, there must be proof that the proceedings in the conduct of the election, or in the return of the vote, were so tainted with fraud that the truth cannot be deduced from the returns." *McCrary on Elec.* § 569. "If we keep in view these general principles, and bear in mind that irregularities are generally to be disregarded, unless the statute expressly declares that they shall be fatal to the election, or unless they are such in themselves as to change or render doubtful the result, we shall find no great difficulty in determining each case as it arises under the statutes of the several states." *Id.* § 227. In *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557, Judge Dent, delivering the opinion of the court, quotes approvingly the following language: "Many provisions of the law, in

regard to the manner of holding and conducting the election and counting the votes and certifying the result, must be held to be directory only, and intended to point out to inexperienced and ignorant persons, who sometimes act as election officers, a plain, easy, and direct way by which they are to attain the great end of their creation, viz., to ascertain the true result of the election. When the true result of the legal election has been ascertained, or can be ascertained, by the officers charged with the performance of the duty, no irregularity, mistake, or even fraud, committed by any of the officers conducting the election, or by any other person, can be permitted to defeat the fair expression of the popular will as expressed in said election. What irregularities are held to be material? It is affirmed that no irregularity, or even misconduct, on the part of the election officers or other persons, will vitiate an otherwise legal election, unless the result thereof has been thereby changed, or rendered so uncertain as to make it impossible to ascertain the true result. A different rule would make the manner of performing a public duty more important than the duty itself." Judge Dent adds: "There is no good reason why these principles should not apply to the present election law, as well as to any other. The contestant neither alleges nor proves that the result of the election was changed, or rendered so uncertain as to make it impossible to ascertain the true result; and yet he wants the court to set aside the election, and declare him the choice of the people, for the sole reason that the commissioner, acting out of a too abundant fear that all the voters would not have an opportunity to vote, and so the right of suffrage be denied them, appointed two additional ballot clerks to assist in holding the election, and thus unlawfully placed these persons in a position to defeat a fair expression of the popular will, if dishonest enough to do so and willing to risk the chances of confinement in the penitentiary." The third point of the syllabus of that case is as follows: "The return of a poll by the commissioners of election is *prima facie* the true result of the election, and will not be reversed by this court because of misconduct on the part of election officers or other persons, unless it plainly appears that such misconduct changed the result of the election." See, also, *McCrary on Elec.* § 222; 10 Am. & Eng. Enc. Law, 766; 15 Cyc. 372.

Applying these principles to this case, the members of this court are unanimously of the opinion that the irregularities which the contestant's evidence tends to prove are insufficient to render void the election at Matewan precinct. We deem it unnecessary to take up each irregularity mentioned. A few, claimed to be the most serious, will suffice for illustration. The election room was in the same building which was established by law as the place of voting. It was changed

since the election of 1900, so that the entrance was from another street; but it is not shown that any voter was misled, or that the result was changed, thereby. The mere fact that the election was held in two rooms, instead of one, will not, of itself, without showing change of result, invalidate the poll. The kind of ballot box is prescribed by statute; but the statute also provides that, if no ballot box be found, the commissioners may make one. Code 1899, c. 3, § 42. It cannot be conceived that the mere fact that there was a hole in the ballot box, when it is not shown that such defect affected the result of the election, would be sufficient to invalidate it. It is claimed that Poll Clerk Buskirk was a usurper. Be that as it may, we deem it immaterial. In *Dial v. Hollandsworth* it was shown that there were four poll clerks, two of whom were usurpers. The usurpers acted separately in assisting voters to make out their ballots, and yet this court upheld the election. The few instances of electioneering by the poll clerks shown in this case, by which no vote was changed, we think also insufficient to invalidate the election. To hold otherwise would be to place a great power in the hands of a poll clerk, who might, intentionally or otherwise, violate the law by suggesting to a voter the manner in which the clerk would like him to vote. The admission of the votes of persons challenged, without the statutory affidavits, we think likewise insufficient to invalidate the election. The statute provides that a person challenged shall not vote, unless he makes the statutory affidavit; but, if he does vote without the affidavit, his vote may be thrown out if illegal. The result could not be more than an illegal vote; and illegal votes are insufficient to invalidate an election where they can be thrown out, or where it is not shown that they are sufficient in number to change the result. *State v. O'Day*, 69 Iowa, 368, 28 N. W. 642; *Esker v. McCoy*, 5 Ohio Dec. 573; *Rader v. Board of Educ.*, 57 W. Va. 220, 50 S. E. 240; *Brazie v. Com'rs*, 25 W. Va. 213. We might review each irregularity claimed, reaching the result that it is insufficient to invalidate the election. We are therefore of opinion that the circuit court erred in holding that the election at Matewan precinct was void by reason of the matters shown under the first ground of contest.

What we have said does not conclude this case, as the second ground of contest by the contestant is in effect that 337 of the ballots cast and counted for contestee at Matewan precinct were void, under the decision in the case of *Kirkpatrick v. Deegans*, 53 W. Va. 275, 44 S. E. 465, by reason of the fact that they had been signed by one of the poll clerks for both. It is shown that all but 4 of the ballots cast at Matewan precinct were so signed. Controversies in relation to the election of county officers of Mingo county at the election of 1904 have previously

been before this court for decision. The cases involving such controversies are *Stafford v. Board of Canvassers*, 56 W. Va. 670, 49 S. E. 364, and *Stafford v. Sheppard*, 57 W. Va. 84, 50 S. E. 1016. It appears from the evidence that, during the recount for county officers by the board of canvassers, the ballot box and the ballots cast at Matewan precinct, as well as other ballot boxes, were placed in the custody of the sheriff by order of the board, in whose custody they remained for a number of days. When the board came to Matewan precinct upon recount, and the ballot box and ballots were produced, it was found that they bore the evidence of having been tampered with, and that the two paper sacks containing the ballots, which had been placed therein by the members of the board previously, and who had written their names across the places where they were sealed, had been torn open. The canvassing board refused to count these ballots on the recount, and Stafford applied to this court for a writ of mandamus. It was decided in the last case mentioned that there was a prima facie case of tampering with the ballots. We quote from the opinion as follows: "It is undenied and undeniable that the sacks of ballots at Matewan precinct bore unmistakable appearance of having been tampered with. The tops of the sacks were partly torn open, and the names of the members of the board of canvassers, which they had written across the sealing places of the sacks, were gone. Under principles stated in *Dent v. Board*, 45 W. Va. 750, 32 S. E. 250, the appearance and condition of the sacks of ballots raised the presumption of unlawful tampering, and excluded the ballots from recount, and called for the declaration of the result of the election at that precinct upon the certificate returned by the precinct officers. * * * There stands the prima facie case of tampering presented by the very appearance of the broken sacks. The canvassers knew that they had been so tampered with, as they themselves had but recently sealed them in the sacks when they canvassed the returns of that precinct. When you propose to introduce oral evidence to repel a prima facie case of tampering, what is the character of such evidence; where will it lead? It opens a broad field, and presents a case judicial in character, proper for a court of contest." It is clear, under the opinion in that case, that the board of canvassers was in effect directed, in case the evidence of tampering was not rebutted by comparing the ballots with the certificate return of the commissioners of election, and if it found part of the ballots void because signed by one of the poll clerks for both, and part valid, being properly signed by the poll clerks, that the precinct should not be rejected, but that the certificate return should be taken. This being true, the question here presented as to this branch of the case is: Has the prima facie case of tampering been rebutted or overcome by the

evidence? The members of this court are unanimously of the opinion that the prima facie case of tampering has not been rebutted. The evidence of tampering has been strengthened upon the trial in the contest court. It is true that evidence has been offered tending to show the identity of the ballots—that is, the identity of the pieces of paper; but this evidence does not prove that the faces of the ballots are the same, or that they are genuine as evidence of persons voted for. It is also shown that the two packages of ballots, when they were placed by the board of canvassers in the paper sacks, were tied with strings, and that when produced they appeared to be in the same condition. But no identifying marks were on the strings, and there was no peculiarity about them, or the manner of tying them, which enabled the witnesses to say that they had not been untied. Evidence was also offered tending to show that the packages of ballots could not be brought through the hole in the ballot box without untying. No witness was able to say that they were not untied; and there is the fact that the ballots did not correspond with the certificate return, varying as much as 23 votes as to one candidate. The evidence of the sheriff, in whose custody the ballot box and ballots were placed, and the evidence of the clerk, from whose custody they had been taken and to whose custody they were returned, and of the persons who assisted those officers, were taken to show that the ballots had not been tampered with so far as known to them. But how were the ballots kept? While in the custody of the sheriff, they were placed in the courtroom. At night the sheriff slept in an adjoining room, with the lights turned on, and the door open between that room and the courtroom. No less than six or eight keys to that courtroom were in the hands of other parties. Some of the keys were in the hands of unknown persons, so far as the testimony shows. The sheriff requested two persons to stay with him. One of them did stay during the forepart of one night, and the other during the afterpart of the same night. When the latter came to relieve the former, he found the outside door of the courtroom open. There was a balcony to the courtroom, accessible from a stairway leading from a hallway outside of the courtroom. From the balcony the courtroom was accessible by rope or ladder, and a ladder was there. While in the custody of the clerk, the ballot box and ballots were kept in the vault of his office; but the vault was accessible to the public, and persons went there unattended by the clerk. The clerk was not in his office for some days at least, during which the custody of his office was in the hands of others. There is much evidence tending to show that the ballots were left open, lying on the table in the county courtroom, when the members of the board of can-

vassers were absent, and that a person or persons were seen in the room at the time.

We might detail all the evidence, but we deem it unnecessary to do so. When the evidence is considered, the proof of tampering is complete. The burden was on contestant to rebut the prima facie case of tampering presented by the appearance of the ballots. He has wholly failed to do so. It is held in the last Stafford Case that certificates of the result of the election, made by the commissioners of the precinct, are prima facie evidence of the result of the election. The ballots, if identified as the ballots cast, are primary and higher evidence; but in order to continue the ballots as controlling evidence it must appear that they have been preserved in the manner and by the officers prescribed by the statute, and that while in such custody they have not been changed or tampered with. "Where, in an election contest, it appears that the ballots have been changed, or so exposed as to afford opportunity to be tampered with, or left in the custody of an officer or other person so personally interested in the result of the election as to be subject to the temptation or inducement to alter them, the presumption of their integrity is lost, and they are not to be accepted as evidence." *Hamilton v. Young* (Ky.) 81 S. W. 682. "It must affirmatively appear that they [the ballots] have been preserved with that jealous care which precludes the opportunity of being tampered with, or the suspicion of change, abstraction, or substitution." *Davenport v. Olerich*, 104 Iowa, 194, 73 N. W. 603. See, also, *Farrell v. Larsen*, 26 Utah, 283, 73 Pac. 227; *De Long v. Brown*, 113 Iowa, 370, 85 N. W. 624; *Windes v. Nelson* (Mo. Sup.) 60 S. W. 129; *Jeter v. Headley*, 186 Ill. 34, 57 N. E. 784; *Fenton v. Scott*, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801. We have before us the same case, in all essential particulars, upon which the board of canvassers was directed, in the last Stafford Case, to take the certificate result of the commissioners holding the election at Matewan precinct. The only difference is that, instead of a prima facie case, we have a conclusive case of tampering with the ballots. It is true that this is a review of the judgment of a court of contest, clothed with full power to receive all proper evidence. It is also true that nearly all the ballots were signed by one of the poll clerks for both. It is contended that these ballots never could legally have been counted. This argument was as forcible when the Stafford Case was decided, as now. These ballots are not void because the persons who cast them were not entitled to vote, but because the poll clerks failed to properly sign them. It must be borne in mind that we are laying down a rule, not only for the case before us, but for all cases of like kind. In this case, probably a larger per cent. of the ballots were found to be improperly signed than will usually be found. It may be

said that this was an extreme case of improper signing by a poll clerk. If only one ballot had been improperly signed by a poll clerk, the same rule must apply. Then, shall we say that one ballot signed by one poll clerk for both, coupled with proof of tampering, is sufficient to throw out the vote of a precinct, and to destroy the certificate return of an election made before the tampering occurred? Should the legal voters of a precinct be thus disfranchised, and their votes count for naught? We think, under the facts here appearing, as a general rule less harm will come from taking the certificate result, notwithstanding some one or more of the ballots are found to have been improperly signed by one of the poll clerks for both. To hold otherwise would give great power to the tamperer. All that would be necessary to throw out a poll would be to find one void ballot, and a case of tampering with the ballots. If ballots are improperly signed by one poll clerk for both, it is the duty of the commissioners of election to reject such ballots. Usually we may expect this to be done. If all the ballots are void, the vote of the precinct may properly be rejected. The commissioners of election are composed of persons belonging to different political parties; and we think that it is safer to rely upon their return than to place in the hands of the tamperer power to destroy the result of the election.

It may be urged that the Stafford Case does not apply here, because the canvassing board was a ministerial body, and that a court of contest is judicial. While a board of canvassers is generally a ministerial body, yet it exercises quasi judicial functions as to some matters before it. In *Brazie v. Comrs.*, supra, Judge Snyder, delivering the opinion, says: "While the duties and powers of the commissioners are mainly ministerial, they are quasi judicial so far as it is their duty to determine whether the papers laid before them by the clerk, and purporting to be returns, are in fact such genuine, intelligible, and substantially authenticated returns as are required by law. To the extent here indicated, a judgment in the nature of a judicial function is necessarily exercised; for, if it be otherwise, the whole law is inoperative in respect to the power of the county commissioners to do any act whatever." To the same effect is *Dent v. Board*, 45 W. Va. 750, 32 S. E. 250. It will be observed that in the Stafford Case this court directed the board to receive the evidence of the poll clerks and commissioners of election, to show whether or not the ballots were void for want of signing by both poll clerks, and, if it found them all void, to reject the precinct, but, if not all void, to compare them with the certificate return, and in case of disagreement to take the certificate. Under this mandate, the board exercised judicial, or quasi judicial, functions. It heard evidence, and determined from that

evidence whether or not the ballots were void, and, not finding all ballots void, it compared them with the certificate return and determined that there was disagreement. These acts required the exercise of judicial determination. They were not merely ministerial. Under that decision, the canvassing board had as full judicial power to determine the void character of the ballots arising from failure of both poll clerks to sign the ballots, upon the evidence before it, as the court of contest had upon the evidence before it. We agree that the court of contest has a wider power to admit evidence; but if, after the evidence is admitted, it shows a case practically the same as that upon which the board of canvassers was directed upon the recount to take the certificate return, we think that the court of contest must do likewise. There is a change of forum, it is true, but not a change of law. It cannot be said that one law as to void ballots prevails before the board of canvassers and another before the court of contest. We feel bound by the decision in the Stafford Case, not only because it is the decided law, but because we believe that it is the safer and better rule to take the certificate return under the facts presented in this case.

For the reasons stated, the final order of the circuit court in this case is reversed. Proceeding to enter such judgment as the circuit court should have entered, we declare, as the true result of the election held on the 8th day of November, 1904, for the office of sheriff of Mingo county, for the term beginning on the 1st day of January, 1905, that the contestee, E. E. Musick, received 1,410 votes, and that the contestant, H. H. Williamson, received 1,300 votes, and that said contestee was elected to said office for said term.

POFFENBARGER, J. (dissenting). I think the powers of a court of contest are more ample than those of a board of canvassers, and that it is not bound or controlled by the decision of the canvassers on any question properly raised in the court of contest. A canvassing board has power only to count and declare the result of the count, and all the judicial power it has is simply such as is incident to the act of counting. When, because of tampering, it cannot count the ballots, it must take the certified result, if there were any legal ballots cast. It has no power to throw out a ballot because it was cast by a person not entitled to vote, nor to decide against a candidate on the ground of illegibility. And any decision it makes lacks finality. It only determines the prima facie right, and the final and absolute determination of the right is with the contest court, if the question be carried into that court. The court of contest is armed with full judicial power. Is not limited to the mere matter of counting. If it can see clearly that a man is elected, without being able

to specify the exact number of votes received, it has the judicial power to declare him elected. These candidates came to Matewan precinct with their respective votes standing as follows: Musick, 1,070; Williamson, 1,245—a majority of 175 votes for Williamson. It is an indisputable fact that only four valid ballots were cast at Matewan. Had Musick received all four of them, he would still have lacked 171 of being even with Williamson. But this decision overcomes the difficulty by counting 411 void ballots, giving Musick 337 of them and Williamson 54, because, in view of the tampering, the court is unable to say just exactly how many votes each candidate received. What difference can that make, when it is plainly impossible that Musick could be elected by legal ballots? How could the tampering put life and vigor into void ballots? Rules declared by this and other courts in cases not at all similar to this constitute no obstacle to such a disposition of it.

Believing the court of contest has power to declare the result, in accordance with plainly apparent right, although unable under the rules of counting to specify the exact number of votes received, I cannot concur in the decision. In these views, Judge McWHORTER concurs.

(59 W. Va. 301)

ANDERSON v. TUG RIVER COAL & COKE CO.

(Supreme Court of Appeals of West Virginia. May 14, 1906.)

1. NEGLIGENCE—PERSONS LIABLE—ACTS OF INDEPENDENT CONTRACTOR.

Where one, for a stipulated price per piece, contracts to procure timbers for a mining company for use in its mine, from the lease of the company, and the company retains no supervision of the work, or control of the manner of doing it, and the contractor is responsible to it only to the extent of procuring satisfactory timber and delivering it at such times and places as needed, and employs and pays his own help, in doing so, such contractor exercises an independent employment, and the company is not liable to one in its employ who is injured by the contractor in negligently prosecuting his work.

2. SAME.

Where a competent and fit person renders services in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means of its accomplishment, such work not being in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual dangers when being prosecuted in the usual and ordinary manner, such person exercises an independent employment, and the person so employing him is not liable for wrongs committed by him, his agents or servants, in the prosecution of such work.

3. SAME—INDEPENDENT CONTRACTOR—QUESTION FOR JURY.

Where, from the evidence, it is to be determined whether or not one is an independent contractor, and the evidence is so conflicting as to support a finding of the jury, then it is purely a question for their determination, but if the evidence is without conflict, it then be-

comes a question of law as to whether or not an independent employment has been established.

4. APPEAL—REVERSAL—INSUFFICIENCY OF EVIDENCE—RENDERING JUDGMENT.

Where a motion is made to exclude the plaintiff's evidence because not sufficient to support a verdict in his favor, and the motion is overruled, and this court reverses the judgment because of the insufficiency thereof, it will enter judgment for the defendant without remanding the cause, although the defendant introduces his evidence, where such evidence, taken in connection with that of the plaintiff, does not support the verdict, and where it does not appear that injustice will result from so doing.

5. SAME.

Where, at the conclusion of the evidence, the defendant asks for a peremptory instruction, directing a verdict in its favor, which the court refuses to give, and this court reverses the judgment because the evidence is not sufficient to support the verdict, or because the verdict is contrary to the evidence, judgment will be entered by this court for the defendant, without remanding the cause, unless satisfied that such course would be unjust.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County.

Action by Harvey Anderson, by his next friend, against the Tug River Coal & Coke Company. Judgment for plaintiff. Defendant brings error. Reversed, and judgment rendered.

Rucker, Anderson & Hughes, for plaintiff in error. D. J. F. Strother, for defendant in error.

SANDERS, J. The plaintiff, Harvey Anderson, an infant, suing by his next friend, brought an action in the circuit court of McDowell county against the defendant, Tug River Coal & Coke Company, claiming damages for a personal injury alleged to have been sustained by him while working in the defendant's coal mine, and on account of the negligence of the defendant. A verdict and judgment in favor of the plaintiff was rendered for \$1,800, and the same has been brought here for review on writ of error and supersedeas.

The defendant company, at the conclusion of the plaintiff's evidence, moved the court to exclude it from the jury, and to direct a verdict in its favor, which motion was overruled, and at the conclusion of the trial, after all the evidence had been introduced, the defendant asked the court to instruct the jury to return a verdict in its favor, which instruction the court refused to give. The refusal of this instruction presents the real ground of complaint here. To determine whether or not this instruction should have been given, it will be necessary to inquire what relation J. I. Garretson sustained to the company. It is presented by the plaintiff in error that the relation of master and servant did not exist between the company and Garretson, but that he was an independent contractor, and this being so, and the injury being the direct and proximate result of his act, that the company should not be

held liable therefor. The defendant in error insists that the determination of this question is one of fact, and should be left entirely with the jury. This would be true if there were such conflict in the evidence as would support a verdict if found for the plaintiff. But when the evidence is not conflicting, there is nothing for the jury to decide, and it then becomes a question of law as to whether or not the facts proved are sufficient to support the particular theory or contention advanced. If the question at issue is one of fact, and the facts adduced are sufficient to support the verdict, or where the evidence is so conflicting as to support a finding for either the plaintiff or defendant, then the matter is purely a jury question. The facts in this case, however, are substantially without conflict, and, therefore, the rule advanced by counsel for plaintiff does not obtain here. "What constitutes an independent employment, so as to make the person engaged in the employment an independent contractor within the meaning of the rule under consideration, is a question of law for the court, and not a question of fact for the jury; but, as in other cases, subject to the rule that the jury are to determine the facts upon which the decision of the question of law is to be made." Thompson, *Comm. on Negligence*, vol. 1, § 641; *Emmerston v. Fay*, 94 Va. 60, 26 S. E. 386.

The evidence discloses that the defendant was, at the time of the injury complained of, the owner of a mining lease, in area about one mile in length by about a quarter of a mile in width, on which a coal mine had been opened and was being operated; that the plaintiff who was about 19 years of age, was employed as a driver in the mine. The mine was not running on the day of the injury, and the plaintiff was set to work, hauling slack from the outside to the inside of the mine, which was used in ballasting the track. While the plaintiff was so at work on the outside, a noise was heard, to which plaintiff's attention was called, and he started to run, but just then a log came down the mountain side and rolled into the drift mouth, knocking down some timbers, one of which struck and injured him. At the time of the injury, J. I. Garretson and his brother were at work on the mountain side, about 300 yards above the drift mouth, getting out timber for use in the mine as props, cross-ties, and caps. The timber which caused the injury was started on the hillside above the drift mouth by Garretson, and was supposed to stop about 30 feet therefrom, where it was worked up, but this piece was going very fast, and ran out of the usual way, and over a point of land, instead of following the hollow, as the others had done; and this was the first piece that had done so. This work was being done by Garretson under a contract with the defendant company, by which Garretson was to get out props and cross-ties for so much per piece, and caps for so much

per hundred, to be delivered by him to the various drift mouths of the mine. Under this contract, Garretson was responsible to the defendant only for results, that is, the defendant had no control over cutting the timber, and so long as it was furnished in a satisfactory manner, Garretson was to receive a stipulated price per piece for it, and if the timber was not gotten according to contract, the defendant had a right to cancel it. Garretson had the privilege of getting timber anywhere on the lease of the defendant; he was not restricted to any point, and the manner of delivery was left with him, and he employed his own help in doing so, without, in any wise, consulting the defendant. He had cut timber all around the drift-mouth where the accident occurred. It is not shown that the defendant company knew that Garretson and his brother were at work above the drift mouth, or that they were, in fact, working at all on the day the accident occurred. So far as the record discloses, no one but themselves knew that they were so at work, and under the contract Garretson chose his own time to work, only being responsible for the delivery of the timber cut by him in the quantities as needed.

We deduce from the evidence that it does not show that the relation of master and servant existed between the company and Garretson, but, on the other hand, it appears that Garretson was exercising an independent employment, over which he had exclusive and absolute control. While it is true he stated in his evidence that he was doing this work under the control of the defendant, yet, when he states the terms of the contract, it is apparent that this statement is not entitled to the consideration which the defendant in error attempts to give to it, for by the terms of the contract as given by him, which do not substantially conflict with the evidence of the defendant, it is clearly shown that the work being done by him was that of an independent contractor, and that it was not under the control of the company. The company had no power to control him in the execution of this work, and the only power it reserved to itself in regard to it, was the right to cancel the contract if not complied with by Garretson. It had no right to direct when the timber should be gotten out or when it should be delivered. It only stipulated with Garretson that it would pay a certain price per piece, and that he should procure the timber at such time as the company needed it. No supervision of his work was reserved by the company. He had exclusive power to select any one to assist him in carrying out his contract, and had the right to procure this timber from any point upon the lease of the company. The law is now well settled that the employer of one who exercises an independent employment, over which the employer has no control, is not responsible for the negligence of one in such employee's service or to third persons

injured by reason of the negligent acts of the employe or his servants, if, however, the employer has used reasonable care to select a contractor of proper skill and prudence. While this doctrine is well settled, it will not be amiss to give what some of the eminent law writers say upon this subject, and to show by the decisions of many states that what they have said is sound. Thompson, in his work on Negligence (volume 1, § 621), lays down the general rule to be: "It is a general rule that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's own methods, and without being subject to control except as to the results of his work, and subject to other qualifications hereinafter stated, will not be answerable for the wrongs of such contractor, his subcontractors or his servants, committed in the prosecution of such work." And in the following section (622) it is again stated: "An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs and the wrongs committed in the course of the work by his servants. In every case, the decisive question is: Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? Does he reserve to himself the essential powers of a master? It is but another form of language, expressing the same idea, to say that the true test to determine whether one who renders service to another does so as a contractor, or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. On this question, the contract under which the work has been done must speak conclusively in every case, reference being had, of course, to surrounding circumstances." And also we find, in 16 Am. & Eng. Ency. Law (2d Ed.) 187, the law to be announced as follows: "Generally speaking, an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished." Also (same volume, on page 188) it is said: "A reservation by the employer of the right by himself or his agent to supervise the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation." In Shearman and Redfield on Negligence, vol. 1, § 164, it is said: "The true test of a 'con-

tractor' would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The mere fact of direction as to things to be done, without control over the method or means of doing them, does not make a contractor a servant." And we also quote from section 166; "It is now practically settled that the reservation, in a contract, of the right to inspect the work at all times and to have it done subject to the approval of the employer, without any right to dictate the details or methods or to interfere with servants, does not make the contractor a servant." And in section 168 it is said that the employer is not liable for the contractor's negligence; "It appearing, from the definition which we have given of a contractor, that he is not the agent or servant of his employer in relation to anything but the specific results which he undertakes to produce, it follows that his employer is not responsible to third persons for his negligence, nor for the negligence of his servants, agents, or subcontractors in the execution of the work." Mechem, in his work on Agency (section 747); says: "The principal's liability for the acts of his agent, within the scope of his authority, depends upon the fact that the relation of principal and agent exists. It is the principal's will that is to be exercised; his purpose that is to be accomplished; his are the benefits and advantages which ensue. He selects his own agent, puts him in motion, and has the right to direct and control his actions. It is, therefore, just and proper that he should be responsible for what the agent does while so employed. Where, however, the principal has not this right of control a different rule prevails. Neither reason nor justice requires that he should be held responsible for the manner of doing an act when he had no right or power to direct or control that manner. If, therefore, the principal, using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent where the person renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.

In *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386, it was held that a person employed to con-

struct a building, with materials to be furnished by the owner, and according to certain plans, who was to receive in payment a per diem for himself and the other men engaged in the work, who were to be paid by him, is an independent contractor, and occupies the relation of master to such employes, for whose negligence the owner is not liable, the work contracted for being lawful. In *Bibb's Adm'r v. N. & W. R. Co.*, 87 Va. 711, 14 S. E. 103, which was an action to recover damages for the death of the plaintiff's intestate, caused by the collapse of a bridge on which he was working, the court held that where an employer selects with due care a competent contractor, and commits to him a work that is lawful, and such as may be done without injury to third persons, and to be done in a workmanlike manner, at a stipulated price, such employer cannot be held liable for injuries caused by the negligence of such contractor or his servants to third persons. In *Carter v. Berlin Mills Co.*, 58 N. H. 52, 42 Am. Rep. 572, A. contracted to have B. cut timber on A.'s land, at a certain price per foot, and deliver it at the mouth of a river, using A.'s dams for driving the logs, if he chose. By B.'s unreasonable use of A.'s dam, C.'s lands were flooded, but A. had nothing to do with cutting or driving the logs, and it was held that A. was not liable for C.'s injury. In *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172, the owners of buildings employed a competent independent contractor to repair the chimneys of their buildings, who was to do the work without supervision of the owners over the details of the work, or the manner in which it should be done, and it was held that they were not liable to a person who was injured on the street by falling bricks, caused by the contractor's negligence. In *Harrison v. Collins*, 86 Pa. 153, 27 Am. Rep. 699, the owner of a sugar refinery employed a rigger to remove machinery from a railroad car to the refinery. In doing the work, the rigger opened a coal hole in the sidewalk, and left it open a few minutes after the work was finished. A lad fell into the hole, and was injured. The rigger was paid by the day. The court held that if one renders services in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means of accomplishment, it is an independent employment—the fact that the contractor is paid by the day is immaterial. In *Harris v. McNamara*, 97 Ala. 181, 12 South. 103, the court held that an ore digger, who furnishes his own tools and appliances, who employs and pays his own assistants, and who is paid by the mine owners a certain sum per car for ore mined by him, is not a servant of the mine owners, but an independent contractor, as the means and details of the execution of his work are subject to his own exclusive control and management; and hence the wrongful employment of an infant by the

ore digger does not render the mine owners liable to the infant's parents for his death. It was held in *St. Louis, etc., Ry. Co. v. Yonley*, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 004, that a person employed by a railroad company to clear off and burn the rubbish from its right of way at so much per mile, who hires, pays, and controls his own help, is not a servant of the company, but an independent contractor; and the railroad company was not liable for damage caused by the spread of fire, owing to the negligence of the contractor and his employes. In the case of *Town of Pierrepont v. Loveless*, 72 N. Y. 211, millowners who had severally placed saw logs on the ice in the Racket river, severally contracted with S. to drive and put them in the respective booms. Other parties also placed logs there, and employed servants to drive them down. The logs all got mixed in driving; and by the negligence of the drivers, a jam was formed, which carried off a bridge. It was held, in an action by the town to recover the damages, that S. was not a servant, but an independent contractor, for whose negligence those so contracting with him were not answerable. In *McCarthy v. Second Parish of Portland*, 71 Me. 318, 36 Am. Rep. 320, the plaintiff was injured by the carelessness of men occupied in repairing the roof of defendant's building. The work was being done by men who were employes and under the orders of one who carried on the business of slating roofs, and who was engaged to do the work in question. It was held that the slater carried on an independent employment, and the defendant was not liable. Chief Justice Bigelow, in *Brackett v. Lubke*, 4 Allen (Mass.) 188, 81 Am. Dec. 694, says: "If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer, by which he has agreed to do the work on certain specified terms, in a particular manner and for a stipulated price, then the employer is not liable; the relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it if he deems it necessary or expedient." In *Cincinnati v. Stone*, 5 Ohio St. 38, it was declared that the principle of respondeat superior does not apply to cases of independent contracts not creating the relation of principal and agent, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract.

To the same effect is *Gwathney v. Little Miami R. R. Co.*, 12 Ohio St. 92. In *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63, it is said, to render the employer liable, "the employé must be acting at the time strictly in the place of the employer, in accordance with and representing the employer's will and not his own; and the business must be strictly that of the employer, and not in any respect the employé's." In *Wood v. Cobb*, 13 Allen (Mass.) 58, the court said it is too well settled to admit of debate, that the employer of one who exercises an independent employment, is not responsible for the negligence of one in the latter's service. In *Pearson v. Cox*, 2 C. P. Div. 369, a tool, called a "straightedge," was jostled out of the window of a house that was being built, and fell upon the plaintiff and injured him; but, it appearing that the act which caused the straightedge to fall was the act of one of the men employed by the mason, a subcontractor, the court held that the builders of the house were not liable.

It must be borne in mind that in the selection of the independent contractor, the employer is charged with the duty of exercising reasonable care to secure a person of skill and prudence, and the work to be done must not be, within itself, unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual dangers, when being prosecuted in the ordinary and usual manner. *Thompson on Negligence*, § 645, says: "The modern doctrine seems to be that if one engages with a contractor to do an act which may be done in a lawful manner, and the contractor in doing it unnecessarily commits a nuisance, whereby injury results to a third person, the employer will not be liable. In other words, if the act or neglect which produces the injury is purely collateral to the work contracted to be done, and entirely the result of the wrongful acts of the contractor and his workmen, the proprietor is not liable; but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor." It will be observed that the author, in the concluding part of this section, says: "but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor." This means where the work itself is of such dangerous character as that injury may result therefrom, notwithstanding its accomplishment is unattended with negligence, and though it be done with prudence and care, and does not apply where the work to be done is not of itself dangerous to others, unless it becomes so by the negligent or unskillful manner of its execution. *Davie v. Levy*, 39 La. Ann. 551, 2 South. 395, 4 Am. St. Rep. 225; *Hundhausen v. Bond*, 36 Wis. 39; *Chicago City v. Robbins*, 67 U. S. 418, 17 L. Ed. 298; *Robbins v. Chicago City*, 71

U. S. 687, 18 L. Ed. 427; *O'Rourke v. Hart*, 7 Bosw. (N. Y.) 511. There is no complaint that the company did not exercise reasonable care and prudence in the selection of a competent and proper contractor. But it is claimed the evidence does not show that Garretson was an independent contractor, but that, on the other hand, it appears therefrom that he was a servant of the company. When we apply the law to the facts of this case, there can be no other conclusion reached, as we have observed, than that he was an independent contractor, and that the relation of master and servant did not exist between him and the defendant.

The defendant in error insists that it was the duty of the company to provide a safe place for him to work, and in this it failed to discharge its duty, because the place at which he was employed to work was rendered unsafe on account of the work which was being done in getting out the timber. It is an elementary rule of law that the master must exercise reasonable care to furnish and continue to provide a reasonably safe place for his servants to work, and this is a duty which is imposed upon the master, and which cannot be delegated by him to others to the extent of relieving him from liability for a failure to discharge it. This rule of law is not questioned, but it cannot be applied here. There is no question that the mine at which the plaintiff was employed to work was in a perfectly safe condition, in fact, the injury was not caused from any mismanagement of the mine or from any result proceeding from its operation, but it was the result of the act of one whose business was entirely separate and distinct from that being carried on in which the plaintiff was employed to assist. There was no connection between the operation of the mine and the procurement and delivery of the timber. It is true the timber was used in the mine, but because of this it cannot be said that the work of procuring it was in any way connected with the actual operation of the mining enterprise, even if this would alter the case. The act of cutting and delivering the timber did not render the place at which the plaintiff was employed to work, unsafe, because if the timber had been secured in a proper manner, and without negligently skidding it down the hill, the injury would not have occurred. It was the negligent manner of prosecuting the work in delivering the timber that caused the injury, and not the lack of safety of the place at which the plaintiff was employed to work.

As the case now stands, all we have to inquire is, whether judgment should be entered for the defendant here, or should the case be remanded for a new trial. We have determined that the evidence is wholly insufficient to sustain the verdict of the jury, and, from the very character of the case, we can see that a new trial can avail the plaintiff nothing. Therefore, under such

circumstances, it would seem entirely unnecessary to remand the case for a new trial. Litigation should be speeded, and its termination quickly reached, and to bring about this end, frivolity, and idle practices should be discountenanced. In *Maupin v. Insurance Co.*, 53 W. Va. 558, 45 S. E. 1003, it was made a query: "If the Supreme Court holds that a verdict for the plaintiff is without sufficient evidence, or contrary to the evidence, and reverses the judgment for that cause, will it grant a new trial or enter judgment for defendant?" This was not decided in that case. Neither is it necessary to decide it here, because, as we have observed, at the conclusion of the plaintiff's evidence, a motion was made to exclude it, which the court overruled. "If a defendant, giving no evidence, moves the court to exclude the plaintiff's evidence as not sufficient to warrant a verdict for plaintiff, or to direct a verdict for him, and his motion is overruled and this court reverses the judgment for that cause, it will not remand the cause for another trial, but will enter judgment for the defendant, or as it chooses, direct the circuit court to do so, unless satisfied that it will work injustice." *Maupin v. Insurance Co.*, 53 W. Va. 558, 45 S. E. 1003. This rule should not be different where the defendant does introduce evidence, where all the evidence, taken together, does not entitle the plaintiff to recover. There is no reason for such difference. The fact of the introduction of testimony by the defendant has not changed the status of the case. The court is asked to exclude the evidence, and improperly refuses to do so, and because the defendant attempts to strengthen his case, he should not lose the benefit of his motion, especially in so far as he is entitled to have judgment entered for him in this court, on the ground that he made such motion, and it was overruled. It is true we have cases holding that where the defendant introduces evidence, after his motion to exclude is overruled, the error, if any, by reason thereof, is waived, but this rule cannot be applied where the evidence of the defendant, when introduced, does not strengthen the plaintiff's case, and when, taking the whole evidence together, the plaintiff is not entitled to recover. In *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596, it was held that if the defendant, after the court had overruled its motion to exclude the plaintiff's evidence, on the ground of insufficiency, introduces its evidence, this court will disregard such motion and will not reverse the judgment, unless it appears that the whole evidence is insufficient to justify the verdict of the jury. And in the case of *Trump v. Tidewater Coal & Coke Co.*, 46 W. Va. 238, 82 S. E. 1035, it is said that a motion to exclude the plaintiff's evidence for insufficiency is waived by the defendant after such motion is made introducing his evidence, as his evidence may cure the defects

of the plaintiff's. Where, however, there is not sufficient evidence to support a finding for the plaintiff, there is no reason to say that this court should not, when such motion is made and overruled in the court below, give judgment for the defendant here, when it was the duty of the court below to have excluded such evidence, and rendered judgment for him. But, again, at the conclusion of all the evidence, the defendant asked the court for a peremptory instruction, directing the jury to find a verdict in its favor, which instruction the court refused. The offering of this instruction was equivalent to a demurrer to the evidence. *Maupin v. Insurance Co.*, 53 W. Va. 558, 45 S. E. 1003. It was the duty of the court to give this instruction, and enter judgment for the defendant, and not having done so, it is now proper for this court to do what the court below should have done.

The judgment of the circuit court is reversed, the verdict of the jury set aside, and judgment is entered for the defendant.

(60 W. Va. 34)

MEADOWS v. MEADOWS.

(Supreme Court of Appeals of West Virginia.
May 1, 1906.)

SPECIFIC PERFORMANCE — VERBAL GIFT OF LAND.

To enforce specific performance of a verbal gift of land by father to son, the contract of gift must be clear and definite, and the evidence to sustain it must be direct, positive, express, and unambiguous.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 388, 392, 393.]

(Syllabus by the Court.)

Appeal from Circuit Court, Raleigh County.

Bill by Henry W. Meadows against Joseph Meadows. Decree for defendant, and complainant appeals. Affirmed.

A. P. Farley and M. F. Matheny, for appellant. J. E. Summerfield, A. D. Preston, and Lilly & McGinnis, for appellee.

BRANNON, J. Joseph Meadows is an old man of 70 years. Many years ago he purchased a little tract of poor mountain land in Raleigh county. It required many years of hard toil to pay for his little home and get a deed for it. It contained only 105 acres. He had three sons, Henry, Charles, and George—Henry the oldest. Henry married early and went to live with his father-in-law. Soon he moved to this tract of his father, and upon one end of it built a log cabin of one room, and later some addition, very humble in character, and set out an orchard, and cleared a good deal of land. The father furnished some of the trees. He had a large family of 12 children and was very poor. He was on this home place 18 or 20 years. Some trouble springing up between him and his old father, in 1904 he

brought a chancery suit against his father to compel him to make a deed to him for a section of the home tract containing about 35 acres. He claimed that, 20 years before, his father had given him that part of the home tract, and that on the faith of the gift he built a house and cleared land and otherwise improved the property. The circuit court dismissed the bill.

It is useless to detail evidence. It is absolutely conflicting. Henry and his wife and two daughters swear to a declaration, or rather declarations, made by the old man to the effect that Henry was to have that part of the tract marked by a certain line of trees dividing it from the remainder; that it should never be taken from Henry. That, in connection with improvement, is the whole of the plaintiff's case. The old man denies Henry's claim. He declares that he always told the boys that they should have the land when he and his wife were done with it, that Henry should live down on the lower end of it, Charles on another part, and George the old home section—that is, the house section, where the old man lives. Now, there is no doubt that the old man talked in that way. That is quite natural and fatherly, and we can readily see that the old man contemplated this division. But did he intend to oust himself and his old wife while they lived? Charles and George fully corroborate the old man by saying that they did not expect their parts while their father lived; that the talk between father and sons was that the old man would retain the land as long as he and his wife lived. Charles was in possession of one section of the land, but he did not expect any deed depriving the father of it during his life. He swears that his father told Henry that he would never make a deed, and that he would hold the land during his lifetime; that he told them all that he intended the place for his sons when he and his wife were done with it. George swears that he knows that his father never gave the possession of the land in controversy to Henry absolutely; that his father told them all that he meant to keep the land as long as he and his wife lived, and then it was to go to his children. He swears, like Charles, that he heard his father tell Henry that he did not intend to deed him the land as long as he lived. He says he never heard of any claim by Henry until recently. Are we to infer that, because the father let a young married son build a little log cabin on his land to make bread and meat, the father intended absolutely to part with his ownership and control, and thus deprive himself and his wife of the means of support? Especially when the tract is very small and hardly equal to the support of his own family? If that be so, if that calls for specific performance, how many fathers would be brought to penury? Courts ought not to

thus hold from such mere possession. How natural for a son to settle on his father's land and clear a few acres and plant an orchard for the support of himself and family. In the absence of a specific, definite contract, are courts to hold that mere loose declarations of a father that he intends to give one son a certain end of his place shall call for specific performance? Particularly when the tract is so small? That would be against the interest of father and child; for, if that be so, the father would not dare to let his child go upon any of his land, as it might injure him and other children.

A witness named Olemens, produced as credible by the plaintiff, swears that the old man said, what many fathers have said, that as Charley and Henry both had built, the third boy, George, was to live where the old man lived, and "that he didn't expect to make the boys the deed then, but that he was going to hold the land for him and his wife then, as in their old days they might need it." He intended to will it to them. Now, this is the whole truth. The evidence is not only conflicting, but it preponderates to sustain that theory of the case. It is proven that Henry talked about moving away, and was seeking another home. He does not deny, but admits, that his father sold nearly all the poplar timber from the land he claims. Why did he allow him to do so, if he himself owned the land? And he never paid a cent of taxes on the land through many years. His father swears he refused to pay a part of the taxes on the land. Why wait 20 years for a deed? The law properly applicable to such a case is well stated by Judge Lucas in *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. 87. While admitting that oral gifts of land by father to son, if definite and fully sustained by evidence, will be enforced, yet it is not to be inferred from a son's going into possession of his father's land and making small improvements that the father gave the son the land; that loose declarations of the father are not sufficient evidence of such a gift. "A contract between a parent and child, from the nature of the relation, requires to be proved by a kind of evidence much stronger than that which might suffice between strangers. The evidence, in case of a parol gift from father to child, should be direct, positive, express, and unambiguous, and its terms clearly defined." That settles this case. Judge Lucas did only repeat fixed law; but I have been struck with the practical force and applicability of the expressions of the case to cases constantly arising. The case preponderates in favor of the defense on the evidence; but, aside from that, how can we be asked to overrule a circuit judge upon such frail evidence and upon evidence absolutely conflicting?

We therefore affirm the decree.

(141 N. C. 741)

STATE v. DURHAM.

(Supreme Court of North Carolina. March 6, 1906.)

HOMICIDE—SELF-DEFENSE—RESISTING OFFICER.

Under Acts 1889, p. 65, c. 51, declaring that any person who unlawfully resists, delays, or obstructs a public officer in discharging or attempting to discharge a duty of his office shall be guilty of a misdemeanor, a person who kills an officer attempting to arrest him for a misdemeanor cannot set up self-defense, but is guilty of manslaughter at least.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 90, 95, 144.]

Walker and Connor, JJ., dissenting.

Appeal from Superior Court, Polk County; Council, Judge.

Frail Durham was convicted of murder, and appeals. Affirmed.

Smith & Schenck and A. H. Dean, for appellant. The Attorney General, for the State.

BROWN, J. The evidence tends to show that the deceased was a deputy sheriff and had a warrant for the arrest of the prisoner for carrying concealed weapons. Deceased approached prisoner for the purpose of effecting his arrest, and some conversation ensued; the prisoner finally agreeing to give bond for his appearance. The prisoner, the deceased, and others started to the office in the feed store of one Engel for the purpose of signing the bond. Hilton, the deputy sheriff, sat down at the table to write the bond, and while thus engaged the prisoner escaped from the room, Hilton following to capture the prisoner, and in the altercation which followed the prisoner shot and killed Hilton.

In one of their briefs the prisoner's counsel admit that, if the decision in State v. Horner, 139 N. C. 603, 52 S. E. 136, is to be adhered to, all their exceptions are untenable except the fourth; and as to that exception it is insisted that the court below erred in charging the jury that in any view of the evidence the defendant was guilty of manslaughter, thereby depriving him of his plea of self-defense. In the able argument of Mr. Dean, as well as in their well-considered briefs, counsel for defendant endeavored to draw a distinction between the case at bar and Horner's case. After most careful consideration we fail to see the distinction. In fact, the cases appear to be on all fours. The deceased, Hilton, was a deputy sheriff, and had arrested the prisoner upon a warrant for carrying a concealed weapon—a misdemeanor. The defendant, according to his own evidence, recognized Hilton's authority and went with him to give bond for his appearance. When they arrived at the office the deceased commenced to write the bond. As to subsequent occurrences the defendant testified: "Hilton then sat down and got to writing, and while he was doing so I slipped out of the side door of the store, and after

I had got about 20 yards I looked back, and saw Hilton coming with his pistol in his hand, coming towards me. I was running, and he was running. I ran on about 5 or 10 steps, and looked around and saw Hilton with his pistol pointing towards me. Up to this time I had not drawn my pistol. I then drew my pistol and continued to go forward sideways, holding my pistol pointing in the direction of the left side [describes attitude]. The range of the pistol was not on Hilton. I looked around as I was going away, and as I did so he fired on me. I then turned and fired. I did not aim at him this shot. I did not attempt to hit him. I did not want to hit him this shot. When I fired the first shot I came to a little stop—a moment's stop. I then went two or three steps, and Hilton shot again, and the bullet grazed me on the left arm. I then fell back a little bit—standing against a little sapling. Up to this time Hilton had fired two shots and I one, and after this he fired two more before I fired any more. I then fired one and killed him. At the time I fired the last shot Hilton was standing up aside of a sapling, his pistol pointing at me. After the last shot I ran off and went home." The defendant further testified that when Hilton arrested him he laid hands on the defendant and said, "Give me your gun;" that he had a pistol in his pocket, and did not give it up or allow Hilton to search him; that he had a bottle of liquor in his right hip pocket; that he fired on Hilton and killed him because he thought Hilton would kill him; and that Hilton ordered him to stop as he ran off. One Kuykendall corroborates the defendant, but states that he never saw the defendant when he drew the pistol, and never saw it until the defendant turned and fired. This is not necessarily inconsistent with the defendant's statement.

We have stated only the material evidence offered by the defendant and most favorable to him, because in passing on this exception that testimony alone should be considered. The facts in Horner's Case, briefly stated, are that Nichols, a deputy sheriff, had a warrant for Horner for a misdemeanor, viz., whipping his daughter-in-law. Horner refused to submit to arrest, and attempted to escape. The testimony most favorable to Horner was his own (139 N. C. 610, 52 S. E. 139): "I was in the woods. Dog had treed a squirrel. Nichols and Breez came on down the road. Nichols called to me, and I answered. He said, 'Come on and go with me.' Had a warrant. He read it. I said, 'I am not going to do it.' He said, if I would promise to be at Squire Terry's tomorrow at 8 o'clock, he would go. I refused. He came on me, and said to me, with an oath, 'If you do not go with me I am going to shoot you.' Then I picked up gun and walked off. He shot at me. I ran about 50 yards. He shot again, and I threw gun 'round and shot. I was going away from him; was out there for a squirrel. I ran against a tree when he was after

me; knew deceased was a deputy sheriff." Horner was convicted of murder in the second degree, and appealed. His honor had instructed the jury, as in the case at bar, that Horner was guilty of manslaughter at least. In almost every respect the cases are similar. Ever since Garrett's Case, 60 N. C. 145, 84 Am. Dec. 859, it has been thought that in this state the principle of self-defense does not apply to the case of one who places himself in the posture of armed defiance to the process of the state. In that case the great Chief Justice says: "When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and to set up the excuse of self-defense." The law of self-defense applicable to encounters between private persons does not arise in the case in which a person sought to be arrested kills the officer seeking to make the arrest. In this state we think this is most essential to "preserving good order and asserting the supremacy of the law." After mature consideration this rule was reaffirmed in Horner's Case by a unanimous court. The well-considered opinion delivered by Mr. Justice Connor is not open to any possible misconstruction, so far as we can see. Much of his language would apply with aptness to this case. The learned justice says: "The prisoner knew that the deceased was a deputy sheriff and that he had a warrant for his arrest. It was his duty to submit to arrest, and in resisting it with a gun in his hand it is not open to him to say that he acted in self-defense. Conceding that as he [the prisoner] was going away from the officer, refusing to submit to arrest, the officer was not justified in shooting him to make the arrest, does not affect his right to kill. If there was a necessity to shoot the deceased to save his life, it was the result of his unlawful act in resisting the mandate of the law. The position of the prisoner is similar in this respect to one who brings on or provokes a difficulty, and in the progress of it kills. It is not *se defendendo*, because he brought on the necessity. This is elementary, and uniformly sustained by numerous cases in our own and other jurisdictions."

The officer is not excused if he, with undue violence, menaces the life of the defendant when he attempts to arrest a person for a misdemeanor. The officer may be convicted and punished. But his crime will not excuse or condone the crime of the defendant in making open resistance to the process of the state. We are aware that in some jurisdictions it is held otherwise, and that while an officer, in attempting to arrest for a misdemeanor, dangerously menaces the life of the accused, the latter may defend himself to the extent of taking the officer's life, and the plea of self-defense is open to him. But in this state we have a statute (Acts 1889, p. 65, c. 51) which enacts that "any person who willfully and unlawfully resists, delays or

obstructs a public officer in discharging or attempting to discharge a duty of his office, shall be guilty of a misdemeanor." At the time he killed the deceased the defendant was engaged in an unlawful act, not only *malum in se* (being in armed resistance to the process of the state), but an act directly connected with and which finally resulted in the death of the officer; for it is plain that, had the defendant himself not resisted the law, but submitted to arrest, there would have been no homicide by any one. *State v. Hall*, 132 N. C. 1094, 44 S. E. 553; *Turnage's Case*, 138 N. C. 566, 49 S. E. 913; *Wharton, Cr. Law*, vol. 1 (10th Ed.) § 305.

There is no error.

WALKER, J. (dissenting). I am unable to concur with the majority of the court in the conclusion they have reached in this case. As the effect of the decision is to deprive the citizen of the important right of self-defense when, upon the plainest principles of law, he is justly entitled to it, I deem it but right that my views should be stated somewhat at length, supported, as I think they are, by the highest and weightiest authority. In order to understand the precise question presented, it will be necessary to summarize the facts, for they are not stated in the opinion of the court as I understand them.

The defendant was indicted in the superior court of Polk county at fall term, 1905, for the murder of L. C. Hilton at Tryon on the 26th of March, 1905. The trial resulted in a verdict of murder in the second degree, and the defendant was sentenced to 14 years' imprisonment. The facts and circumstances connected with the killing are practically undisputed, and are as follows: The deceased was a deputy sheriff of Polk county, and held a warrant for the arrest of defendant for carrying concealed weapons. On Sunday, March 26, 1905, defendant was in Tryon and deceased attempted to arrest him. The deceased, the defendant, and several others were in the rear of Shore & Engle's barn, discussing the matter of arrest and the giving of bond. The defendant at first demurred to the arrest upon the ground that the officer could not arrest him on Sunday. Finally, upon the advice of his friends, the defendant yielded, and, in the language of McFarland, the only eyewitness, introduced by the state in chief, "then they, Frail and others started on to the store to get the bond signed; Frail deciding to give it." One Engle had agreed to sign the defendant's bond and this arrangement had been accepted by the deceased. The deceased was requested to sit down at the table and prepare the bond. While he was in the act of writing it, the defendant slipped out of the side door of the feedroom. The deceased asked, "Has he gone?" Some one answered, "Yes." Mr. Engel, who was to become surety on the defendant's bond, said

to the deceased: "Never mind. Let him go. I will sign the bond." The deceased made no reply, but bolted out of the door after Durham, with his hand on his pistol. After the defendant had gone about 20 yards he looked back and saw the deceased coming with his pistol in his hand. They were both running. The defendant ran 5 or 10 steps, and, looking around, saw the deceased with his pistol pointing towards him. The defendant then for the first time drew his pistol, continuing his retreat sideways, holding his pistol on his left side, but not toward the deceased. The deceased fired. The defendant returned the fire, but not intending to hit. The deceased fired again, the shot grazing the defendant's left arm. Defendant fell back a little, standing against a sapling. The deceased fired two more shots, and was in the act of firing again, when defendant fired the shot that killed deceased. The defendant's last bullet grazed the knuckle of deceased's right hand and pierced his eye, showing that the deceased was then in the act of aiming and firing. Defendant testified that he fired at Hilton because he thought Hilton would kill him. Another witness had testified that he was present and saw what occurred. When Hilton went out he drew his pistol, about 10 feet from the door, then ran on about the distance of 25 steps from the door and held it up in his hands and fired at Durham. He held his pistol in both hands after taking it out. He did not see defendant draw his pistol until he turned and fired at Hilton. He did not have his hand on his hip pocket as he ran off. Hilton fired three times and defendant twice.

The defendant requested the court to charge the jury as follows: "The law does not justify an officer in killing one accused of a misdemeanor, in order merely to stop his flight, and an attempt to do so by an officer would constitute an assault, against which the person assaulted would have a right to defend himself." The court gave the instruction, omitting the words, "against which the person assaulted would have a right to defend himself," and added to the instruction, as thus stripped of its essential feature, the following: "That, while this is true, yet where one resists lawful arrest, or, having been arrested, flees, and the officer resorts to means to arrest or rearrest which amounts to an assault, still the person so arrested or fleeing from arrest has no right to defend himself against such an assault, unless he satisfies the jury from the evidence that he no longer resists arrest, or has ceased to flee and yielded to arrest. This not appearing from the evidence, the defendant would at least be guilty of manslaughter in this case." If, in any view of the case, the defendant was entitled to have the plea of self-defense submitted to the jury, there was error. We understand this to be conceded. At any rate the right of

the defendant to have it submitted is unquestionable.

The fallacy in the opinion of the court arises out of a total misconception of the distinction between resistance to arrest and resistance to a felonious assault. If the defendant resisted arrest, which he did not do, the deceased had the right to use so much force as was necessary to accomplish his arrest and compel submission to the mandate of the law. And right here it is well to state that there is a wide difference between resistance to arrest and the mere avoidance of arrest by fleeing or running away from the officer. The latter is an escape. With this distinction clearly before us, let us proceed to examine the case. If there is anything settled as law by this court, it is that an officer has no right to endanger the life of one fleeing from him who is charged merely with the commission of a misdemeanor. "A very different principle prevails where a party charged with a misdemeanor flees from an officer, who is intrusted with a criminal warrant or capias, in order to avoid arrest. The accused is shielded in that event, even from an attempt to kill with a gun or pistol, by the merciful rule which forbids the risk of human life or the shedding of blood in order to bring to justice one who is charged with so trivial an offense, when it is probable that he can be arrested another day and held to answer. An officer who kills a person charged with a misdemeanor while fleeing from him is guilty of manslaughter at least. When a prisoner charged with a misdemeanor has already escaped, the officer cannot lawfully use any means to recapture him that he would not have been justified in employing in making the first arrest; and if, in the pursuit, he intentionally kills the accused, it is murder, and if it appear that death was not intended, the offense will be manslaughter." *State v. Sigman*, 106 N. C. 728, 11 S. E. 520. The court further says that such use of a deadly weapon by an officer, as aiming it at one who is fleeing under such circumstances, is an assault, even if the officer did not in fact intend to shoot. *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757. In the latter case, this court said: "But assuming, for the purpose of the argument, that he could lawfully have pursued the defendant beyond the corporate limits in order to effect his arrest, he clearly had no right to use excessive force, and the use of a pistol, which is a deadly weapon, in attempting to arrest one charged only with the commission of a misdemeanor, is excessive force. In such a case the life of the offender must not be imperiled when he is only fleeing from arrest and trying to escape. This doctrine is well settled." This was the admonition of Mr. Justice Foster: "With regard to the ministers of justice executing ordinary process and likewise to private persons endeavoring to arrest

It behooveth them to be very careful, that they do not misbehave themselves in the discharge of their duty; for, if they do, they may forfeit the special protection of the law." Foster's Crown Law, §19. When an officer transcends his right in making an arrest by using excessive force and thereby putting human life in jeopardy, he becomes, by all the authorities, a trespasser from the beginning (*ab initio*), and they say that he stands in no better plight than an individual not clothed with official authority. He is no longer, as one of its ministers, under the protection of that law which he has himself grossly violated. An assault thus committed by him with a deadly weapon is like one committed by an unofficial person, so far as the right of the person assaulted to defend himself against the attack is concerned. *State v. Worley*, 33 N. C. 242; *State v. Queen*, 68 N. C. 617; *State v. Brittain*, 25 N. C. 17.

How could the law be otherwise and be consistent with itself and true to its cardinal principles? Can it be assumed that the law denounces the wrongful act of the officer as a serious crime, and, if death ensue, as a capital felony, and yet that it does not permit the person assaulted to defend himself when he is not resisting the officer or making any attempt upon his life, but simply attempting to escape, an act which the same law says is not of sufficient gravity to justify the assault, as the fleeing person may again be taken, and which certainly does not forfeit life and require the person thus fleeing to tamely submit to be killed and thus lose his life without being permitted to defend it? Does the law, under such circumstances, leave him defenseless and to be dealt with at the mercy of a lawless officer? I have diligently searched the books, and have been able to find no case decided by this or any other court, and no expression of a text-writer, which gives countenance to any such doctrine. The law is supposed to be humane, and I believe my Brethren are greatly mistaken in their interpretation of the cases they cite, and I will attempt to show later on that they are so mistaken, if they think that they sustain such a principle. No case like the one we have presented in this record has ever been before this court. Cases like it have been decided by courts in other jurisdictions, and those courts have, it appears, been unanimous in rejecting the doctrine and asserting the very contrary to be the true and only one. As the officer, by using excessive force in attempting to shoot the escaping misdemeanant, acts in his own wrong, and is a trespasser from the beginning, the same as if he had no official authority to arrest, and as his act constitutes an assault with a deadly weapon which puts the life of the fleeing party in jeopardy, the latter by every ordinary principle of criminal law has the right to defend himself and save his life. "It will be observed that the law does not authorize the kill-

ing of a person charged with a misdemeanor who shall flee or attempt to escape, nor even one charged with a felony, unless he resists or flees and cannot otherwise be taken. If the alleged felon can be otherwise taken, the killing is manslaughter, at least, in the officer. And it is a felony in the officer if he wound a person not charged with a felony who is fleeing to escape arrest, and he is guilty of murder if he kill in pursuit one charged with a misdemeanor only, or required in a civil suit." *Murfrees on Sheriffs*, p. 663, § 1164. And he adds, in discussing the same subject, that an officer, "when transcending his powers or abusing his authority, may himself be lawfully resisted." Section 1160. "If unlawful violence is resorted to in the attempt to make an arrest for a misdemeanor, where it is not lawful to imperil life, the person whose arrest is attempted will be justified in taking life." 1 *McClain, Cr. Law*, § 302. The reasonableness of the apprehension that his life is about to be taken, or that great bodily harm is threatened, is to be judged from the standpoint of the defendant at the time, and not from that of the jury; the two questions being: (1) Did the accused believe himself in imminent danger? (2) Were the circumstances such as would justify such a belief in the mind of a person of ordinary firmness and reason? *Id.* § 306. "It is also true that it is the duty of every citizen to submit to lawful arrest. There is, however, a broad distinction between resistance and avoidance, between forcible opposition to arrest and merely fleeing from it. See *State v. Anderson*, 1 *Hill (S. C.)* 346. There is no rule of law that he who flees from attempted arrest in cases of misdemeanor thereby forfeits his right to defend his life. It is certainly possible for an officer of the law to commit a felony by shooting at a man or by other excessive violence, even when attempting his arrest, and it would follow that the party thus feloniously assaulted might defend his life." *Tiner v. State*, 44 *Tex.* 128.

Deciding a similar case, it said by the court in *State v. Oliver*, 2 *Houst. (Del.)* 608: "Under this view of the case, the resistance of the prisoner to an unlawful attack, though such resistance should result in the death of the aggressor, could not amount to murder, but manslaughter only, or homicide in self-defense. The law of self-defense justifies the repelling of force by force in such cases, even unto death, but gives no protection to wanton or unnecessary aggression." The court further says that unless the prisoner resists, instead of flees, and thus obliges the officer to resort to violence, he may not fire upon him, and if he is not resisted or opposed in such a way as to make that kind of attack prudent and necessary, but proceeds to execute even lawful authority in an unlawful way, he thereby clearly justifies resistance by the prisoner. *Id.* 606. And so it was held in *Hardin v. State*, 40 *Tex. Cr. R.* 208, 49 *S. W.* 607. "If," says the court, "appel-

lant did not resist the officer, but was merely attempting to escape or evade an arrest, then the officer had no right to kill him; and if, under such circumstances, deceased first drew his pistol and shot at appellant to kill him or prevent his escape, the officer had no right to do this, and in such case appellant's right of self-defense would be perfect. This latter phase of the case was not given to the jury at all, and yet there is some testimony tending to raise this phase of the case." Another court says: "The law does not allow a peace officer to use more force than is necessary to effect an arrest. If he do use such unnecessary force, he thereby becomes a trespasser from the beginning and may be lawfully resisted." *Plummer v. State*, 135 Ind. 313, 34 N. E. 968, citing authorities to sustain the principle. The court further says that the principle of self-defense applies as well to an officer attempting to make an arrest, who abuses his authority and transcends the bounds thereof by the use of excessive force and violence, as it does to a private individual who unlawfully uses violence. By his abuse the officer divests himself of his official character and immunity from attack. "It must not be assumed that an officer in the execution of process would be protected in acts of violence upon the prisoner, committed of his own wrong and not warranted in the performance of his duty. The conditions under which an officer is deprived of the protection of his process are those in which, in executing it, he of his own wrong commits acts of violence against the accused which are not justified in the execution of his process. Under such circumstances a right of self-defense by the accused may arise." *Bullock v. State*, 65 N. J. Law, 572, 47 Atl. 62, 86 Am. St. Rep. 668. To the same effect I cite *People v. Burt*, 51 Mich. 190, 16 N. W. 378; *Doolin v. Com.*, 95 Ky. 29, 23 S. W. 663; *Bissot v. State*, 53 Ind. 416; *Galvin v. State*, 46 Tenn. (Cold.) 291; *Agee v. State*, 64 Ind. 340; *Miers v. State*, 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; 1 Kerr on Homicide, p. 217, § 189; *Creighton v. Com.*, 84 Ky. 103, 4 Am. St. Rep. 193; *State v. Underwood*, 75 Mo. 230; *Alford v. State*, 8 Tex. App. 545; *Minnlard v. Com.*, 87 Ky. 213, 8 S. W. 269; *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711; *State v. Scheele*, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106; *Wright v. Com.*, 85 Ky. 123, 2 S. W. 904. "An officer, in the execution of a valid order, has the legal right to use such force as is necessary to execute it, but no more. Any unnecessary force or violence that may be used in the execution of such order or process is without authority of law, and such excess, if any, may be lawfully met by force or violence sufficient to overcome it." *U. S. v. Terry* (D. C.) 42 Fed. 317. "If an officer, in attempting to execute process, shall exceed the power conferred by the writ, he will be liable as a trespasser; but this will not authorize the defendant to resort to personal violence against the officer

while so endeavoring to exceed his authority, unless to protect his own person from violence and injury." *Smith v. People*, 99 Ill. 445. "Whether the arrest be legal or not, the power to arrest may be exercised in such a wanton and menacing manner as to threaten the accused with loss of life or some bodily harm. In such a case, though the attempted arrest was lawful, the killing would be justifiable." *Jones v. State*, 26 Tex. App. 12, 9 S. W. 55, 8 Am. St. Rep. 454. "If one, even an officer, undertakes to arrest unlawfully, the latter may resist him. He has no protection from his office, or from the fact that the other is an offender." 1 Bish. New Cr. Law, § 868. "One may defend himself against the wrongful assault of an officer, as well as against the assault of a person who is not an officer." *Appleton v. State*, 61 Ark. 592, 33 S. W. 1066. In *Williams v. State*, 44 Ala. 44, the court held that, while the citizen should submit when he has no reasonable cause to apprehend any worse treatment than a legal arrest will subject him to, and seek redress from the law, instead of resisting, yet "in misdemeanors it will be murder to kill the party accused for fleeing from the arrest, though he cannot otherwise be taken, and though there be a warrant to apprehend him. The citizen may resist an attempt to arrest him, which is simply illegal, to a limited extent, not involving any serious injury to the officer. He may oppose a felonious aggression upon him in the execution of a lawful arrest, even to slaying the officer, when it cannot otherwise be prevented."

That an officer who exceeds his lawful authority by the use of violence becomes a trespasser ab initio, and is in no better position with respect to the accused, for whom he has process of arrest, than an unofficial person, is clearly shown in *Commonwealth v. Kennard*, 8 Pick. (Mass.) 133, and *Six Carpenters' Case*, 1 Smith's Leading Cases (9th Am. Ed.) 261. To the extent, therefore, that the force is excessive, it may be met by the accused with such force as reasonably appears to him necessary to defend himself against the illegal attack which is threatened. If the officer is in the wrong, and the life of the accused is endangered by his unlawful act, and no more force is used than is adequate to the protection of his life, the accused by no principle of law or justice can be adjudged a criminal. The mere fact that he attempted to avoid arrest, or to escape from one already made by running away, was, of course, an unlawful act, for which, perhaps, he may be punished; but he was not thereby outlawed, and put beyond the pale of the law's protection, and his unlawful act did not justify the officer in assaulting him with a deadly weapon. Resistance to this abuse of power, but not the resistance to arrest, was a lawful act, if properly exerted. He was not resisting arrest, but merely avoiding it by flight. If a person resists a lawful arrest, and kills the officer, it is murder; if an illegal arrest, and

no excessive force is used, it is manslaughter; but if the officer uses excessive force, and threatens the life of the accused, when the arrest is for a misdemeanor, the latter may defend himself, if he is merely escaping, whether the arrest is legal or illegal. This is clearly established by the great weight of authority, and this court practically stands alone in asserting the contrary doctrine.

Before taking leave of this part of the case, and in this connection, we may not inappropriately quote the language of a learned text-writer: "The manner in which an arrest should be made is a matter of no small importance. It is hardly necessary to say that the law, while requiring a strict obedience to its mandates, will tolerate in its ministers no unnecessary violence. 'Molliter manus imponere' is as far as, under any normal circumstances, an officer can go with safety; and one who endangers the lives or limbs of others, or inflicts great bodily injuries in the discharge of his official duties, should be prepared to justify his conduct by proof showing that he acted under the pressure of an irresistible necessity. It may be remarked, however, that there is prevalent, not only among officers of every grade, but throughout the community, an exaggerated idea of the powers in this respect which the law vouchsafes to its ministers. A sheriff, constable, or policeman, with a revolver and a warrant charging a misdemeanor, is popularly supposed to hold the keys of life and death, and, as he frequently shares in the delusion, he abuses his powers with, sometimes, very tragical results. What the law does allow in the use of physical force is the very minimum by which the desired object can be obtained. Whatever a rash or overzealous officer may do in excess of this is without warrant of law." *Murfree on Sheriffs* (1884) § 148; *Brockway v. Crawford*, 48 N. C., at page 440, 67 Am. Dec. 250. As he then becomes the aggressor, the accused, who was originally a wrongdoer by escaping, is remitted to his right of self-defense; whereas, if he had resisted, he would not be. The fact must not be overlooked but emphasized, that the defendant, as the evidence of an eye-witness shows, did not draw his pistol until he was first fired upon by the officer. At least, the jury could have inferred this to be the case. A more flagrant violation of the law by the officer could not be imagined. The defendant was a law-breaker, but was not an outlawed felon. At the time he was perfectly harmless, and yet, under such circumstances, it is said he had no right to defend himself against a most violent assault, which put his life in immediate jeopardy. Surely that cannot be the law of this age. As the court remarked in *State v. Campbell*, 107 N. C. 948, 12 S. E. 441, the fact that he had a pistol on his person afforded stronger reason why he should not have been attacked contrary to law.

But it is said that this court has decided

otherwise than as I contend is the law in *State v. Garrett*, 60 N. C. 145, 84 Am. Dec. 359, and *State v. Horner*, 189 N. C. 610. In my judgment they do not so decide, but are in perfect harmony with the authorities cited in this opinion. The indictment in *Garrett's Case* was against the officer for murder in killing the deceased, for whom he had a warrant and who was openly resisting him, as the jury found under the evidence and charge, and not merely attempting to avoid arrest by flight. The Chief Justice there says that, if the deceased had been attempting to make his escape by moving off, there would have been no necessity for shooting him, and the officer would have been guilty of an abuse of his power, and would have become a trespasser ab initio. It is only when the officer has a right to kill, as in the case of resistance, or when a felon is pursued, and it becomes necessary to do so, that he is justified, and is not a trespasser. The case recognizes the very distinction we have endeavored to show in fact exists. It does not, it is true, decide the question involved in this case, as the officer was indicted, and not the party for whom the process had been issued. It is not, for this reason, an authority against my view, but expressions in the opinion of the court tend strongly to sustain it. In *Horner's Case* the defendant was the person against whom the warrant was issued, and he killed the officer. This is our case; but the evidence most favorable to the defendant tended to show that *Horner* not only resisted, but defied the officer to arrest him. He was no escaping misdemeanor, and the court so says. Here is its language: "It was his duty to submit to arrest, and in resisting it with a gun in his hand it is not open to him to say that he acted in self-defense." I concurred in this statement of the law, and still concur. The evidence in that case shows that at no time before the killing did *Horner* occupy any attitude but that of obstinate and armed resistance to the law. There was no evidence that he was merely running away to avoid arrest, as was the defendant in this case. He was in easy reach of his gun, which he could have used with deadly effect in an instant, and actually picked it up, and still defied the officer. He ran when the officer shot, but he was then running from the shot, and not merely from the law. For the time being he was doubtless frightened by the situation in which he had involved himself, but he soon recovered his courage and made another bold stand against the officer. It is to be noted that when the officer fired *Horner* was walking off with his gun in his hand, not running to avoid arrest. He had just picked it up, and the officer might well have supposed for the purpose of using it. A moment before he was standing by it and refusing to be taken. He was in a sullen and defiant mood, and his conduct indicated bitter hostility to the officer. This was a clear case of resistance,

and the court so regarded it. How different from our case, in which it appears that the defendant fled with all possible speed, making no resistance whatever until his life was put in imminent peril, when he fired evidently to save it. There was no necessity for the officer to shoot, as in *Horner's Case*, where the defendant was standing before him in armed resistance, his every word surcharged with anger, and his every act and movement menacing the life of the officer.

In a case like ours, the merciful rule of the law is that it is better to let the accused escape, when the charge is so trivial, than to shed human blood, as he may be taken another day and held to answer. *State v. Sigman*, supra. As to the position of the party assaulted under such circumstances, I cannot do better than to conclude with the words of an eminent writer, whose perfect knowledge of the science of the law is beyond question: "The right of resistance to illegal official action, it must be remembered, is essential, not merely to all free government, but to any government whatsoever. The Roman law has been charged with being despotic; but by the Roman law this right is repeatedly and unreservedly recognized. If there be no jurisdiction in the officer, then issues the terse command, 'Vim vi repellere licet.' When an officer transcends his powers, obedience to him may become even an offense." 1 Wharton, Cr. Law (9th Ed.) § 646. The law requires that each member of the body politic, citizen as well as officer, should be kept in his due orbit; the latter exercising only such powers as the law confers and only in the way allowed, and the former being free to resist aggression when necessary in his own defense. Dr. Wharton thought that a sound, free, and enlightened jurisprudence required a very close approximation to the principles of the Roman jurists, and a rejection of the feudal policy, which exacted of the vassal implicit obedience and abject submission to the lord and his bailiff, or, as the alternative, his life.

It must not be inferred that I think the defendant was entitled to an acquittal. Not by any means. He might, perhaps, have been convicted of murder, if he fired without any apparent necessity, and of manslaughter if he fired without legal provocation or other circumstance to reduce the killing below the grade of murder, or he might have been acquitted; the verdict being determined by the facts as the jury should find them to be and the law as declared by the court. If he shot upon malice, it would be murder; if upon legal provocation, manslaughter; but if in self-defense against a deadly assault by the deceased who, at the time, had ceased to be under the protection of the law as an officer and had become a trespasser, then he should be acquitted. When the court instructed the jury that he was guilty at least of manslaughter, and thereby excluded the principle of self-defense from the case, an error, in my opinion, was committed which entitled the

defendant to a new trial. The statute cited by the court (Acts 1889, p. 65, c. 51) cannot possibly make any difference in the result. It is merely declaratory of the common law, and, even if it had been the enactment of a new principle, it could not take this case out of the operation of the rule upon which rest the decisions in other jurisdictions cited by me. Nor do I know of any special conditions existing in this state which render the principle of the decision essential to preserving good order and asserting the supremacy of the law.

CONNOR, J., concurs in the dissenting opinion.

(141 N. C. 45)

MILLER v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 8, 1906.)

MASTER AND SERVANT—INJURY TO EMPLOYEE IN STATE OTHER THAN THAT OF EMPLOYMENT.

The contract of employment having been made in North Carolina, and it not appearing that the service was to be performed entirely outside the state, the provisions of the fellow servant act of North Carolina will be read into the contract, and the rights and duties thereunder will govern in an action for injury to the servant, while working in another state, based on the negligence of the employer in failing to furnish a safe and suitable platform on which to work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 137.]

Appeal from Superior Court, Anson County; Ferguson, Judge.

Action by George A. Miller against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The plaintiff alleged that being a resident and citizen of the state of North Carolina, he entered into a contract of service in the said state with the defendant corporation, owning and operating railroads in the states of North Carolina and Alabama, and in the performance of the duties assumed by said contract he was, on the 1st day of October, 1903, in Birmingham, Ala. That at said time some employees of defendant were rolling a truck loaded with a piano along said platform, near which the plaintiff was at work. That by reason of the dangerous, unsafe, and unsuitable condition of said platform it gave way, and the wheels of the truck broke or fell into a hole, causing the piano to fall upon plaintiff, breaking his leg, and inflicting upon him serious and permanent injuries. That it was the duty of the defendant to provide a suitable, safe, and proper place for plaintiff to work; the defendant knew of the dangerous and unsafe condition of said platform, and that by reason of the injuries suffered, he has sustained damages, etc. Defendant admitted that the contract was made in the state of North Carolina as alleged, and that by reason thereof the plaintiff was required to perform duties in Birmingham, Ala. Defendant

denied the other allegations and alleged contributory negligence. The following issues were submitted to the jury: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans. Yes. (2) Did the plaintiff contribute to his own injury? Ans. No. (3) What damages did plaintiff sustain by the injury? Ans. \$1,999.99." Judgment accordingly. Defendant appealed.

W. B. Rodman and G. F. Bason, for appellant. Jas. A. Lockhart, for appellee.

CONNOR, J. (after stating the facts). His honor instructed the jury that it was the duty of the defendant to provide the plaintiff with a reasonably safe place to work, and to exercise reasonable care in keeping the platform in a safe condition, and if they found from the evidence that the platform was in a dangerous and unsafe condition, and that this caused the injury to the plaintiff, they would answer the first issue "Yes." He further charged the jury that if the truck was negligently run into a hole, and thereby the plaintiff was injured, they would answer the first issue "Yes." That they would answer the second issue "No" unless they found from the evidence that the plaintiff saw that the truck would be run into a hole and could reasonably see that the piano would likely fall, and after such knowledge neglected to remove from a place of danger; to all of which the defendant excepted.

The defendant asked certain instructions which were refused, his honor charging in lieu thereof: "If you shall be satisfied from the greater weight of the evidence, that the plaintiff knew the condition of the platform, the place where the truck wheel ran into the hole, and saw the truck approaching in such a way that the wheel would run into the hole, and could have reasonably anticipated that by the wheels running into the hole the piano would fall, it was his duty to step out of the way, and if he had time to do so, after he saw the danger, and failed to do so, he would be guilty of negligence; and if you find from the evidence these facts, and if the injury was received in consequence thereof, you will answer the second issue 'Yes.'"

The defendant insists that, in the absence of any allegation or evidence that the fellow servant law (Revisal 1905, § 2646) was in force in Alabama, the state in which the injury occurred, the common law is presumed to control; that by the common law the plaintiff assumed the risk of injury incident to his employment, including such as are caused by the negligence of a fellow servant. For the purpose of presenting this contention it submitted appropriate prayers which were refused. It will be observed that the cause of action is based upon a contract of service and breach of a contractual duty. The exact question is presented and decided by this court in *Williams v. Southern Ry. Co.*,

128 N. C. 286, 38 S. E. 898. The action was for injuries sustained in Tennessee by an employé, the same objection was made to a recovery, Furches, J., said: "We do not see that the fact that the injury occurred in Tennessee has any bearing on the case. The plaintiff's action is not in tort *ex delicto* but *ex contractu* for breach of contract. For although tort is alleged, it is based on contract." We have recognized the well-settled principle that "the validity and interpretation of a contract as well as liability thereunder is to be determined by the law of the place in which the contract is made." While the authorities are not uniform in the application of this principle to contracts of this character, we find the conclusion of the discussion thus stated in Wharton's *Conflict of Laws* (3d Ed.) 478b: "When the action is expressly based upon a breach of contract, it seems to be assumed that the law of the place where the contract is made, rather than that of the place where the injury occurs, governs. So, undoubtedly, any defense based upon the express terms of the contract is governed by the *lex loci contractus*, even though the action be *ex delicto*." By the contract of service made in North Carolina the provisions of the fellow servant act must be read into the contract, and, there being no evidence that the service was to be performed altogether in another state, it would seem that the relative rights and liabilities of the parties are fixed by the terms of the contract. It would seem, however, from the record that the question is not presented. The negligence alleged is in the failure to provide a safe and suitable platform upon which plaintiff was to discharge his duties, and this question, together with the plaintiff's knowledge of the conditions and conduct in respect to the use of it on the occasion of his injury, were correctly explained to the jury.

Upon an examination of the entire record we find no error in the charge given or the refusal to give the instructions asked. It must therefore be declared that there is no error.

(141 N. C. 43)

W. F. MAIN CO. v. GRIFFIN-BYNUM CO.
(Supreme Court of North Carolina. April 3, 1906.)

1. SALES—CONTRACT—WARRANTY—CONSTRUCTION—CONDITIONS.

Where a written contract for the sale of jewelry provided that defendant waived all right to claim that the goods did not comply with the sample or were not according to order, unless he complied with the terms of the warranty and exchange provision in the contract, by which plaintiff was entitled to notice of any alleged defect in the goods as to quality, and to be given an opportunity to remedy any deficiency before defendant could repudiate the entire contract, the giving of such notice was a condition precedent to defendant's right to recover on a counterclaim for breach of warranty of quality in an action for the price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1227, 1228.]

2. SAME—WAIVER.

Where a written contract for the sale of jewelry required notice of any alleged defects in the quality of the goods and an opportunity to remedy the same before defendant should be entitled to repudiate the contract, and on the delivery of the goods defendant notified plaintiff "goods just received and found all O. K.," and retained possession thereof for more than a year without complaint, any breach of warranty of quality was waived.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 818, 821.]

Appeal from Superior Court, Moore County; Ferguson, Judge.

Action by the W. F. Main Company against the Griffin-Bynum Company on a written contract for the sale of certain merchandise. From a judgment in favor of defendant, plaintiff appeals. Reversed.

U. L. Spence, for appellant. Seawell & McIver, for appellee.

BROWN, J. The jewelry was sold to defendant under the terms of a written contract, the execution of which was proven and the contract was introduced in evidence. According to the terms of this contract the defendant waived all right to claim that the goods did not come up to sample, or were not according to order, unless defendant complied with the terms of the warranty and exchange in the contract. According to the terms of this obligation the plaintiff was entitled to notice of any alleged defect in the goods as to quality, and to be given an opportunity to remedy any deficiency before defendant could repudiate the entire contract. This is a condition precedent to any action or counterclaim upon the part of the defendant looking to a recovery for a breach of the warranty upon its part. *Shepherd v. Larkin*, 79 Mo. 264. The contract of sale may fix conditions precedent to the existence of any rights under the warranty, if they are reasonable. A failure by the buyer to comply with such conditions is fatal to his remedy for a breach of the warranty, whether he institutes an action himself or sets up the breach in defense to an action for the purchase money. This is substantially what is held by the authorities. 30 Am. & Eng. Enc. (2d Ed.) p. 199, and cases cited; *Nichols v. Wyman*, 71 Iowa, 160, 32 N. W. 258; *Furneaux v. Esterly*, 36 Kan. 539, 13 Pac. 824. Not only does the answer fail to set up any such defense, but defendant's own evidence shows that no complaint whatever of any defects in the jewelry was ever made by defendant from the date of the receipt of it to the time of the trial. On the contrary, on June 16, 1902, defendant notified plaintiff that "goods just received and found all O. K." Independent of any contract the law would not, after such notice to plaintiff, permit defendants to keep the jewelry in possession for more than a year without further complaint to plaintiff as to quality or quantity, and then defend upon the ground that the jewelry did not comply with the contract. In admitting evidence of

a breach of warranty as to the quality of a few of the articles sold, over the several objections and exceptions of the plaintiff, his honor erred, as it plainly appears that defendant made no such complaint, and did not pretend to have complied with the terms of the contract relating to warranty and exchange, and no such defense is pleaded in the answer. The real and only defense set up in the answer is to the effect that the defendants were induced to enter into the contract by the false and fraudulent representations of plaintiff's agent. Yet the record discloses that no issue was submitted to the jury embodying such defense, and no evidence whatever appears in the record tending to support it. The plaintiff specifically excepted to the submission of the seventh issue. We think this exception also well taken. The issue is in these words, "What sum, if any, is due the defendants by reason of defendants' counterclaim?" This issue presupposes that the allegations of the "further defense" pleaded in the answer have been established. These allegations are not pleaded as a counterclaim but more properly as a "defense." If the defendant should be able to make good such allegations, then it could recover as a counterclaim such damages as it has sustained, which in the last paragraph of the answer are set out. But it is plain that before he can recover the \$13 damages he must prove the facts alleged in the first and second paragraphs of his further defense.

We do not think the case was tried upon the issue raised by the pleadings.

New trial.

HOKE, J., concurs in result.

(41 N. C. 2)

CAMERON et al. v. HICKS et al.

(Supreme Court of North Carolina. April 3, 1906.)

1. TRUSTS—CONVEYANCE OF TRUST PROPERTY—CONSENT OF TRUSTEE—NECESSITY FOR CONVEYANCE BY BENEFICIARY OR CESTUI QUE TRUST.

A deed to a trustee and his heirs was for the sole and separate use of a married woman during her life, and for her heirs after her death in fee, and it was provided that if, during the life of the woman, she should desire any or all of the property conveyed in fee or otherwise, that the trustee should convey it according to her wishes, as if she were a feme sole, though her husband might be living. The trustee died leaving minor children, and subsequently the woman and her husband executed a deed for the land. Held that, under the terms of the trust deed, the deed of the husband and wife was a nullity.

2. ADVERSE POSSESSION—PARTIES PRECLUDED—CESTUI QUE TRUST.

Where a right of entry is barred and right of action lost by a trustee through an adverse occupation, the cestui que trust is also concluded.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 20.]

3. INFANTS—ADVERSE POSSESSION—OPERATION AGAINST.

Where the legal title to land held in trust was in the infant heirs of the trustee, lim-

tations could not run against the heirs or the cestui que trust during the infancy.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 25.]

4. JOINT TENANCY—HEIRS OF TRUSTEE.

On the death of a trustee having a legal title to land, the title passes to the heirs as joint tenants.

5. ADVERSE POSSESSION—JOINT TENANTS.

Adverse possession, sufficient as against one tenant, is sufficient against them all.

Appeal from Superior Court, Wayne County; Ward, Judge.

Action by D. A. Cameron and others against E. F. Hicks and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Edmund Coor, on the 3d day of May, 1870, executed to E. R. Cox, trustee and his heirs a deed conveying the land in controversy "to the sole and separate use of Amanda M. Cameron, wife of John Cameron, during her life, and after her death to convey the same to such children and their heirs as she, the said Amanda, may leave her surviving, and to the issue and their heirs of such as may be dead, such issue to represent their ancestors and take such part as he or she would have taken if living, and if during the life of the said Amanda she should desire any or all of the said property conveyed in fee or otherwise to convey the same according to her wishes, she joining in said conveyance as if she were a feme sole, though her husband be living." Said deed was duly recorded in the office of the register of deeds of Wayne county. The said E. R. Cox, trustee, died June 18, 1875, leaving surviving certain children and grandchildren, all of whom were either infants or married women and so remained to the beginning of this action, August 11, 1902, except one daughter, Florence Virginia Cox, who became 21 years of age October 24, 1880, and was married to T. J. Newsome, December 9, 1880. On October 28, 1880, John Cameron and his wife, Amanda Cameron, executed a deed for the land in controversy to the defendant E. F. Hicks, sufficient in form to convey said lands in fee simple with full covenants of warranty. There was evidence tending to show that the said Hicks went into possession of said land, described in said deed, immediately after its execution, and that he and the other defendants claiming under him have remained in possession until the beginning of this action. The deed from Cameron and wife to Hicks recited a consideration of \$600. A. F. Cameron died June, 1881. His widow Amanda died March, 1901, leaving surviving six children, all of whom, with the exception of A. F. Cameron and J. D. Cameron, the last of whom died since the beginning of this action, are parties plaintiff herein, together with the children of J. D. Cameron. That all the living children and the children of such as are dead of E. R. Cox, trustee, are parties defendant here-

in, together with the grantees of E. F. Hicks, to whom portions of the said lands were conveyed as aforesaid. The court charged the jury that if they believed the evidence, they should answer the issues for the plaintiffs, to wit: "That they were each entitled to one-sixth undivided interest of the land in controversy." Defendants excepted, and assigned the said instruction as error. From a judgment upon the verdict, defendants appealed.

W. C. Munroe, for appellants. Dortch & Barham, W. S. O'B. Robinson, and Aycock & Daniels, for appellees.

CONNOR, J. (after stating the case). The record, with the exhaustive and well-considered briefs in this appeal, clearly present the questions upon which the rights of the parties depend.

The plaintiffs suggest that it is not necessary for them to combat the principle decided in *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18. They say that the cases may be distinguished. In *Kirby's Case* the declaration of the trust was for the separate use of the married woman and her heirs, whereas here it is for "the sole and separate use of Mrs. Cameron for, and during her natural life, and at her death to convey to her children, then living, and the issue of such as were dead." This language, it is insisted, brings the case directly within the principle announced in *Swann v. Myers*, 75 N. C. 585. Chief Justice Pearson was clearly of the opinion, in that case, that "a married woman owning an estate for life, in a trust estate, has the *jus disponendi*, unless there be a restraint upon the power of alienation." This, he says, "is laid down in all of the books." No authorities are cited. The trust in that case was for "the separate use and behalf" of Mrs. Swann for her life and then over. It is difficult to reconcile this language with that of *Manly, J.*, in *Knox v. Jordan*, 58 N. C. 175. In that case the English rule is discussed, the cases decided by this court reviewed, resulting in the conclusion that the feme covert may alien or incumber her separate estate in execution of powers conferred upon her by the terms of the deed, and if not restricted by the terms may, under the authority of *Frazier v. Brownlow*, 38 N. C. 237, 42 Am. Dec. 165, charge the income or profits, etc. The question in regard to the wife's power to deal with her separate estate was before the court in *Withers v. Sparrow*, 66 N. C. 129, where it was held that she could, "with the assent of the trustee," charge it. Light is thrown upon the language of Pearson, C. J., in *Swann v. Myers* by referring to his dissenting opinion in *Harris v. Harris*, 42 N. C. 120, 53 Am. Dec. 393, wherein it was held that a feme covert entitled to a separate personal estate, in the absence of any restraint in the deed, could dispose of it as a feme sole, whether there was or was not a trustee. In that case a slave had been

conveyed to a trustee for the separate use of a married woman during her life, with remainder over, etc. The court, by Ruffin, C. J., held that, in the absence of any restraint upon her right of alienation, she could sell the slave. The decision is put upon the English authorities, citing, also, *Newlin v. Freeman*, 39 N. C. 312, and *Dick v. Pitchford*, 21 N. C. 480. Judge Pearson vigorously dissented from the doctrine of "implied power" in the wife, etc. He says: "As the feme had only a separate use for life in a negro woman * * * of no annual profit, and as, for her maintenance, she had a right to dispose of the profits, and a life estate is only, in fact, a right to the profits, I should have been willing to put this case upon the ground that, in disposing of her life estate, she disposed of the profits only." He sets forth at length his dissent from the doctrine that, in the absence of any express power to sell the separate estate, the wife may do so as a feme sole. Ruffin, J., in *Hardy v. Holly*, 84 N. C. 681, referring to the question of division of opinion in *Harris v. Harris*, says: "When the question next arose in the case of *Knox v. Jordan*, the court, as then constituted, without division, and without any sort of reservation, repudiated the doctrine of the English courts, and adopted that which prevailed in most of the courts of the states; and whether this was wisely done or not, that case has been too often approved and doubtless too often acted upon in matters intimately connected with the interest and comfort of families to admit of its correctness being now called into question." Although the learned judge writing the opinion gave to the question, and the authorities, as was his custom, a most careful investigation, the case of *Swann v. Myers* is not cited, nor do we find that the learned counsel who argued the case for the plaintiff, in their exhaustive brief called it to the attention of the court. In *Hardy v. Holly*, supra, a mode was prescribed in the deed for the disposition of the property.

We have carefully and anxiously examined the authorities, and are unable to find any recognition in those courts, which reject the English doctrine, of a distinction between the power of a feme covert to convey her "equitable life estate" and her equitable estate in fee. Prof. Pomeroy says that the American courts, in regard to this question, may be divided into two classes. "In the first, the courts have adopted the principle of the English doctrine. They regard the wife's *jus disponendi* as resulting from the fact of an equitable estate over which she is, partially at least, a feme sole, and not as resulting from the permissive provisions of the instrument creating such separate estate. It follows, therefore, when the instrument creating the separate estate imposes no express restrictions, that the wife has a general power of disposing of or charging it, even though no such authority is, in terms,

conferred. This power of disposition, however, does not generally extend to the corpus of the land for her separate use in fee; it is confined to personal property, the rents and profits of the land, and perhaps to her life estate in lands. In the states composing the second class, the courts have widely departed from the principle of the English doctrine. They regard the wife's power over her separate estate as resulting, not from the existence of an equitable separate estate itself, but from the permissive provisions of the instrument creating such estate. They have accordingly adopted the general rule that a married woman has only those powers of disposing of or charging her separate property which are expressly, or by necessary implication, conferred upon her by the instrument conveying the property or creating the trust, and in determining the extent of these powers, the terms of the instrument are to be strictly construed." 3 Pom. Eq. (3d Ed.) 1105; *Bispham*, Eq. § 103. Both these writers place North Carolina in the second class. The dissenting opinion of Judge Pearson in *Harris v. Harris*, supra, strongly maintains this doctrine. As we have seen, this dissenting opinion was adopted in *Knox v. Jordan*, and it is upon that decision the doctrine of *Hardy v. Holly* is based. In none of the cases following *Hardy v. Holly* is there any reference to *Swann v. Myers* or suggestion that, as to the equitable life estate, the feme covert may convey without the intervention of her trustee, when the deed requires his co-operation. It is not improbable that, in writing the opinion in *Swann v. Myers*, the Chief Justice had in mind the English doctrine by which the feme covert was permitted to charge the anticipated income, when not restrained, from her separate equitable estate, which he construes in his dissenting opinion in *Harris v. Harris* as enabling her to dispose of the entire life estate. However it may be, it would seem clear that, in this state, the distinction cannot be sustained. It will be observed that when the trust is declared "for the sole and separate use," or words equivalent thereto, of a married woman, the courts have uniformly held that, because of the presumed intention of the maker of the instrument, the trust is active and the statute does not execute the use. When, as in *McKenzie v. Sumner*, 114 N. C. 425, 19 S. E. 875, there is a simple declaration of a trust, as pointed out by *Shepherd*, C. J., "there is no reason why the legal title is not vested in the feme covert by the statute of uses." Whether the rule should have been modified, by reason of our constitutional provision, in regard to the status of married women, as suggested in *Perkins v. Brinkley*, 133 N. C. 154, 45 S. E. 541, it is useless to discuss. However this may be, the trust declared by the deed from *Coor* to *Cox* is active, and the necessity for the separation of the legal from the equitable estate, manifest. There were contingent remainders to be preserved and powers to be

executed. This question is discussed and so decided, in accordance with all of the authorities, in *Swann v. Myers*, supra. It may be that the correct doctrine is to be found by reading the language of *Ruffin, J.*, in *Hardy v. Holly*, supra, in the light of what is said by *Smith, C. J.*, in *Norris v. Luther*, 101 N. C. 196, 8 S. E. 95, and *Clayton v. Rose*, 87 N. C. 106. This would seem to lead to the conclusion that, in the absence of any permissive provisions in the deed, the wife could not convey her equitable separate estate, either for life or in fee, as a feme sole, but could do so in the manner prescribed for the conveyance of her statutory separate estate, by joining with her husband and privy examination. However this may be, we are not called upon at this time to enter upon this debatable ground.

There is another view of this case which we think conclusive upon the power of Mrs. Cameron to convey any interest in the land. After declaring the trusts, the grantor directs the trustee "if during the life of the said Amanda she should desire any or all of said property conveyed in fee or otherwise, to convey the same according to her wishes, she joining in said conveyance as if she were a feme sole, though her husband may be living." In *Swann v. Myers*, supra, the will gave to the trustees the power, and directed them, "in the soundness of their discretion," to "join with the cestuis que trust in making any conveyance of the above property." Judge Pearson, writing for the court, construed this language to be a restraint upon the power of alienation as to the fee. This ruling, so far as it refers to the fee, is in harmony with all of our decisions and those of other states, which hold that when a mode of alienation is prescribed in the instrument, it must be followed. *Hardy v. Holly*, and *Norris v. Luther*, supra; *Towles v. Fisher*, 77 N. C. 437; *Mayo v. Farrar*, 112 N. C. 66, 16 S. E. 910; *Monroe v. Trenholm*, 112 N. C. 634, 17 S. E. 439. This is the only logical conclusion from the premise stated in the cases in this court, at which it is possible to arrive. It will be observed that, in our case, the mode is expressly prescribed and applies to conveyances "in fee or otherwise." We therefore do not depart from the principle announced in *Swann v. Myers* in that respect, in holding that there is to be found in the deed of settlement an express mode prescribed for disposing of either the life estate or the fee. That such was the intention of the maker of the deed is, we think, seen in the fact that the husband is not required to join in the conveyance, but the wife is to act in that respect as if she were "a feme sole, though her husband may be living." It was the manifest purpose of Mr. Coor to remove Mrs. Cameron, in respect to the sale of this property, from both the influence and protection of her husband and vest in the trustee the sole power to convey "in fee or otherwise, according to

her wishes, she joining in said conveyance." To permit her and her husband to convey the land thus secured to her, without the intervention of the trustee, would be doing violence to the express language and manifest intention of the maker of the deed of settlement. If the land had been conveyed directly to Mrs. Cameron, the Constitution imposed upon her power of alienation the necessity for the assent of her husband. The deed under which she acquires her equitable estate—the right to the sole and separate use of the land—substitutes the trustee for the husband in respect to the conveyance. *Pippen v. Wesson*, 74 N. C. 437; *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694.

It is well settled that, upon the death of the trustee, the legal title descended to his heirs with the trust impressed upon it. *Clayton v. Rose*, supra; *Perry on Trusts*, 341. It seems equally well settled that if the trustee, being clothed with a power as in this case of conveying the legal title by direction and appointment of the cestuis que trust, dies before its execution, the power is gone and cannot be executed. *Sugden on Powers*, 319. In *Barber v. Cary*, 11 N. Y. 397, it is said: "But the power could only be executed on the precise conditions prescribed by the terms of its creation, viz., by and with the consent of H. The first question is whether the death of H., which occurred before the execution of the power, was fatal to the conveyance. The rule of law is settled that when consent of third persons is required to the execution of the power, that, like every other condition, must be strictly complied with. If the person whose consent is necessary die before the execution of the power and without having assented, the power is gone, although his death was the act of God." 22 Am. & Eng. Enc. 1122. It would seem, therefore, that, upon the death of the trustee, the condition upon which Mrs. Cameron could execute the power to direct the conveyance was gone. It may be that as no discretion was vested in the trustee but that he was directed to convey "in fee or otherwise according to her wishes," Mrs. Cameron may have had, either by the clerk under the statute or by a civil action in the nature of a bill in equity, another trustee appointed, with power to convey as she directed. This was not done, and her deed cannot operate as the exercise of her power of appointment. *Towles v. Fisher*, supra.

The suggestion that because the heirs of Mr. Cox were infants the legal estate did not descend to them charged with the trusts, is met by what is said in *Clayton v. Rose*, supra: "After the death of the original trustee, and when the legal estate had descended, clothed with the trust to his infant children," etc. It is suggested that upon the death of Mr. Cameron the statute of uses operated by "legal chemistry" or "parliamentary magic," to execute the use and

unite the legal and equitable estates in Mrs. Cameron for life, leaving to the trustee or his heirs the remainder in fee for the purpose of preserving the contingent remainders, and conveying to those who might be entitled upon Mrs. Cameron's death. It is well settled that when there is a conveyance to trustees for the sole and separate use of a married woman and her heirs, and she becomes discoverd, the necessity for preserving the separate estate being at an end, the statute executes the use, and she becomes the absolute owner. *Monroe v. Trenholm*, supra; *Stacy v. Rice*, 27 Pa. 75, 67 Am. Dec. 447; *Perry on Trusts*, 653. It is equally true that where an estate is conveyed to trustees to preserve contingent remainders, the statute will not execute the use. The legal title must remain in the trustee, because, as in this record, no one in existence could call for the legal title. It was uncertain who would be entitled upon the death of Mrs. Cameron, and this uncertainty continued until the moment of her death. *Latham v. Lumber Co.*, 139 N. C. 9, 51 S. E. 780. In *Battle v. Petway*, 27 N. C. 576, 44 Am. Dec. 59, *Ruffin, C. J.*, says: "Beyond doubt, equity would not compel nor allow the trustee to convey the legal estate to the tenant for life, but require him to retain it for the security of the remainderman. And so, in case of a contingent limitation over, it would be the duty of the trustee to retain the title and control over the possession of the trust property, and the court of equity will not take it from him." We therefore conclude that the trust declared in the deed from Coor to Cox was active, and that the legal title upon the trusts declared vested in Cox in fee; that the mode of conveying or appointing the legal title, prescribed in the deed, applied to both the life estate and the fee; and that Mrs. Cameron was restricted to that mode, and could not otherwise divest herself of her equitable estate for life or appoint the fee.

The deed executed by Mrs. Cameron and her husband to Hicks was therefore a nullity: conveyed no estate, either legal or equitable. Hicks' entrance upon the land was therefore an ouster of the trustee and put the statute of limitations in operation. At the expiration of the statutory period his possession would have ripened into a perfect title, both as against Cox, if living, and his cestuis que trust and her infant children. This rule of law is too well established and has been too often enforced with its variant results to be now called into question. *Smith, C. J.*, in *Clayton v. Rose*, supra, in applying the principle, where it was sought to bar the cestuis que trust, said: "Nor do we think the defendants can protect themselves under a seven years' adverse possession with color of title. It is conceded that when the right of entry is barred and the right of action lost by the trustee, or person holding the legal estate, through an adverse occupation, the

cestuis que trust is also concluded from asserting claim to the land. And the correlative must be accepted that when the trustee is not barred, neither can the cestuis que trust be, since as against strangers they are identified in interest. The alleged hostile possession by the defendants began after the death of the original trustee, and when the legal estate had descended clothed with the trust to his infant children, and this disability prevents the statute from starting to their prejudice." In some cases it operates to destroy, and in others to preserve, title. Courts may not shrink from enforcing it and thereby introduce confusion on account of hard cases. *Kirkman v. Holland*, 139 N. C. 185, 51 S. E. 856; *King v. Rhew*, 108 N. C. 696, 13 S. E. 174, 23 Am. St. Rep. 78. The doctrine is clearly stated and treated as settled in the opinion from which the plaintiffs seek safety, in *Swann v. Myers*, supra.

The resourceful and learned counsel for plaintiffs say that the rule does not militate against their contention in this case, because in *King v. Rhew* the wife was not, as construed by this court, a party to the deed, while here she was a party, executed it, and submitted to a private examination as provided by the statute. The counsel call to our attention the language of the court in that case: "The deed then can only be regarded as that of the husband, and, as he had no interest which he could have conveyed, the trustee could have maintained an action at any time against the defendants for the possession of the property." The difficulty in the argument, based upon this language, is found in the fact that a deed made by a married woman otherwise than as she is empowered by the law is as much a nullity as if she had not signed at all, or as if she had signed a piece of blank paper. *Askew v. Daniel*, 40 N. C. 321. *Ruffin, J.*, in *Scott v. Battle*, supra, speaking of the deed of a married woman without compliance with the provisions of the statute, says: "It prescribes the terms, and without their strict observance the act stands as it would at common law—absolutely null and void." In *Green v. Branton*, 16 N. C. 500, it is said that her deed, not executed as the law requires, is an absolute nullity under which no equity whatever can be set up. *Towles v. Fisher*, 77 N. C. 438; *Jones v. Cohen*, 82 N. C. 75. If the trustee had sued Hicks for the possession, it is manifest that the deed of Mrs. Cameron could not have been used to bar his action. This is the test by which to ascertain the character of Hicks' possession as against the trustee and, thus tested, we are of the opinion that such possession was adverse to the trustee, and the statute of limitations was put into operation against the trustee. The reasoning of the court in *Swann v. Myers*, as to the effect of the deed made by Mrs. Swann upon the right of the trustee to recover possession, is based upon the theory that her deed conveyed the equi-

table life estate and is therefore not applicable here. The plaintiffs say that Cox having died in 1875, the legal title descended to his heirs who were at that time infants and were unable to execute the trusts, convey the legal estate, or protect the possession. This is true, and, as said in *Clayton v. Rose*, supra, the statute did not run against them; their disability inured to the benefit of the cestui que trust and protected their estates against the adverse possession of Hicks. The rights of Mrs. Cameron and her children were absolutely secured by the infancy of the trustees, and no act, either of themselves or persons claiming under them, could destroy or affect their estate. Conceding that the power to convey the estate was suspended by the death of Cox during the minority of his heirs and that no ouster under color or otherwise could ripen into title against them, the plaintiffs have no cause to complain of the law which secured their estate from harm by acts of themselves or strangers.

We are thus brought to a consideration of the last question presented by the exceptions. Are the trustee's heirs at law of Cox barred by their right of entry? At the date of Hicks' entry, October 28, 1880, they were all, except Florence, under disability, and have so continued until the date of the summons August 11, 1902. Florence reached her majority October 24, 1880, and married December 9, 1880. Hence, for 1 month and 11 days she was under no disability. The statute ran against her, and it is elementary learning that when the statute begins to run no subsequent disability interferes with it. Hicks and those under him have, therefore, been in the adverse possession 21 years and a few months and prior to the beginning of this action. If the heirs of Cox, trustee, held the legal estate as tenants in common, they would recover in respect to their separate interests. The defendants insist that they held as joint tenants and not as tenants in common. This is not controverted by plaintiff, and seems to be sustained by the authorities. "Trust property is generally limited to trustees as joint tenants. * * * Therefore, upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on to the last survivor. If he has made no disposition of the estate by will or otherwise, it devolves upon his heirs, if real estate, and upon his executors or administrators, if it is personal estate." *Perry on Trusts*, 343; 17 Am. & Eng. Enc. 639; Revised 1905, § 1580. It seems to be well settled that joint tenants must sue jointly, differing in that respect from tenants in common. Mr. Freeman says: "Whenever the title of the co-tenants, as in the case of joint tenancy and coparceny, is joint, the action must also be joint; and whenever, as in tenancy in common, such tenant is deemed to possess a separate and distinct estate, the

remedy of each must be separately and distinctly pursued. Joint tenants being seized per my et per tout and deriving but one and the same title, must jointly implead and be impleaded. If 20 joint tenants be, and they be disseized, they shall have, in all their names, but one assize because they have but one joint title." *Co-tenancy*, 329. To the same effect is *Sedgwick & Wait, Trials*, etc., § 302. It was at one time held in this state that two tenants in common could not join in one demise, because there was no unity of title—one might recover and the other fail. It was afterwards held, for the reason set out by *Ruffin, J.*, in *Hoyle v. Stowe*, 13 N. C. 318, that they could join in one demise. He says: "It is the universal rule that the title must be truly stated in the declaration. A joint demise, therefore, can only be supported by showing a title in each to demise the whole. If one of the lessors has no title, the plaintiff must fail." He says that this is "common learning." An examination of the opinion shows the ground upon which tenants in common are permitted to make a joint demise and recover in respect to their interests. *Alfred v. Smith*, 185 N. C. 443, 47 S. E. 597, 65 L. R. A. 924. The difference is in this: Joint tenants must join in one demise because of the essential unities; tenants in common may join, or, if they prefer, may sue separately because there is no unity of title. It would seem to follow that joint tenants must recover in respect to their title, and, if they fail in that, they cannot recover at all. This is the doctrine of this court. *Riden v. Frison*, 7 N. C. 577, was an action by three joint owners of a slave. Two of the plaintiffs were barred, the third under disabilities. *Taylor, C. J.*, said: "Whenever the statute of limitations is a bar to the recovery of one of the parties, in such action, it operates against the whole, because the disability of one does not save the rights of the others." The case was approved in *McRee v. Alexander*, 12 N. C. 321, *Henderson, J.*, saying: "In a joint action brought by several, when the defendant avails himself of the bar given to such action by the statute of limitations, all the plaintiffs must bring themselves within some of the savings of the statute, otherwise the bar is not avoided. The decisions on this point are uniform, as far as I know, and I shall not now inquire whether they are founded on the technical reason that the action being joint all or none of the plaintiffs must recover, otherwise the judgment does not pursue the writ and declaration, or whether on the very words of the statute." The learned justice severely criticises the rule. In that case the lessors of the plaintiffs were tenants in common, and the rule so justly criticised, as applied to tenants in common, no longer obtains, although a joint demise be laid, or, under our Code practice, the several interests be shown, either in the complaint or the evidence, the plaintiffs recover accordingly. This cannot

be so when the plaintiffs are joint tenants; they must all recover or none can do so. *Montgomery v. Wynns*, 20 N. C. 667. In *Weare v. Burge*, 32 N. C. 169, the same rule is recognized. The statute (Revisal 1903, § 374) changes the rule in regard to personality. See *Clark's Code*, § 173. It does not affect the law as to real property. "Expressio unius est exclusio alterius." When we go beyond our own reports we find the same principle enforced. *Marstella v. McLean*, 7 Cranch, 156, 3 L. Ed. 300, was an action of trespass. Judge Story held, for the court, that if one of the plaintiffs was barred all were. That if they were compelled to join in the action, that result necessarily followed. Vol. 1, *Rose's Notes*, 156. In *Hardeman v. Sims*, 3 Ala. 747, it is said: "It was contended on the argument that the exception in the statute in favor of infants would take the case out of the statute, notwithstanding one of the complainants was barred by the statute. We understand it to be the settled rule that when a joint right of action accrues to several, the right must exist in all at the time of the action brought. When the statute begins to run as to one of several parties to a joint action, it runs as to all." The law was so ruled in *Perry v. Jackson*, 4 Term Rep. 516. It is true that the contrary doctrine is laid down in Vol. 19, *Am. & Eng. Enc.* 182. It will be found that the North Carolina cases cited do not sustain the text as construed by plaintiffs' counsel. In *Caldwell v. Black*, 27 N. C. 463, the plaintiffs were tenants in common, and while, under the rule prevailing in this state, they might join in one action, yet when thus joined they recovered in accordance with their several rights. In *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4, the plaintiffs were tenants in common.

We have given to this subject a most careful consideration, examining the authorities and decided cases from other courts. They are not uniform. In several states it is held that where there is a joint action by tenants in common, if one is barred, the action fails as to all. The true rule would seem to be that, except where the necessity for all parties in interest to join "is founded upon the nature of the interest in the particular property," the plaintiffs recover in accordance with their rights as developed upon the trial; in other cases they must all show a right to recover when the action is brought. Statutes have been enacted in many of the states, permitting any one or more of joint tenants and tenants in common to sue. *Pomeroy*, *Code Rem.* 137, note; 11 *Enc. Pl. & Pr.* 771. The possession of Hicks and those defendants claiming under him has continued for more than 21 years, during all of which time the statute has been in operation against Florence Cox, now Mrs. Newsome. She is clearly barred, and the conclusion must follow that her co-trustees are also barred. We think the statute well pleaded.

The claim of both plaintiff and defendant is based upon what may be termed "technical rules of the law." If we should adopt the plaintiffs' contention that, in respect to this property, Mrs. Cameron should be treated as a feme sole, there would seem to be no very good reason why we should not find in her deed to Hicks a clear intention to execute the power conferred upon her to convey in fee, and aid its defective execution by adjudging the holders of the legal title trustees for the benefit of the defendants, who appear to be purchasers for value. The plaintiffs were objects of Mr. Coor's bounty, contingent upon Mrs. Cameron's failure to exercise the power of appointment. There is much force in the facts shown by the defendants to sustain an equitable estoppel upon the plaintiffs.

The case is fraught with perplexities. Many of the principles of the common law regarding titles to real property are difficult to sustain upon the "reason of the thing." We find wisdom in the language of Earle, J., in *Berties v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361. To the suggestion that the reason upon which a common-law rule was founded had ceased to exist, he said: "It is impossible now to determine how the rule of the remote past obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist or is not discernible, and yet on that account courts are not authorized to disregard them. They must remain until the Legislature abrogates or changes them, like statutes founded upon no reason, or reasons that have ceased to operate." When men undertake to place their property out of the usual and fixed channels of alienation and descent, it frequently happens that their best considered plans fail to be accomplished, or, if accomplished, bring about the results not anticipated. There has been no more prolific source of litigation, with difficult questions to be solved, than the creation of trusts for the benefit of married women, and attempting to control the passing of the property into the possession of posterity.

To the end that the rights of the parties may be adjudged upon the principles herein laid down, there must be a new trial.

(141 N. C. 809)

STATE v. MCWHIRTER.

(Supreme Court of North Carolina. April 3, 1906.)

1. CRIMINAL LAW—APPEAL—TRIAL—THEORY.
A criminal case on appeal must be regarded in the light of the theory on which it was tried in the court below.

[Ed. Note.—For cases in point, see vol. 15, *Cent. Dig. Criminal Law*, § 2091.]

2. INDICTMENT—ALLEGATIONS AND PROOF—VARIANCE.

In a criminal prosecution, the allegation and proof must correspond.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 536.]

3. FALSE PRETENSES—INDICTMENT—VARIANCE.

Where, in a criminal action, under an indictment charging defendant with having falsely represented to prosecutors that he was the owner of two mules and that there was no lien on them, whereas in fact there was a lien, and that by such false pretenses he obtained from prosecutors one note and mortgage of the value of \$265, proof of a surrender by prosecutors to defendant of a note for \$315, on reduction of which the note referred to in the indictment was given by defendant and a mortgage securing the same, did not sustain the charge, and a substantial and fatal variance was shown.

4. CRIMINAL LAW—NEW TRIAL.

In a criminal prosecution, the submission of the case to the jury without any corresponding evidence to establish the special charge of the bill, entitles the defendant to a new trial.

Appeal from Superior Court, Union County; Ferguson, Judge.

G. P. McWhirter was convicted of obtaining property under false pretenses, and appeals. New trial.

Stewart & McRae, R. L. Stevens, and Tillett & Guthrie, for appellant. Robert D. Gilmer, Atty. Gen., for the State.

WALKER, J. The defendant, being indebted to the prosecutors, executed to them on November 23, 1903, a note for \$315, and also a paper writing in form a crop lien to secure advancements and a chattel mortgage to secure a debt, but no description of the note for \$315 is inserted in this paper writing, which is called in the case "Exhibit A." The defendant, in January, 1904, paid \$50 on the \$315 note, and executed a new note for \$265 for the balance, and a mortgage to secure its payment, which were given in lieu of the \$315 note, and were a payment and satisfaction of it, and a substitution for it. The case was tried upon the theory in the court below that such was the nature and legal effect of the transaction, and we must so regard it here. *Allen v. Railroad*, 119 N. C. 710, 25 S. E. 787.

The defendant is charged in the indictment with having falsely represented to the prosecutors that he was the owner of two mules, and that there was no lien on them, whereas in fact there was a lien on them at the time, and with having by said false pretense obtained from the prosecutors "one note and mortgage, of the value of \$265, executed 28th day of January, 1904, of the goods and chattels of the said E. M. Griffin & Co." (the prosecutors). All the evidence tended to show that the prosecutors did not surrender the note and mortgage for \$265, nor did the defendant obtain the same as alleged in the indictment, but that he did surrender the note for \$315, and the instrument known as "Exhibit A." The defendant requested the court to charge the jury that there was a variance between

the allegation of the bill and the proof, and that they should acquit the defendant. This request was refused, and the defendant excepted. There was a verdict and judgment, from which the defendant appealed.

We do not perceive why the defendant was not entitled to the instruction asked for in his prayer. The prosecutor testified that the \$265 note and mortgage had not been delivered to the defendant, but that they were then in his possession. This was contrary to the allegation of the bill. Proof of the surrender of the \$315 note and Exhibit A surely could not have the effect of sustaining the charge. So far as the latter is concerned, there was a clear and substantial variance, and the allegation was not only left without proof to support it, but it was disproved by the prosecutor's own testimony. The allegation and the proof must correspond. We cannot hold that the fact of the delivery of the mules to the prosecutor in payment of the \$265 note, if such was the fact, was sufficient to sustain the allegation, and if we correctly interpret the charge of the court we hardly think it was intended so to instruct the jury. There was a fatal variance between the allegation and the proof, if not a failure of proof. *State v. Corbett*, 46 N. C. 264.

The error of the court in refusing the instruction, and afterwards submitting the case to the jury without any corresponding evidence at all to establish the specific charge of the bill, entitles the defendant to another trial.

New trial.

(141 N. C. 797)

STATE v. PERKINS.

(Supreme Court of North Carolina. April 8, 1906.)

1. CRIMINAL LAW—STATUTORY CRIMES—STATUTES—REPEAL—EFFECT.

Where a statute prescribing the punishment for an offense is expressly and unequivocally repealed after the crime has been committed, but before final judgment, though after conviction, no punishment can be imposed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2485.]

2. INTOXICATING LIQUORS—STATUTES—REPEAL—REPUGNANCY.

Laws 1903, p. 749, c. 434, prohibited the sale of liquor in Union county or the keeping of it for sale without a license. By Laws 1905, p. 492, c. 497, it was declared that the sale of liquor and the keeping of it for sale "shall be" prohibited with certain exceptions. There was no clause unequivocally repealing prior enactments on the same subject, but sections 26, 27, declared that all laws and clauses of laws in conflict with the act were repealed, and that the act should be effective after June 1, 1905. *Held*, that as to offenses committed prior to the latter date there was no repugnancy between the two statutes, and that as to such offenses there was no repeal of the act of 1903 by the latter act.

3. STATUTES—REPEAL BY IMPLICATION.

The repeal of a statute by implication or construction is not favored, and the rule of implied repeal will not be extended, so as to in-

clude cases not within the expressed or implied intention of the Legislature.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 228.]

4. SAME.

To effect a repeal of a former statute by the passage of a later one, the repugnance between the two must be plain.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 229, 230.]

5. SAME—PROSPECTIVE OPERATION.

Where a later statute was clearly intended to be prospective in its operation, it will not effect a repeal of a prior statute relating to the same subject.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 229-231.]

Appeal from Superior Court, Union County; Ferguson, Judge.

Richard Perkins was indicted in one count for selling and in the other for keeping for sale liquor without having a license as provided by law, and was convicted. The offense was committed in the year 1904, and the indictment was found at July term, 1905. The defendant requested the court to charge the jury that, as the offense was committed, if at all, prior to June 1, 1905, the defendant should be acquitted, and he moved to quash the bill and to arrest the judgment upon the same ground. The instruction and the motions were all refused, and the defendant excepted. There was a judgment upon the verdict, and the defendant appealed. Affirmed.

A. M. Stack, for appellant. The Attorney General, for the State.

WALKER, J. (after stating the case). The ruling of the court was in all respects correct. The indictment was drawn under chapter 434, p. 749, of the Laws of 1903, prohibiting the sale of liquor in Union county, or the keeping it for sale, without a license. By chapter 497, p. 492 of the Laws of 1905, it is enacted that the sale of liquor and the keeping it for sale "shall be" prohibited, with certain exceptions not necessary to be stated. There is no clause in the latter act unqualifiedly repealing prior enactments upon the same subject, but by sections 26 and 27 it is provided that all laws and clauses of laws in conflict with the act are repealed and that the act shall be in force and take effect from and after the 1st day of June, 1905. The decision of this case must therefore turn upon the question whether the act of 1903 is repealed by the act of 1905 to the extent of defeating this prosecution against the defendant.

Where a statute prescribing the punishment for a crime is repealed after such crime has been committed but before final judgment, though after conviction no punishment can be imposed because the act must be punishable when judgment is demanded, and authority to pass sentence must then reside in the court. This is the well-settled principle, and it is essential in order to give effect to the clear intention of the Legislature and to require that the decision and judgment of the courts shall be based upon exist-

ing law. *State v. Cress*, 49 N. C. 421; *State v. Nutt*, 61 N. C. 20; *State v. Long*, 78 N. C. 571; *State v. Massey*, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308; *State v. Biggers*, 108 N. C. 760, 12 S. E. 1024; 28 Am. & Eng. Enc. (2d Ed.) 755. The rule is so familiar and well grounded in reason that we need not stop to discuss it further, except to say that it necessarily relates to an unqualified and express repeal, in the view we take of it as to its effect upon pending prosecutions, for offenses committed under the prior statute, before the repeal or upon prosecutions for such offenses afterwards instituted. As thus considered, it has no application to the facts of this case, for the act of 1905 does not expressly and unqualifiedly repeal the act of 1903, but repeals only to the extent that it conflicts with it. If the Legislature had intended to repeal the act of 1903 absolutely, it was easy to have expressed that intention in words of unmistakable meaning, but it preferred not to do so but to repeal it only so far as it is repugnant to the provisions of the later statute. The act of 1905 is by its very language prospective in its operation. It refers to sales made after the 1st of June, 1905, when it became effective, and could not, under our Constitution, apply to antecedent acts, so as to make them criminal or punishable if not so at the time they were committed. If it does not affect prior acts which are covered only by the earlier statute, how can it be said to conflict with the latter as to those acts. There can be no repugnancy except as to offenses which are punishable under the later statute, and as to these the earlier act is repealed and has no further operation. Repeals by implication or construction are not favored, and they should not be extended so as to include cases not within the intention of the Legislature.

The act of 1905 forbids the sale of liquor and prescribes a much greater punishment than that fixed by the act of 1903 for selling liquor without a license, and its general features clearly indicate a purpose on the part of the Legislature to adopt more drastic measures for the suppression of the liquor traffic. Can it be reasonably supposed that with this object in view and in its then frame of mind, it designed to extend pardon and forgiveness to those who had violated the provisions of the former act? Why should we come to such a conclusion and give to the repealing clause of the act of 1905 the same meaning we would to words of unqualified repeal, which is so much at variance with the declared will of that body? Will it not be more reasonable and more likely to effectuate the intention of the Legislature if we hold that the act of 1903 is still in force as to offenses already committed when the act of 1905 took effect, and to confine the latter act to its proper and legitimate sphere by applying it to offenses thereafter committed? This brings the two acts into harmonious operation by repealing the former act so far as it conflicts and leaving it in full effect

where it does not interfere with the full operation of the other act? There is abundant authority, we think, for this construction. Coke says: "It must be known that for as much as acts of Parliament are established with gravity, wisdom, and universal consent of the whole realm for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated, but ought to be maintained and supported with a benign and favorable construction." *Dr. Foster's Case*, 11 Rep. 63. Sedgwick thus expresses the same idea: "In this country it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is therefore but reasonable to conclude that the Legislature in passing a statute did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable, and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law if the two acts may well subsist together." *Sedg. Stat. & Const. Law*, 127. "It is a general rule that subsequent statutes, which add accumulated penalties and institute new methods of proceeding do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words. Nor hath a latter act of Parliament ever been construed to repeal a prior act, unless there be a contrariety or repugnance in them, or at least some notice taken of the former act, so as to indicate an intention in the law giver to repeal it. Neither is a bare recital in a statute, without a clause of repeal, sufficient to repeal the positive provisions of a former statute. The law does not favor a repeal by implication unless the repugnance be quite plain; and such repeal carrying with it a reflection on the wisdom of former Parliaments, it has ever been confined to repealing as little as possible of the preceding statutes. Although, then, two acts of Parliament are seemingly repugnant, yet if there be not a clause of non obstante in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication." *Potter's Dwarrris on Statutes*, 156, 157. "Every effort must be made to make all acts stand, and the later act will not operate as a repeal of the earlier one if by any reasonable construction they can be reconciled. The repeal in any case will be measured by the extent of the conflict or the inconsistency between the acts, and if any part of the earlier act can stand as not superseded or affected by the later one, it will not be repealed." 26 Am. & Eng. Enc. (2d Ed.) 726, 727. "Where a provision of law is thus modified or cut short, it is not in any proper sense repealed. And we may lay down the doctrine broadly that no repeal takes place if the earlier provision can stand, to any extent consistently with the later. Yet this proposition must not be misapplied.

For if the later statute conflicts in any particular with the earlier, then the earlier is so far abrogated; though we do not say, speaking of the earlier as a whole, that it is repealed." *Bishop, Stat. Crimes* (1873) § 165.

The quotations we have made from Lord Coke and the text-writers are but forceful statements of the universal rule applicable to such cases. We find, though, that these general principles of statutory construction have been extended and applied to just such a case as we have presented in this record. This court, in *State v. Putney*, 61 N. C. 543, in passing upon a similar question, the punishment for the offense having been increased, said by Reade, J.: "It is true that the defendant cannot be punished under a law which was not in existence at the time when the offense was committed because that law would be *ex post facto*, unless where it lessens the punishment. It is equally true that, where a new law expressly or impliedly repeals the old law, there can be no conviction under the old law. But the act of 1866-67 has no application to the case before us because it does not repeal the old law, but is only prospective in its character and is to be read thus: If any person shall hereafter steal a mule, etc., he shall suffer death. All larcenies committed before that act are to be tried and punished without reference thereto." The motion in arrest of judgment was accordingly overruled. It has been suggested that this case conflicts with subsequent decisions of this court, and especially with the principle applied in *State v. Massey*, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 808. We are not aware of any case in this court where the rule, as laid down in *Putney's Case*, has been differently stated; nor do we think any such case can be found. A careful search induces us to believe that in every case, where the question has been decided at all, the doctrine so tersely stated by Judge Reade in *Putney's Case*, as applicable to the facts then before the court, has been approved. We are quite sure that the judge who decided *Massey's Case* accepted it as the doctrine of this court, and distinguished it from the rule that obtains when there has been an express and unqualified repeal, as was declared in *Massey's Case* to be the effect of the statute then under consideration.

No stronger proof of the full acceptance and approval of the rule can be furnished than by quoting from the opinion of the court in *Massey's Case* as delivered by Avery, J.: "There is a marked distinction between the case at bar and *State v. Putney*, 61 N. C. 543, cited by the Attorney General. The defendant *Putney* was convicted at fall term, 1867, of the superior court of Wake county, under an indictment found in December, 1866, of the larceny of a mule. On the 25th February, 1867, the General Assembly, after reciting that the crime of stealing horses and mules hath of late, notwithstanding the punishment provided by law, become much more common than formerly, enacted that every

person who shall steal any horse, mare, gelding, or mule, and shall be thereof convicted, according to due course of law, shall suffer death. Before that time larceny was punishable by whipping, or fine or imprisonment. The court held that the old and new law would be construed so as to give effect to both by interpreting 'shall' according to its natural import, as referring exclusively to offenses hereafter committed, and the preamble certainly indicated that intent. No law or part of the law was expressly or by necessary implication repealed; and the old and new law were both left operative. *Potter's Dwarria*, 133." The *Massey Case* was decided upon the theory that the later statute, by its very terms and as if in so many words, had unqualifiedly and expressly repealed the earlier one. It did not provide, as here, that the earlier act, where it conflicted with the later one, should be repealed, but it actually repealed so much of it as affected the defendant's criminality and conferred the power to punish him, by striking it from the earlier statute. There could not be a stronger illustration given of an express and direct repeal. It was the same as if the act had provided that so much of the earlier statute as made the defendant's act criminal and punishable, as therein provided, is hereby repealed, and the court so regarded it. Whether that was the true construction is not now the question. We are merely attempting to explain the reason for that decision without regard to its merits, in order to show that the court recognized fully the authority of *Putney's Case* and held that it was not inconsistent with the *Massey Case*. The dissenting justices in the latter case rested their contention upon the construction of section 3761 of the Code, by which they said the amending act should be given prospective operation. *Massey's Case* therefore instead of rejecting the doctrine of *Putney's Case* or in the least impairing its force, must be taken to have affirmed it in the most positive language.

The question presented has been considered in the courts of some of the other states, and their decisions sustain the conclusion we have here reached. In *Pitman v. Commonwealth*, 2 Rob. (Va.) 804, the court said: "It is argued, however, that though there is no express repeal of the previous laws, there is an implied one; that the act prescribes a new punishment for past offenses—an aggravated punishment—by increasing the fine from \$20 to \$30; that it is inconsistent with the former laws, and, being the last expression of the legislative will, must abrogate them upon the principle, '*Leges posteriores priores contrarias abrogant*.'" The authorities cited at the bar show that implied repeals are not favored; that two affirmative statutes shall coexist if they can, and this notwithstanding the use of general words, whose grammatical construction might imply the contrary. 6 Bac. Abr. 439. Let us then inquire why we are obliged to imply a repeal of the previous laws and

discharge the previous offenses? Did the Legislature intend such repeal and discharge? For we admit that in this act, as in all others, we must inquire into the legislative intent and give effect to it if we can. Admitting then that the act varied and increased the punishment prescribed by former laws, the question occurs, to what offenses does it apply? Does it apply to violations committed before its passage or to those committed afterwards? If it applies only to offenses committed after its passage, it does not conflict with the former law, and consequently both will stand. If it applies or can be legally applied to previous offenses, then the conflict will arise, and the last law only will have effect." And Field, J., in the same case, said: "This law, therefore, so far as it was intended to apply to offenses which had been committed before its passage, was void; and being void it cannot have the effect of repealing by implication any previously existing law, with which it would have been in conflict if it had been a valid law. It is not in conflict with any law against unlawful gaming, as to offenses theretofore committed, because it is void, and as a piece of blank paper. But as to offenses committed after the passage of the act, it is in conflict with the old law because it increases the penalty from \$20 to \$30. From this view of the case it follows that as to offenses of which the defendant has been convicted (both of which were committed before the 1st of March, 1842), the old law was in force and is yet in force, and judgments shall be rendered against them for the fine of \$20 only, and costs." In *Pegram's Case*, 1 Leigh (Va.) 569, it was said by the court: "Although the principle is correct that '*leges posteriores priores contrarias abrogant*,' yet they only abrogate them from the time that the latter law is passed or goes into effect. The principle on which this rule prevails is that the latter statute being incompatible with the former, they cannot exist together, and the latest expression of the will of the Legislature is the law. But there is no incompatibility in the statutes now under consideration. A punishment affixed to an offense prior to the 1st of May, 1828, is not incompatible with a different punishment, either lighter or more severe, affixed to the same offense subsequent to that date. They may both well stand together. The punishment prescribed by the act of 1827-28 being different from that prescribed by the act of 1822-23 is certainly an implied repeal of it, as to new offenses, from the time it goes into effect, but, by the very terms of the law, the new punishment is only applied to the offenses happening after the 1st of May, 1828, leaving the old punishment to be applied to the offenses happening before that day."

There are decisions in Alabama to the same effect. "No court," it is said in *Miles v. State*, 40 Ala. 42, "will, if it can be consistently avoided, determine that a statute is repealed by implication. *Ludlow's Heirs*

v. Johnston, 3 Ohio, 553, 17 Am. Dec. 609. When two affirmative statutes exist, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation. *Dodge v. Gridley*, 10 Ohio, 178. Section 3184 of the Code of 1852 and the act of December, 1865, being both affirmative statutes, when does the contrariety or repugnance in them effect a repeal of the former by the latter? The latter statute has operative effect only as to the offenses named therein, when committed subsequent to its passage. It cannot have retrospective operation as its language and the Constitution both alike forbid it. There is no conflict in the two statutes, then as to the offenses named, when committed prior to the enactment of the latter statute; and consequently as to the offenses thus committed, there is no repeal by the latter of the prior law. To this extent, the two may well stand together; but when the field of operation becomes entirely covered by the latter statute, the former is repealed by the repugnance in the two, by analogy to a principle in nature that no two things can occupy precisely the same space at the same period of time." And in *Moore v. State*, 40 Ala. 53, it is said: "The punishment, as to a certain class of persons, who after its passage 'shall be guilty,' is prescribed, and it is greater than the punishment prescribed by the prior law for the same offenses, and this upon principles of the common law, neither expressly nor by implication, repealed the former statute. Repeals by implication are not favored, and for such a repeal to take effect, the repugnancy must be clear. A statute is never repealed by the repugnancy of matter in a subsequent one, except to the extent of such repugnancy. If such repugnancy between two statutes effects a repeal of the former to the extent of the opposition, and leaves a field still for the independent operations of both, the latter does not repeal the former as to such matter not affected by the latter statute." See, also, *David v. State*, 40 Ala. 69; *Wade v. State*, Id. 74; *Com. v. Wyatt*, 6 Rand. (Va.) 694, and especially the case of *Shepherd v. People*, 25 N. Y. 412. A like construction was given to the statute of frauds (St. 29 Car. II. c. 5) in *Gilmore v. Shuter*, 2 Lev. 227. It is true that was a case of a promise in consideration of marriage, but the underlying principle of the decision, that the new act operates prospectively and does not conflict with the old, bears directly upon our case, though the two cases are not of the same kind.

This court in *Winslow v. Morton*, 118 N. C. 491, 24 S. E. 417, approved the following rule in the construction of statutes with reference to implied repeals, namely, that the law does not favor implied repeals and the implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts, the later abrogates the earlier only to the extent that

it is plainly inconsistent and irreconcilable with it, citing *Simonton v. Lanier*, 71 N. C. 498, in which Judge Bynum for the court said that it is true every affirmative statute is a repeal of a prior affirmative statute, so far as it is contrary to it, under the maxim, "*Leges posteriores priores contrarias abrogant*," but the law does not favor an implied revocation, nor is it to be allowed unless the repugnancy be plain; and where, in the latter act, there is no clause of non obstante, it shall, if possible, have such construction that it will not operate as a repeal, citing *State v. Woodside*, 31 N. C. 498, where the same rule is clearly stated by Judge Nash. Applying this rule to the construction of the act of 1893, creating degrees of homicide, this court said in *State v. Coley*, 114 N. C. 883: "The controversies that have heretofore provoked discussion have arisen upon the question whether particular language could be construed as implying a legislative intent to limit the operation of an act to offenses committed after its passage, and leave the pre-existing law in force as to those previously committed. *State v. Putney*, 61 N. C. 543; *State v. Long*, 78 N. C. 571; *State v. Williams*, 97 N. C. 455, 2 S. E. 55; *State v. Massey*, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308. As the purpose that the act of 1893 should operate prospectively and that the common law should remain in force as to homicides committed prior to its passage, is expressed in unequivocal terms in the proviso to the act, we think that the question, whether the offense, with which the prisoners are charged, should be classified as murder in the second degree, did not arise." It can make no difference how the intention of the Legislature that an act should have prospective operation is expressed; whether it is done by unequivocal terms in the act by a proviso, or is to be gathered from its general scope and tenor, so that it appears with sufficient clearness that such is the intention. This is too plain for argument, for at last it is the intention that we seek to find in the act, and when found we enforce it. The principle of the decision in *Coley's Case*, therefore, applies to the case at bar, as the two cases, with this understanding of the law, become parallel, and the repealing act in each must have the same construction and be in like manner restricted in its effect, as it is perfectly apparent that the Legislature intended the act of 1905 to operate prospectively. The use of the words "It shall be unlawful" in the first section clearly evince such a purpose, not only by their grammatical construction but by the meaning assigned to them in the decisions of the courts. *Putney's Case*, supra; *Moore v. State*, supra. The spirit and purpose of the two acts and the object with which they were passed forbid the conclusion that the Legislature intended a repeal of the prior act. The Legislature, when it passed the second act, was apparently not in a forgiving mood. The evils of

Intemperance no doubt had increased and called for more stringent provisions for the future, but not for the exercise of mercy in dealing with past offenses.

It follows that the defendant can derive no aid from the last enactment in making good his contention that the act of 1903 has been repealed, and therefore that there is no law now under which he can be punished for his unlawful act, committed in 1904. There was ample authority for the sentence imposed.

No error.

(141 N. C. 101)

COOK et al. v. VICKERS et al.

(Supreme Court of North Carolina. April 10, 1906.)

1. HIGHWAYS — CARTWAYS — APPEAL — STATUTES — CONSTRUCTION.

Laws 1901, p. 945, c. 729, amending Laws 1899, p. 775, c. 581, provides for the establishment of highways and cartways. Section 10 (page 948) defines a cartway. Section 13 (page 950) provides how it shall be laid out. Section 14 (page 951) directs how timber, gravel, and other material may be taken for constructing, improving, and repairing roads, and prescribes the method of making compensation. Section 15 (page 952) provides for the assessment of damages, and section 16 (page 953) gives a right of appeal to any landowner when he is dissatisfied with the finding of the jury, provided for in "sections 11 and 12," and with the decision of the county commissioners. Sections 11 and 12 do not relate to the taking of land or material, or the assessment of damages, and reference to them was a clerical mistake; they being evidently inserted in the place of sections 13, 14, and 15. *Held*, that section 16 conferred a right of appeal in proceedings for the establishment of a cartway, as under the Code, from the commissioners' order establishing such way.

2. SAME — STATUTES — REPEAL.

Acts 1901, p. 945, c. 729, relating to the establishment of highways and cartways, and providing only for a repeal of all laws or parts of laws in conflict therewith, not being repugnant to Revisal 1905, § 2686, authorizing appeals in cartway proceedings, did not repeal such section, so that an appeal in such proceedings had under the act of 1901 might be taken under such section.

Appeal from Superior Court, Durham County; Shaw, Judge.

Proceedings by G. W. Cook and others for the establishment of a cartway, in which J. Vickers and others excepted and appealed from the county commissioners to the superior court. A motion to dismiss the appeal was granted, and defendants appeal. Reversed.

Proceeding for a cartway. The plaintiffs, through the road supervisor of the district, filed their petition before the county commissioners for the establishment of a cartway from the residence of Geo. W. Cook, one of the plaintiffs, to the Fayetteville road, a public highway, over the lands of the defendants, under chapter 729, p. 945, Laws 1901, relating to public roads and cartways in Durham and certain other counties therein named. The commissioners granted the order, and the defendants excepted and appealed to the superior court. The plaintiffs moved there to dismiss the appeal, which motion was heard at January term, 1905,

and refused by Judge Peebles, then presiding. At October term the motion was renewed before Judge Shaw, who allowed the same and remanded the proceeding to the board of commissioners of the county, with directions to execute the order theretofore made by them appointing five freeholders to lay out the cartway. The plaintiffs' motion to dismiss was based upon two grounds: (1) That the appeal from the commissioners was premature, as the jury of five freeholders had not carried out the order of the board by laying out the cartway and assessing the damages. (2) That no appeal is allowed by law from the order directing the cartway to be laid out, but only from the assessment of damages by the jury and the decision of the commissioners thereon. The court dismissed the appeal upon the ground that the act of 1901 does not provide for an appeal. The defendants excepted, and appealed.

Guthrie & Guthrie and Boone, Giles & Boone, for appellants. Winston & Bryant, for appellees.

WALKER, J. (after stating the case). The right of appeal, even where property is taken for public use, should not be denied in any case if by fair and reasonable interpretation of the law it can be allowed, and surely we should give a free construction to the statute in favor of the right, as between individuals, one of whom seeks to acquire a right or easement in respect to the other's land. There is not the same reason in the latter case for refusing the right, which is said to hold good in the former because of the usually long delay thereby caused in the furtherance of public improvements or of works in which the public have a more or less extensive interest. Cartways are regarded as quasi public roads and the condemnation of private property for such a use has been sustained upon that ground as a valid exercise of the power of eminent domain. The public have the right to use them and are otherwise interested in their establishment and maintenance. 1 Lewis on Em. Domain, § 167; *Cozard v. Hardwood Co.*, 139 N. C. 283, 51 S. E. 932. They are laid out, it is true, on application of a particular individual and paid for by him, and are designed primarily and principally for his special accommodation; but, as they are intended also for the use of the public generally, they are for this reason properly considered a part of the public road system of the county (*Lewis, supra*) and are so designated in the act of 1901, though they are distinguished from public highways proper, being in a certain sense subsidiary to them. As the contest for a cartway is between individuals and is conducted with a view of primarily benefiting one to the detriment perhaps of the other, we would be reluctant to hold that an appeal is denied to the landowner in such a case, while it is given in a proceeding for the opening of a public road where the people generally are concerned, unless the law im-

peratively so requires. We do not think it does in this instance.

In the light of what has been said, we will examine the statutes. The act of 1901 (page 945, c. 729) is an amendment to the act of 1899 (page 775, c. 581). The latter act made no provision for cartways but left them to be governed by the general law in the Code. Section 10 (page 948) of the act of 1901 defines a cartway, and section 13 (page 950) provides how it shall be laid out. Section 14 directs how timber, gravel, and other material may be taken for constructing, improving, and repairing roads and prescribes the method of making compensation. Section 15 provides for laying out public roads and the assessment of damages. Section 16 gives the right of appeal to the landowner "when he is dissatisfied with the finding of the jury provided for in sections 11 and 12 and with the decision of the county commissioners." Turning to sections 11 and 12 of the act, we find that they do not relate to the taking of land or material or the assessment of damages, so that it is apparent the reference to those sections was a clerical mistake. Section 13 and sections 14 and 15 of the act of 1901 do relate to that subject and were evidently intended for sections 11 and 12. In substituting sections 4 to 20, inclusive, of the act of 1901 for the sections with corresponding numbers in the act of 1899, the draftsman has brought forward sections 11 and 12 of the act of 1899 with different numbers (14 and 15) and overlooked the fact, in drafting section 16, that a new section relating to the same general subject, namely, section 13, referring to cartways, had been inserted in the act of 1901. The language of section 16 of the latter act clearly indicates that the Legislature intended to give the right of appeal in all cases where land or material is taken for road purposes, and we must so construe it. The provision in regard to cartways, it is true, is not embraced by sections 14 and 15 of the act of 1901, being in a separate section which immediately precedes those two, but we cannot think that it was the purpose to give the right in the one case where public interests alone were involved, and deny it in the other where the accommodation of an individual is the main object to be accomplished, especially as section 16 is comprehensive enough in its general terms to cover the latter case. The right of appeal in proceedings to establish cartways has existed for so long a time and is so just in itself, that the statute should be given such a meaning as to preserve it, if under the rules of construction it is possible to do so. There can be no doubt of the legislative intent concerning appeals in road cases. The only difficulty we encounter in holding the right to exist, under the act, in cartway cases, is that section 16 provides for appeals only if the party is dissatisfied with the finding of the jury and with the decision of the commissioners thereon, and there is no provision in section 13 of the act, relating to

cartways, for a report by the jury to the commissioners and exceptions thereto, and for a confirmation, revision, or rejection of the report, as in the case of roads. We should not permit this dissimilarity between provisions relating to the two subjects to defeat the leading idea of section 16, that there shall be the right of appeal by the landowner, but should rather construe section 16 in connection with the other sections relating to the laying out of roads and cartways, so as to give proper effect to it with respect to each of the others according to the nature and requirements of the particular subject-matter and the object to be attained. It is very clear that section 13, as well as sections 14 and 15, was intended to come under the operation of section 16, as practically all the elements of a case in which an appeal is allowed by that section are present in the case of cartways; the only exception being that, in the latter case, no report is directed to be made to the commissioners. But the appeal is required by section 16 to be taken from the decision of the commissioners and, in this respect, a distinction has been made by this court, in construing other statutes, between an appeal in the case of cartways, where it is taken from the decision of the commissioners ordering the cartway to be laid out and before there has been an assessment of damages, and an appeal in the case of a public road or a railroad, where a report is made to the commissioners and the appeal is taken from their decision thereon. This distinction and the reason for it are stated and applied in *Warlick v. Lowman*, 101 N. C. 548, 8 S. E. 120; *McDowell v. Asylum*, 101 N. C. 656, 8 S. E. 118; *Tel. Co. v. Railroad*, 88 N. C. 420; *Railroad v. Railroad*, *Id.* 499; *Railroad v. Warren*, 92 N. C. 622; *Railroad v. Newton*, 133 N. C. 132, 45 S. E. 549. It arises out of the difference in the language of the several statutes. Section 16 therefore confers the right of appeal in proceedings for a cartway according to the nature of the case, that is, by allowing the appeal to be taken, as under the Code, from the order of the commissioners for a cartway, which is treated as their decision in that particular case.

But the right can be sustained upon another ground. The act of 1901 does not by express terms repeal the provision of section 2056 of the Code (Revisal 1905, § 2686) relating to appeals in cartway proceedings. It only repeals all laws or parts of laws in conflict with it. There is no necessary repugnancy between an act providing for the laying out of a cartway, which is silent as to an appeal (if such is the case here), and a general law providing substantially for the same proceeding with the right of appeal. An implied revocation is not favored (*State v. Perkins* [at this term] 53 S. E. 735), and certainly it should not be, where it will result in depriving a party of so important a right as that of an appeal by which to review the lower courts, and especially the decisions of statutory bodies not possessing many of

the attributes of judicial tribunals, competent to try the questions involved. Conceding it to be true that the right of appeal is purely statutory, and that unless some statute authorizes an appeal the judgment of a court of competent jurisdiction is final, the rule should be very carefully applied in highway cases. "In such cases the statute should be liberally construed in favor of the right, and every reasonable intent made in favor of its existence. The power of seizing property is a high one, and the assessment of benefits and damages often involves very important and difficult questions, and it should not be held, where it can be avoided, that the decision of the tribunal of original jurisdiction cannot be appealed from, since it ought not to be presumed that the Legislature meant to place the decision of a tribunal, of the rank of those to which original jurisdiction is usually given, beyond review by higher courts." Elliott on Roads and Streets, 359. We conclude that the right of appeal from the order of the commissioners is given by the act of 1901 and by the Code. The case will be tried *de novo* in the superior court (Warlick v. Lowman, supra), the statute and the Code as to the mode of trial in that court being very much the same.

This is not like a case where the statute is totally silent as to the right of appeal (Railroad v. Ely, 95 N. C. at page 81; Railroad v. Jones, 23 N. C. 24), and the reasoning of the cases cited does not apply. Here there is a general law applicable to this particular class of cases and providing the necessary procedure which, as we think, was not intended to be repealed by the act of 1901; and, besides, the general tenor of the last-named act clearly implies that an appeal was contemplated. Where an appeal is expressly or impliedly given, the courts may look to other statutes regulating appeals in analogous cases and give them such application as the particular case and the language of the statutes may warrant, keeping in view always the intention of the Legislature. Elliott, 360 and 362; Blair v. Coakley, 136 N. C. 408, 48 S. E. 804.

There was error in the judgment of the court, which is reversed with directions to proceed further in the cause according to the rule herein declared. Reversed.

(41 N. C. 811)

STATE v. BASKERVILLE.

(Supreme Court of North Carolina. April 10, 1906.)

COURTS—ESTABLISHMENT—LEGISLATIVE POWER.

Under Const. art. 4, § 27, prescribing the jurisdiction of justices of the peace in criminal matters, as modified by section 14, authorizing the General Assembly to provide for the establishment of special courts for the trial of misdemeanors in cities, so as to authorize the Legislature to establish special courts in cities and give them exclusive jurisdiction of misdemeanors committed within the corporate limits, Priv. Laws 1905, p. 110, c. 36, § 13, establishing a police court for a city and conferring on it exclusive jurisdiction over violations of the ordinances of the city, is valid.

Appeal from Superior Court, Wake County; Justice, Judge.

Sarah Baskerville was convicted of a violation of a city ordinance, and she appeals. Judgment arrested.

Defendant, on warrant duly issued, was tried, convicted, and sentenced in a court of a justice of the peace of Raleigh township, for violating a valid ordinance of the city, and thereupon appealed to the superior court, contending that the justice of the peace had no jurisdiction to try the case. The cause coming on for hearing in the superior court, defendant moved to dismiss for want of jurisdiction. Motion overruled, and defendant excepted. Defendant admitting that on the facts she was guilty, if the court had jurisdiction, the verdict was so entered and sentence imposed, and defendant excepted and appealed.

J. C. L. Harris & Son, for appellant. The Attorney General, for the State.

HOKE, J. (after stating the case). In section 13, c. 36, p. 110, Priv. Laws 1905, the Legislature established a police court for the city of Raleigh and defined its jurisdiction as follows: (a) Exclusive original jurisdiction over all offenses arising from the violation of the provisions of this act, or of all violations of ordinances, by-laws, rules, and regulations of the board of aldermen made in pursuance of this act, within the corporate limits of the city of Raleigh and within Raleigh township. (b) Jurisdiction, power, and authority for the trial and determination of all misdemeanors created by the laws of the state of North Carolina committed within the corporate limits of the city of Raleigh and within Raleigh township. In the case before us the defendant was tried and convicted before a justice of the peace of a misdemeanor in violating a lawful ordinance of the city of Raleigh. The act in question gives exclusive jurisdiction of such offenses to the police justice, and if the act is valid the justice of the peace who tried and sentenced the defendant was without jurisdiction of the case, and the motion of the defendant should have been allowed.

The sections of our Constitution, in article 4, bearing on the question now before us, are as follows: Article 4, § 2, provides that "the judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, superior courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law." Section 12: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court, among the other courts prescribed in this Constitution

or which may be established by law, in such manner as it may deem best, provide also a proper system of appeals and regulate by law when necessary, the methods of proceeding in the exercise of their powers, of all courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution." Section 14: "The General Assembly shall provide for the establishment of special courts, for the trial of misdemeanors, in cities and towns, where the same may be necessary." And section 27, so far as pertinent to this case, provides that the several justices of the peace shall have jurisdiction of the criminal matters arising within those counties where the punishment cannot exceed a fine of \$50 or imprisonment for 30 days.

In *Rhyne v. Lipscombe*, 122 N. C. 850 et seq., 29 S. E. 57, the Legislature had created a criminal circuit court embracing several western counties, and had given same, to a certain extent, concurrent jurisdiction with the superior courts in that portion of the state, providing, among other things, that an appeal would lie in certain cases from a justice of the peace to said criminal court, and from this court direct to the Supreme Court, and the Supreme Court in substance decided: (1) "The superior courts and courts of justices of the peace were created by the Constitution (section 2, art. 4), and the General Assembly cannot abolish them." (2) "While the General Assembly may, under section 12 of article 4 of the Constitution, allot and distribute the jurisdiction of the courts below the Supreme Court, it must be done without conflict with other provisions of the Constitution." (3) "In construing legislation establishing courts inferior to the Supreme Court and affecting the jurisdiction of the superior courts, the term 'superior court' must be interpreted in the sense it had at the time of the adoption of the Constitution which established such court, which was that it was the highest court in the state next to the Supreme Court and superior to all others, from which alone appeals lay direct to the Supreme Court, and possessed of general jurisdiction, criminal as well as civil, and both in law and equity." (4) "The superior court cannot, under section 12, art. 4, of the Constitution, be deprived of the pre-eminence and superiority attaching to it at the time of its adoption by the Constitution or shorn of either its criminal or civil jurisdiction without conflict with the constitutional provisions creating it; and while its jurisdiction may be made largely appellate by conferring such part of its original jurisdiction on such inferior courts as the General Assembly may provide, its jurisdiction must be retained by original or appellate process. (5) "The allotment and jurisdiction provided for in section 12 of article 4 of the Constitution cannot be such as to take from justices of the peace the jurisdiction conferred by section 27 of such

article, or to repeal the right of appeal given by that section, both in criminal and civil actions, to the superior court from the courts of justices of the peace." The court thereupon held the statute unconstitutional in so far as it was in conflict with these principles.

In that case the Supreme Court was only considering the relative position, as to power and jurisdiction, of the superior courts as part of our judicial system, and the right of such courts alone to hear appeals from justices of the peace. The jurisdiction of the justices' courts, as established by section 27 of article 4, was only incidentally in question, and was only considered in so far as the same was affected by section 12 of article 4, conferring power on the Legislature to "allot and apportion the jurisdiction which does not pertain to the Supreme Court among the other courts prescribed by this Constitution, or which may be established by law in such manner as it may deem best, * * * so far as this may be done without conflict with the provisions of this Constitution." Section 14 of this article which confers on the General Assembly the power to provide for the establishment of special courts for the trial of misdemeanors in cities and towns, was in no way involved in the decision of *Rhyne v. Lipscombe*, nor was the effect of this section, as affecting the jurisdiction of justices of the peace, in any wise determined. While some expressions in the opinion gave intimation to the contrary, the decision is only authority and precedent on the material facts then before the court, established or accepted as true. *Cooper v. Railroad*, 140 N. C. —, 52 S. E. 982. Accordingly the opinion of the court in *State v. Lytle*, 138 N. C. 738, 51 S. E. 66, written by the present Chief Justice, who also wrote the opinion in *Rhyne v. Lipscombe*, treats this point as an open question, and the same is now presented for our consideration.

This section 14, providing for the establishment of special courts for the trial of misdemeanors in cities and towns, was in *ipsisimilis verbis* in the Constitution of 1868 as section 19, and there has been no change, constitutional or otherwise, which restricts or tends to restrict the power therein granted. Soon after the promulgation of the Constitution of 1868, there were acts creating courts under this section, which gave to the chief officers of the towns, where established, exclusive jurisdiction of certain misdemeanors arising from violation of their own municipal regulations, and while no case perhaps necessarily raised the question directly, this was the construction put upon these acts by the court, and such construction was then accepted without question. *State v. White*, 76 N. C. 15; *State v. Threadgill*, *Id.* 17. It is a familiar principle that construction by contemporaneous legislation in matters of doubtful import, while not controlling, should be received as an aid to cor-

rect decision, and it is proper that these acts should be so considered here. And while, in *State v. Wood*, 94 N. C. 855, the court rendered a decision having a different effect, this was put expressly on the ground that the act itself had been so changed, and not from any lack of power in the Legislature to confer the exclusive jurisdiction. The reason is thus stated by Ashe, J.: "And it was this provision in the second section of the act—'shall be subject to the provisions of this act'—that led this court to decide in *Threadgill's* and *White's Cases*, supra, that the mayor or chief officer of a city or town had exclusive jurisdiction of violations of the ordinances of cities or towns, of which they were chief officers. But when the act of 1871 was carried forward into the Code, the words 'and shall be subjected to the provisions of this chapter,' were omitted, so that the section read, 'Any person violating an ordinance of a city or town shall be guilty of a misdemeanor and shall be fined, not exceeding \$50 or imprisoned not exceeding 30 days.' There are no restrictive words. The very terms of the enactment are such as to confer jurisdiction upon justices of the peace, and our opinion is, under this section of the Code, the justice of the peace had jurisdiction and it was error to quash the warrant on that ground." In *Town of Washington v. Hammond*, 76 N. C. 33-37, *Bynum, J.*, delivering the opinion of the court, said (at page 37): "It is clear beyond doubt that as the act of 1871-72 has established special courts in cities and towns, as is authorized by the Constitution as it was and as it is now amended (article 4, § 25), the General Assembly has the power to vest in these courts original and final jurisdiction over all misdemeanors whatever. Whether it would not be a most beneficial and economical jurisdiction, if extended to the mayors of the principal and most populous cities and towns of the state, thus relieving the superior courts of a mass of business, which in some counties has engrossed the whole time of the regular terms of the courts and has been the subject of much complaint, is an inquiry which we cannot pursue."

And it has also been held that the Constitution, in giving the Legislature the right to establish these courts "where the same may be necessary," also gave the right, when such courts are properly organized and equipped for the purpose, to confer upon them such power and jurisdiction over all misdemeanors committed within the corporate limits as may be adequate and necessary to their proper and efficient operation. *State v. Pender*, 66 N. C. 313. In this case *Rodman, J.*, said: "The words 'provide for the establishment of,' are very wide, and it seems to us that they not only admit of, but that they cannot receive their full and adequate force, without giving them the interpretation that they authorize the Legislature to establish the courts in any way it may think proper, and to give the judge such

power (not exceeding the trial of misdemeanors), and to provide for them and the other officers of the court (if any), such mode of election and such terms and emoluments of office as it may think proper." And in the same opinion, at page 319 of 66 N. C., it is said: "From the language of section 19 of article 4 (and it is by its language only that we can be guided) we think the leading idea in that was to give the Legislature full power over the establishment of special courts, thus making it an exception to the general provision in section 10 of article 3. This is necessary in order to give to the words their full and adequate force." It is well established that an act of the Legislature will never be declared unconstitutional unless it plainly and clearly appears that the General Assembly has exceeded its powers. *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968; *State v. Lytle*, supra. It is also an accepted canon of construction that in case of ambiguity the whole Constitution is to be examined in order to determine the meaning of any part and the construction is to be such as to give effect to the entire instrument and not to raise any conflict between its parts which can be avoided. *Black on Interpretation of Laws*, p. 17, cl. 10, citing *Cooley*, *Const. Lim.* p. 58, and *Manly v. State*, 7 Md. 135. And the same idea is expressed by our court in *State v. Pender*, supra, where the judge says: "It is the duty of the courts of this state, and one which the court has endeavored faithfully and impartially to perform, to give to the Constitution such an interpretation as will harmonize all of its parts, and without violating any leading idea in it as a whole."

From the principles here stated and the decisions of our own courts, from the language of the Constitution itself, and considering the two sections together and giving to each its proper effect, we think it a correct deduction and hold it to be the law that (a) section 27, art. 4, conferring jurisdiction on justices of the peace, is so modified by section 14 of the same article as to authorize and empower the Legislature to establish special courts in cities and towns and give them exclusive jurisdiction of misdemeanors committed within the corporate limits of the same; (b) that the act in question, in so far as it confers exclusive jurisdiction on the police court of the city of Raleigh, of any and all violations of the city ordinances committed within the corporate limits, is a constitutional exercise of legislative power; (c) that the justice of the peace who tried this cause had no jurisdiction, and the judgment against the defendant must be arrested.

It may be well to note that, the superior court having only appellate jurisdiction, the case necessarily is made to depend on the jurisdiction of the trial justice, and has been so considered. *State v. Lachman*, 93 N. C. 763, 3 S. E. 635.

Judgment arrested.

(141 N. C. 111)

MOORE v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 10, 1906.)

MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY.

Where, in consequence of the defective and worn condition of an engine and its gearing and fixtures, carelessly and negligently provided by a railroad company, a wrought-iron cup was snapped from the driving rod while the engine was running at a high speed, and the cup was thrown by the driving rod and struck the right eye of the engineer, permanently destroying its sight, and impairing his nervous system, and doing him other permanent injuries, the railroad company was liable therefor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 214.]

Appeal from Superior Court, Durham County; Ferguson, Judge.

Action by John M. Moore against the Southern Railway Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

Guthrie & Guthrie, for appellant. Winston & Bryant, for appellee.

BROWN, J. We have been favored with an argument and an elaborate brief, in this case, by the learned counsel for the defendant, largely devoted to an attack upon the constitutionality of the fellow servant act of 1897 (Revisal 1905, § 2646), in which we are asked to overrule *Hancock's Case*, 124 N. C. 222, 32 S. E. 679, and other cases sustaining the validity of such act. Were we disposed to consider the matter, we could not do so upon this record, for nowhere, so far as we can see, is such a question presented. The demurrer, of course, admits the truth of the facts alleged in the complaint, and, taking those facts to be true, we are of opinion that the complaint states a cause of action which the defendant is required to answer.

The allegations of the complaint aver that plaintiff was an engineer in the service of defendant; that the defendant negligently failed to supply a reasonably safe and properly equipped engine, in consequence of which plaintiff was injured. The complaint more specifically alleges that plaintiff was running his engine under orders at a high rate of speed "when suddenly, in consequence of the defective and worn condition of said engine and gearing and fixtures, carelessly and negligently provided and furnished by defendant, as hereinbefore stated, the said wrought iron cup above referred to (being on the said worn and defective side rod), about 3 inches in diameter and weighing about two pounds, was snapped from the driving rod, by reason of the disalignment of said gearing and the loss of motion caused by said defects in said engine, which driving rod was moving at a great rate of speed, horizontally—the said cup having been placed on the driving rod in order to hold oil to lubricate the pin which held the side

rod—and was thrown by said driving rod with force and violence from its position and struck the right eye of the plaintiff, permanently destroying the sight of the same and impairing his nervous system and doing him other permanent injuries herein-after set out." These facts, together with the others set out in the complaint, if established by proof, make out a cause of action. It is universally held at this day that it is the master's duty to furnish his servant reasonably safe machinery. If he fails to do so he exposes the servant to extraordinary risks and hazards. *Hicks v. Mfg. Co.*, 138 N. C. 320, 50 S. E. 703; *Pressly v. Yarn Mills*, 138 N. C. 413, 51 S. E. 69; *Labatt*, § 279 (a) 296, 297, 298 (a). The failure to exercise due care in furnishing such machinery is a breach of duty which the master owes the servant. *Tanner v. Hitch* (at this term) 53 S. E. 287.

We will not discuss the question of contributory negligence attempted to be presented by the demurrer. That is a defense which will be more properly considered when the facts are found by the jury. Certainly there are no facts stated in the complaint which the court can, as a matter of law, declare constitutes contributory negligence.

Affirmed.

(141 N. C. 106)

DAVIS v. SMITH.

(Supreme Court of North Carolina. April 10, 1906.)

WATERS—DRIFF FROM ROOF—INJURIES TO ADJOINING OWNERS.

The owner of a building is liable for damages caused by water collected on its roof, and running against the wall of a building on an adjoining lot, and collecting at the foot of the wall.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 136.]

Appeal from Superior Court, Durham County; Ferguson, Judge.

Action by Lella R. Davis against J. W. Smith. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Manning & Foushee, for appellant. R. B. Boone, for appellee.

CLARK, C. J. The complaint alleges that the roof of defendant's building, a large three-story livery stable, not being provided with gutters, the water collected thereon is thrown against the wall of plaintiff's building adjacent thereto, which keeps the plaintiff's wall moist and wet all the time, and this water has leaked through the plaintiff's wall and injured her building, and the water has collected at the foot of her wall and this has put her to expense in drainage of her building, under orders of the health officer, to which she would not otherwise have been subjected. The demurrer that the complaint did not state a cause of action should have been overruled. The water falling on the defendant's

lot, in its natural condition, could run off as nature provided for it, and the lower proprietor could not complain. But when the defendant erected a building, the roof prevented part of the rainfall from being soaked up by the ground, and when the defendant collected it on his roof and discharged it against the plaintiff's wall, or increased the quantity at the foot of the plaintiff's wall, he diverted the water from its usual course and became responsible for any damage caused thereby. *Porter v. Durham*, 74 N. C. 767.

The demurrer also admits the further allegation of the complaint, "that the plaintiff has complained to the defendant at various times of this condition, and has requested him to remedy it; that it could be remedied by the defendant at little cost, by putting upon his building proper gutters and drains from the gutters under the sidewalk of Main street, as the plaintiff has done, but the defendant has persistently refused to do." In *Shipley v. 50 Associates*, 106 Mass. 194, 8 Am. Rep. 318, it is held that maintaining a building with a roof constructed so that snow and ice collecting on it from natural causes would probably fall onto an adjoining highway, renders the owner liable to the person injured. It is there said that "It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail for the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such roof as his, nothing could prevent or guard against. He has no right so to construct his building that it will inevitably, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed. He must at his peril keep the ice or snow that collects upon his roof within his own limits, and is responsible for all damages if the shape of his roof is such as to throw them upon his neighbor's land in the same manner as he would be if he threw them there himself." To same effect, *Gould v. McKenna*, 88 Pa. 297, 27 Am. Rep. 705; *Hazeltine v. Edgmand*, 85 Kan. 202, 10 Pac. 544, 57 Am. Rep. 157. 30 Am. & Eng. Enc. (2d Ed.) 342, says: "The owner of a building must prevent the water from the roof thereof from falling upon adjoining land belonging to another, and if he fails to do so he is liable therefor." To same purport, *Copper v. Dolvin*, 68 Iowa, 757, 28 N. W. 59, 56 Am. Rep. 872; *Gould on Waters* (2d Ed.) §§ 292 and 293.

To throw the water against the plaintiff's wall is to throw it on her land. In *Porter v. Durham*, supra, the court says that the higher owner "cannot artificially increase the natural quantity of water or change its natural manner of flow . . . in a different manner from its natural discharge." The erection of a large three-story building, and the discharge of water from its roof either

against the plaintiff's wall or in a volume at the foot of her wall, is a "different manner from its natural discharge."

Reversed.

(73 S. C. 442)

CALDWELL v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. March 15, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—INSTRUCTIONS.

Where, in an action for injuries to a railroad employé, the evidence was conflicting as to whether the contract of employment was made in South Carolina or in another state and whether the law of South Carolina or that of the other state governed the contract, so as to determine which law would govern as to what constituted fellow servants, it was proper for the court, in its instructions, to define "fellow servant" and "common undertaking," and the laws of both states applicable thereto, and to submit to the jury whether a brakeman, an engineer, and a yard conductor were fellow servants.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1134.]

2. SAME—CONTRACT OF EMPLOYMENT—QUESTION FOR JURY.

In an action by a servant for personal injuries, where he entered into an oral contract in the state to work as brakeman in another state, and in such state was promoted to yard conductor, and was injured while in such employment, it was a question for the jury whether he was working under the contract made in the state or in the foreign state.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1004.]

3. APPEAL—INSTRUCTIONS—FAILURE TO FOLLOW.

Where a jury fails or refuses to obey the law as laid down by the trial court, the Supreme Court will correct such error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3402.]

4. NEW TRIAL—OVERRULING MOTION.

In overruling a motion for new trial, the court has a right to state the effect of the testimony on his own mind.

Appeal from Common Pleas Circuit Court of York County; Gage, Judge.

Action by Joseph H. Caldwell against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

The following is the judge's charge:

"Before I proceed to charge you the law in this case as I see it, I will take up the requests to charge, and that means the law as it is seen by the counsel for the parties. The plaintiff in the case, Mr. Caldwell, makes no written requests. The defendant, the railroad company, makes these requests, seven in number, Mr. Stenographer, all written, and all of which I charge: '(1) That plaintiff, in his complaint, charges and alleges that he was injured by the negligence of the defendant railway company. It is therefore incumbent upon him, before he can recover, or even make out prima facie case, to satisfy the jury, by the preponderance of the testimony, that he was injured, and that the said injury was the immediate and direct re-

suit of the negligence and carelessness of the defendant railway company. The burden of the proof is upon him to make out his case by the greater weight of the testimony. It will not be presumed that the defendant was guilty of negligence. (2) If the plaintiff's injuries were the result of a pure accident, such as could not ordinarily be anticipated, and not the result of the negligence of either the plaintiff or the defendant, then the plaintiff cannot recover. He cannot recover at all unless his injuries were caused by the negligence of the defendant company or its employees. (3) Even if the plaintiff was injured by the negligence of the defendant company or its employees, and he was also guilty of negligence, and his negligence contributed to his injuries as an immediate and proximate cause, then he cannot recover. If the plaintiff was guilty of negligence, and his negligence concurred and combined with that of the defendant in bringing about his injuries, this will deprive him of the right to recover, although the defendant may have been guilty of negligence, and that negligence may have been the immediate and proximate cause of his injuries. [I change that to "one of the immediate and proximate causes."] The statute of North Carolina, in evidence in this case, in reference to the liability of the railroad for the negligence of its servants, does not deprive the railroad company of the defense of what is commonly known as contributory negligence. Contributory negligence is the want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as the proximate cause thereof, without which the injury would not have occurred. (6) The Supreme Court of South Carolina has placed acts of omission and commission on the same plane in adopting the following definition of contributory negligence, to wit: "Properly speaking, contributory negligence, as the very words import, arises when the plaintiff, as well as the defendant, has done some act negligently, or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury." (7) If the testimony satisfies you that there were not a sufficient number of hands when this conductor of the yard at Monroe, N. C., started to make up the train at the time stated in the complaint, it was his duty at that time to refuse to make up the train described in the complaint with such inadequate help, but if you find from the testimony that the plaintiff nevertheless did make up the train with such inadequate help, he waived the obligation of the defendant to him, and made up the train at his own risk, and if you find that from the testimony that plaintiff was injured while making up the train with inade-

quate help, and from such cause, he cannot recover of defendant."

"Now, gentlemen, in my own way I will try briefly to help you to a conclusion in this case, and it is always a matter of great pain to me, gentlemen, that it is such a difficult matter to state to a jury of men plainly, without technicalities, and in a way they can understand it, the principles of law by which they are guided. I will endeavor to do so in this case, and, if you follow the law, whether you think it is good law or bad law, and then if you apply that to the testimony of the witnesses on the stand, you are bound to reach a correct verdict, and you cannot reach a verdict which will be hurtful to anybody, because if I charge you the law wrongfully, gentlemen, there are four judges at Columbia, with great wisdom, to examine it more carefully, and to send it back to a jury to try it according to right law, if I charge you the wrong law. Now, so much. At the threshold of the case, gentlemen, and somewhat out of its regular order, but it seems to me in its logical order, lies this question of fellow servants, about which you heard so much talk. It is contended by the defendant company, the railroad company, that these three men working with that train on that night were fellow servants, to wit: Caldwell, the plaintiff, and the man Morrow, and the man Jackson—the yard master or 'yard conductor,' as Caldwell is described, the plaintiff, and the two brakemen, Jackson and Morrow. Now, I say the contention of the railroad company is that they were fellow servants, and, if fellow servants, were governed and controlled by the law of fellow servants as understood in this state. Now, the law of fellow servants, gentlemen, rests upon the primary law, which means that when a man has a servant—and by servant I do not mean manual servant, as understood generally in this country, but I employ that when a man has a servant about a job, and that servant undertakes to do that job, if he wrongfully and negligently does a man injury in doing that job, he is not only liable, but his master is liable, too. I will illustrate it this way, gentlemen. You send a man in a yard to cut your wood. He is your servant. His business is to cut the wood, and the law puts it upon him, and puts it upon you that he shall cut that wood in a careful manner. If in the cutting of the wood, gentlemen, he is guilty of negligence by which another man is injured, why he is liable to that other man, and so are you, because, if you have employed a negligent man, and a negligent man in the performance of that duty has done harm to another person, he is liable, because he did it, and you are liable because you put him in your place to do it, and he has done it negligently. Now, you understand, Mr. Foreman. Well, now, that is the law of master and servant. Well, now, we will put another man in the yard, two

men to cut wood. Now, suppose one of these men cutting wood negligently hurts the other fellow. The question arises: Are you liable for that injury to the other fellow? These two men are called fellow servants—fellow servants to you, one principal—and if one hurts the other through negligence, then you are not liable to that other, because long ago our court settled that fact. It is not necessary now to inquire into the reason of it. It would confuse you to do it, but that is the settled law of this state—where two men are working as fellow servants for one principal, and one by negligence hurts the other, the master is not liable. Now, that is the law of fellow servants in this state.

"The law of fellow servants as laid down by our courts means this: They are fellow servants where they are employed in a common undertaking—you know what that means—and sustain towards each other the relation of fellow servant, of exercising only the ordinary duties of the employment, even when they cannot see each other, or are working apart, and not in conjunction. Now, in this case, I charge you, if these two men bore that relation to one another—and you are to say whether they did—were they employed in a common undertaking? If they were, according to the definition I have given you, then they were fellow servants. Now, the contention of the railroad company is, being fellow servants, that the railroad was not liable for the negligence of one man towards the other. Well, now, here arises another difficulty in the case. That is this: It is charged in this case this injury was done in North Carolina, at Monroe. It is further charged by counsel that this contract of employment was made in South Carolina; that the railroad company and Caldwell made the contract in South Carolina, at Abbeville. That is what counsel said about where Caldwell was employed as a yard conductor, and the contract was made here, and he went over into North Carolina to perform it, and Caldwell got hurt there, and now Caldwell comes back and sues here. So that adds some complication to the case. The law of states differ. The laws of North Carolina and South Carolina about this law of fellow servants is different. The law of North Carolina as to fellow servants isn't the same thing I have charged you is the law of South Carolina. So now I charge you this, gentlemen, that the plaintiff in this case bases his right to recover upon the fact that he was in the employ of the railroad company as a yard conductor; that they made a contract that he was to be yard conductor (the complaint doesn't call it a contract, but the complaint alleges that he was in the employ of the railroad company, as a yard conductor); and that he went to North Carolina, to Monroe, to perform that service, and I charge you that when they made the contract, one to

give employment, and the other to do the employment as yardmaster or yard conductor, that was written into the contract, the law of the land, just as much as if they had written it out with pen and ink. We make this contract—the one to serve as yardmaster, the other to pay him as yardmaster—and we write in the contract all the law of the land, whatever that be. Now, I charge you this, gentlemen, if the accident at bar had occurred in South Carolina, then it would have been subject and governed by the law of fellow servants, as I have charged you. There is no question about that.

"I charge you, secondly, if the accident occurred in North Carolina, under a contract of employment there—that is, in North Carolina, the case would have been governed by the fellow servant law there, even though the suit be in South Carolina, and the North Carolina law is as follows about fellow servants: Now, the North Carolina law on that subject is stated by Mr. Hart, in his complaint, that, under the laws of the state of North Carolina in force for more than seven years last past, 'Any servant or employé of any railroad company operating in that state, who shall suffer injury to his person in the course of his service or employment with said company by the negligence, carelessness or incompetency of any other servant, employé or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company, and any contract or agreement, expressed or implied, made by any employé of a railroad company to waive the benefit of the said laws, shall be null and void, under the said laws of the said state.' Now, that is the law of North Carolina about fellow servants, and I charge you, as I did before, that if the accident did occur in North Carolina, and if the contract of service was made there, then the case would be governed by the fellow servant law that I have just read to you, even though the suit be brought in South Carolina, but those are not the facts as stated by counsel. Counsel stated that the accident occurred in North Carolina, and one of the counsel states that the contract of service was made in South Carolina, and you know that the suit is being brought here. So, now, is the law of North Carolina or the law of South Carolina going to apply? If the accident had occurred in North Carolina, under a contract of employment in South Carolina, and if the injured party returns here to sue on contract, the case is governed by the fellow servant law here. I will state that again. If the accident occurred in North Carolina, under a contract of employment here, and if the injured party returns here to sue on the contract, the case is governed by the fellow servant law here. Now, next and after that, where a contract of employment was

made is a question of fact for the jury. A contract for employment may be expressed, or it may be implied. Now, you heard the testimony about the contract here of employment. Such a contract may be expressed, or it may be implied. If the plaintiff had expressly agreed with the railroad company to work for it in North Carolina, subject to the South Carolina laws, then in a suit here he would be bound by that contract. That is to say, gentlemen, if they had specifically agreed in so many words in writing—Caldwell and the railroad company—if the contract was made between them in South Carolina, and they said, 'We agree to work, one as a railroad company and the other as a yard master, and we agree that our relationship shall be governed by the laws of South Carolina at all times, no matter where we work,' then they would have been so governed in the matter where they worked, whether North Carolina, Georgia, or Virginia, because that was the contract. But in this case there was no writing showing any express contract, and you heard from the witnesses on the stand whether there was any verbal, expressed contract. Has any witness sworn that the express contract was that they should be always governed by the law of South Carolina, whether they worked in North Carolina, or whether they worked in South Carolina? If so, then it is a South Carolina contract. If not, then I leave it to the jury to say what the contract of the parties was. If the plaintiff did not expressly agree to that, what did he and the railroad company impliedly agree to by his transference from South Carolina to North Carolina? Did they intend that the contract of employment should be one in North Carolina when he went there, if he did go there, or if it should be a South Carolina contract still? That is a question for the jury to decide from all the evidence and the conduct of the parties. Now, gentlemen, with the little consideration I have been able to give it, that is as near as I can come at it, and it is as apt to be wrong as right. That is very clear to me. I don't know whether it is clear to you or not.

"We will go one step further, and I will talk to you in a little more plain language about negligence. The basis of this action, gentlemen, is negligence, and that is to say, and about this branch of the case I am going to talk to you, the laws of North Carolina and the laws of South Carolina do not cut any figure. The law is the same in both states. The basis of this action is that the railroad company owed a duty to Caldwell which it failed to perform, and the basis of the defense is that Caldwell owed a duty to the railroad company which he failed to perform. Now, you take up those two issues and try them. Now, I will charge you right here, gentlemen, so as to put it clearly in your head. If the accident occurred,

and occurred as the result of the railroad company's negligence, and occurred by reason of that, and that alone, the railroad's negligence, moving this way, like my hand [indicating], and did the devilment, and did it alone, then the railroad company is liable; but if the accident occurred by reason of the negligence of both parties moving this way like my two hands [indicating], and did the devilment, then the railroad company is not liable. The courts and some of the judges call that conduct on the part of the plaintiff contributory negligence. I call it negligence. It is a question of negligence. Now, what is negligence, gentlemen? It would be hardly worth while to define negligence to you when you know yourselves. Negligence is the failure of a man or a corporation to come up to the ordinary standard of men or corporations. We are all measured not by the conduct of a smart man, or by the conduct of a weak man, but measured by the conduct of the ordinary man, and when your child, Mr. Foreman, does wrong, or is charged with doing wrong, and you bring him before you for trial, you immediately inquire, has this child done wrong, and you do not fix the highest standard for him, and don't fix the lowest standard. You fix the standard of the common child. Has he done what an ordinary child under like circumstances, under all the environments, would have done. If he has, he has come up to the standard, and you let him go. If he has done less than he ought to do, or done more than he ought to have done, you punish him. One we know as omission, the other as commission. The great inquiry in this case is: Has the railroad company done things in this case that it ought not to have done, or has it left undone things it ought to have done, and by that I mean has it in the operation of its railroad, through its servants, come up to the standard of the ordinary person in what it has done, or has it fallen short. Now, first establish the standard to which they must come, and inquire whether their conduct has fallen short of the standard. If it has fallen short of the standard, that is what the law calls negligence. Now, what are the acts of negligence charged here against the railroad company? The acts of negligence are these: That the railroad company was in duty bound to furnish Caldwell with two brakemen, and it failed to do that. That is the first, they put their fingers on like a surgeon would put his fingers on a muscle in the body. The second one is this: That the railroad company owed the duty to Caldwell to give him a good engine, and it failed to do it. That is the second one. What is the third one? The third one is: That the railroad company owed the duty to give the right signals to Caldwell about the movement of the train, and that it failed to do it. Now, gentlemen, all of those three are questions of fact.

Was the railroad company under obligations—was it its duty, and you know what duty means—was it the duty of the railroad company to give Caldwell two brakemen, and if it was its duty, did it give him two brakemen, and if it did not give him two brakemen, was that one of the things which led to this accident? Those are questions for you.

"So with the next issue. It is manifestly the duty of the railroad company to give a reasonably safe engine. The law says that. Now, the jury must say whether or not the railroad did give Caldwell a safe engine. If it did, it has come up to the standard. If it did not, it is for the jury to say whether or not that is an act of carelessness. It is for the jury to say whether or not they did give the engine, and whether or not it was an unsafe engine. So with the other issue. Did they fail to give Caldwell the right signals of the movements of those trains, and was that the cause of his injury? Was that one of the causes? That is a question for the jury. Now, gentlemen, if you find that those acts, or any one of them, was done by the railroad company, and that that act or failure to perform the act was negligence, as I have described to you, and if you find that injury resulted to Caldwell as the cause of that, the next cause to that, then the railroad company is guilty of negligence, and is bound to pay the damage, unless, as I told you in the outset, the railroad company establishes these acts of negligence on Caldwell's part. Now, what do they say? The railroad company comes back in the same language Caldwell does. They say it was the duty of Caldwell to keep from between the cars. It was his duty not to work with an inadequate force. Now, fix, gentlemen, a standard for him just like you fixed for the railroad. He charges the railroad with negligence, and the railroad charges him with negligence. Fix the standard. Inquire for yourselves whether it was negligence for Caldwell to have gone between the cars, as counsel say he did. Did he go between those cars? Was it an act of negligence for him to go between the cars? You have heard all the testimony. Does he fall short of the standard of a reasonable man in what he did that night? If he does, that is negligence. Was that an adequate force, gentlemen, for him to make up the freight train that night? Were there too few brakemen there? Counsel for the plaintiff charges there was in his complaint; says it led to the accident, because there were too few men to operate the train. Well, now, gentlemen, was it an act of negligence? If a man goes into the performance of a task with too few hands, and disaster comes to him, counsel for the railroad says that is negligence. Well, now, as I charged you in this business of negligence, if the disaster was brought about by the carelessness of both of them working together, operating

together like two stands of rope, gentlemen, and brought about the disaster, then the law leaves them both where it found them.

"Now, on the question of damages. I can't assist you on that, gentlemen. The plaintiff sues for \$20,000. That is a matter always left in the wise discretion of a jury. I take it for granted, gentlemen, when a jury goes to assess damages that it does its best to formulate some rule; it makes a wise survey of all conditions; it takes into consideration its knowledge of its own affairs in life; and it takes into consideration those matters with an honest desire to do justice between litigants, to fix the damage as near as it can at what is right; and, as I have often said to juries before, no matter what duty you are called to perform, you never will be called to perform a higher duty than that of sitting in judgment between your fellow men. If your neighbors fall out, and call you to settle their controversy, you ought to be uplifted by every high motive to do the right thing. Your neighbors, your fellow citizens, have fallen out, and the law has called you in to settle the difficulty, and that ought to inspire in every man the highest and best motives to do the best service in him. Now, gentlemen, I will not talk to you any more. I am sorry to have talked to you so long. If you find for the plaintiff, say, 'We find for the plaintiff,' and sign your name as foreman. If you find for the defendant, say, 'We find for the defendant,' and sign your name as foreman. And if you find for the plaintiff, specify how much, and write it out in words, and, Mr. Foreman, do not express it simply in figures. You understand. Write your verdict, gentlemen, upon the back of this complaint, Mr. Foreman, beneath the cross mark, and sign your name as foreman."

From judgment for plaintiff, defendant appeals on following exceptions:

"(1) For that his honor, under the undisputed evidence in this case that the employes of the defendant, through whose negligence the injury to plaintiff is alleged to have been sustained, were at the time of such injury exercising only the ordinary duties of their employment with plaintiff, another employe of defendant, in a common undertaking, that of making up a freight train for their common master, the defendant, erred in submitting to the jury the question whether said employes, or any of them, were fellow servants with plaintiff.

"(2) For that the undisputed testimony in this case being susceptible of but the single inference that the engineer in charge of the switch engine in the yard at Monroe, N. C., and the brakeman, Jackson, were performing their ordinary duties, and that, in the absence of the other brakeman, Morrow, plaintiff, without orders or instructions from defendant, was performing the ordinary duties of the absent brakeman, when he

received the injuries complained of, the question whether said yard engineer and brakeman were fellow servants with plaintiff was one of law for the court, and it was error on the part of his honor to submit same to the jury.

"(3) For that his honor, under the undisputed evidence in this case that the employés of defendant, through whose negligence the injury to plaintiff is alleged to have been sustained, were at the time of such injury exercising only the ordinary duties of their employment, erred, as matter of law, in not instructing the jury, as contended by the defendant, that said employés and plaintiff were fellow servants, and, under the further undisputed fact that the contract of employment between plaintiff and defendant was made and entered into at Abbeville, S. C., were governed and controlled by the law of fellow servants, as understood in this state.

"(4) For that his honor erred in charging the jury as follows: 'Now, in this case, I charge you if these two men bore that relation to one another—and you are to say whether they did—were they employed in a common undertaking? If they were, according to the definition I have given you, then they were fellow servants'—the error being that the undisputed testimony established that the employés of defendant, through whose negligence the injury to plaintiff is alleged to have been sustained, were each at the time of the injury exercising their ordinary duties and were employed in a common undertaking with plaintiff for their common master, the defendant, and his honor should have instructed the jury, as matter of law, that said employés were fellow servants with plaintiff.

"(5) For that his honor, having charged the jury, in substance and effect, that plaintiff's action in this case is not in tort, ex delicto, but ex contractu, for breach of contract, erred in submitting to the jury the question where the contract was made, whether in South Carolina or in North Carolina, on the undisputed evidence of plaintiff, himself, that the contract between himself and defendant, was made and entered into at Abbeville, S. C.

"(6) The undisputed evidence of the plaintiff, himself, being that the contract of employment between himself and defendant was made in Abbeville, S. C., at a time when plaintiff was a resident of this state; and, there being absolutely no testimony whatsoever as to the law of which state the parties contracted should govern them in performing that contract, it was error on the part of his honor to submit to the jury the question whether the parties had in mind the law of South Carolina or the law of North Carolina at the date of the contract, and also at the time of the transfer of plaintiff from South Carolina to North Carolina.

"(7) For that his honor erred in charging the jury as follows: 'Well, now, here arises

another difficulty in the case. That is this: It is charged in this case, this injury was done in North Carolina, at Monroe. It is further charged by counsel that this contract of employment was made in South Carolina; that the railroad company and Caldwell made the contract in South Carolina, at Abbeville. That is what counsel said about where Caldwell was employed as yard conductor, and the contract was made here, and he went over into North Carolina to perform it, and Caldwell got hurt there, and now Caldwell comes back and sues here'—the error being: (a) The fact that the contract of employment between plaintiff and defendant was made and entered at Abbeville, S. C., was established by the undisputed evidence of plaintiff, himself, and did not rest on the mere charge or statement of any of the counsel in the case. (b) The jury was thereby misled into supposing that the fact that said contract was made in Abbeville, S. C., rested entirely on the mere charge or statement of the counsel or of some of the counsel in the case, and did not rest upon the undisputed evidence of plaintiff that such was a fact. (c) In the absence of all testimony to the contrary, it became the duty of the court to instruct the jury that the place of the making of the contract is presumptively that of its performance by the law whereof it is to be interpreted and its effect defined, regardless of where the contract was being performed, when the accident occurred.

"(8) For that his honor, under the undisputed evidence in this case that the contract of employment between plaintiff and defendant was made in South Carolina, and in the absence of all testimony as to the law of which state the parties contracted that they should be governed in its performance, erred in reading and explaining to the jury the statute law of the state of North Carolina abolishing the common law, which exempts the master from liability for injury to a servant sustained at the hands of a fellow servant; the said statute, under the undisputed evidence, being inapplicable to this case.

"(9) For that his honor erred in charging the jury as follows: 'Now, that is the law of North Carolina about fellow servants, and I charge you, as I did before, that if the accident did occur in North Carolina, and if the contract of service was made there, then the case would be governed by the fellow servant law that I have just read to you, even though the suit be brought in South Carolina, but those are not the facts as stated by counsel. Counsel stated that the accident occurred in North Carolina, and one of the counsel states that the contract of service was made in South Carolina, and you know that the suit is being brought here. So, now, is the law of North Carolina or the law of South Carolina going to apply?'—the error being: (1) The fact that the contract

of employment between plaintiff and defendant was made in Abbeville, S. C., rested not on any statement of any of the counsel on either side of the case, but on the undisputed evidence of plaintiff, establishing the place where the contract was made and what were the terms of his said contract. (2) The contract, as established by the undisputed evidence of plaintiff himself, being silent as to what law should govern them in performing same, the court should not have submitted to the jury the question, 'Is the law of North Carolina or the law of South Carolina going to apply?' but should have instructed the jury that, in the absence of all testimony to the contrary, it became the duty of the court to charge the jury that the law of South Carolina, where the contract was made, is presumptively that of its performance, by the law whereof it is to be interpreted and its effect defined, regardless of where the contract was being performed when the accident occurred. (3) The jury was thereby misled into supposing that the fact that said contract was made in Abbeville, S. C., rested entirely on the mere charge or statement of counsel or of some of the counsel in the case, and did not rest upon the undisputed evidence of plaintiff that such was a fact.

"(10) For that his honor erred in charging the jury as follows: 'If the accident had occurred in North Carolina, under a contract of employment in South Carolina, and if the injured party returns here to sue on contract, the case is governed by the fellow servant law here. I will state that again. If the accident occurred in North Carolina, under a contract of employment here, and if the injured party returns here to sue on the contract, the case is governed by the fellow servant law here'—the error being that all of the facts on which his honor based or predicated his instruction, being either admitted or established by undisputed testimony of the plaintiff, it became the duty of the court to instruct the jury that the case is governed by the fellow servant law of South Carolina.

"(11) For that his honor erred in charging the jury: 'But in this case, there is no writing showing any express contract, and you heard the witnesses on the stand whether there was any verbal expressed contract. Has any witness sworn that the express contract was that they should be always governed by the law of South Carolina, whether they worked in North Carolina, or whether they worked in South Carolina? If so, then it is a South Carolina contract. If not, then I leave it to the jury to say what the contract of the parties were'—the error being: (a) That the jury were thereby misled into supposing that unless the parties expressly contracted that, in the performance of said contract, they would be governed by the law of South Carolina always, whether they worked in North Carolina or in South Carolina, the

law of South Carolina would not govern in the interpretation of said contract; whereas, it is respectfully submitted, under the undisputed testimony of the plaintiff himself, establishing the fact that the contract was made in South Carolina and the terms thereof, it became the duty of the court to instruct the jury that, in the absence of anything indicating the contrary, the place of the making of the contract is presumptively that of its performance, by the law whereof it is to be interpreted and its effect defined.

"(12) For that his honor erred in not granting defendant's motion for a new trial on the minutes of the court on the grounds (1) that the verdict of the jury was in direct conflict with the law as charged it by the court; (2) that the verdict was against the clear preponderance of the testimony—the errors being: (a) That the jury disregarded and failed to follow the law of contributory negligence, as charged by the court; it having been charged by plaintiff in his complaint that he was injured because he did not have a sufficient number of brakemen to make up the freight train, and the undisputed evidence being that he did not refuse to make up the train with such inadequate force, but, on the contrary, attempted to do so, he himself discharging the duty of a brakeman, and receiving his injury by an error of judgment as to the distance of the shifting engine from him when he went between the cars, where he was injured. (b) The admission of plaintiff, contained in his letters, Exhibits C and D, to the testimony, showed that he was guilty of contributory negligence in going between the two box cars when he did, and that the accident occurred through the miscalculation or error of judgment on the part of plaintiff as to the distance of the shifting engine from him, when he went between the cars. (c) That the jury disregarded and failed to follow the law, as charged by the court, as to the waiver by plaintiff of the obligation of defendant to him and the assumption of risk by plaintiff, if he did not refuse to make up the freight train with an insufficient force, but persisted in doing so; the undisputed evidence being that plaintiff did not refuse to make up the train with an insufficient force, but, on the contrary, attempted to do so, he himself discharging the duty of brakeman, and receiving his injury by an error of judgment as to the distance of the shifting engine from him, when he went between the cars, where he was injured. (d) That the jury disregarded and failed to follow the charge of his honor in the following particular, to wit: 'If the accident had occurred in North Carolina, under a contract of employment in South Carolina, and if the injured party returns here to sue on contract, the case is governed by the fellow servant law here. I will state that again. If the accident occurred in North Carolina, under a contract of employment here, and if the injured party returns here to sue on the contract, the case is governed

by the fellow servant law here;' the undisputed proof being that the accident did occur in North Carolina under a contract of employment made in South Carolina, and plaintiff returned to South Carolina to sue on contract. (e) The admission of plaintiff in his letters, Exhibits C and D, to the testimony, standing alone, was sufficient to defeat a recovery in favor of plaintiff, and his honor erred in not granting a new trial, because the verdict was not only against the clear preponderance of the evidence, but without any evidence to sustain it.

"(13) For that his honor, in his order refusing defendant's motion for a new trial, erred in making the following statement: 'Plaintiff was required to go between the cars to uncouple the air hose; he did so, and while in the act an engine which was doing the shifting drove a freight car over him'—the error being that there was absolutely no evidence that plaintiff was required to go between the cars to uncouple the air hose, but, on the contrary, the undisputed evidence was that it was no part of his duty to uncouple the air hose, and he did so of his own volition, without orders or instructions to do so from defendant."

J. L. Glenn and Wm. B. McCaw, for appellant. Geo. W. S. Hart, for respondent.

POPE, C. J. The plaintiff's action, commenced in the court of common pleas of York county, in the state of South Carolina, on the 27th of October, 1904, has for its object the recovery of damages for personal injury by defendant's railway on the 22d and 23d of February, 1904, while the plaintiff was acting as night yard conductor in defendant's yard at Monroe, N. C. The case came on for trial before Judge Gage and a jury. A verdict for \$5,000 was rendered for the plaintiff. A motion for a new trial was made upon the minutes of the court by the defendant. This motion was overruled. Thereupon, after entry of judgment, an appeal was taken. Let the charge and exceptions (except that subdivision [b] of the eleventh exception must not be included, having been abandoned by the defendant at the hearing) be set out in the report of this case. We will now examine these exceptions in their order, in groups, as follows: (1) Exceptions 1, 2, 3, and 4. (2) Exceptions 5, 6, 7, 8, and 9. (3) Exception 10. (4) Exception 11. (5) Exception 12. (6) Exception 13.

1. To understand this group of exceptions, it may be said that the contract between the plaintiff and the defendant was an oral contract made at Abbeville, S. C., by one Sellers, the trainmaster of the defendant company. Under this contract the plaintiff first did service as a flagman and thereafter he was appointed night yard conductor in the yard at Monroe, N. C. The duties of that position, amongst others, were that the plaintiff should make up all trains for the defendant in the nighttime, and in making up such trains he

would have two brakemen, and also that a yard engine with an engineer could be used in moving trains or parts of trains. While the night conductor was making up a train in said yard in Monroe, N. C., he only had one brakeman and was himself doing the work of the second brakeman; that this work was required to be speedily done, only about 30 minutes being given within which trains must be made up; that the plaintiff sent his one brakeman in another part of the yard to give signals to the engineer of the yard engine; that plaintiff himself went in between two cars to carry out a bulletin of the defendant company which required the air brakes to be uncoupled by hand, and he had just succeeded in uncoupling said air brakes between the two cars when the engine, without warning to him, or orders from him, or signals from him, with great force drove the cars, just uncoupled, together, throwing the plaintiff down upon the ground and running over his leg, from which injury his leg was amputated above the knee, and with great effort only was he saved from loss of his life. It was in testimony by the plaintiff that the yard engine was defective, though this was denied by the testimony of the defense. A statute of the state of North Carolina is as follows: "Any servant or employé of any railroad company operating in this state, who shall suffer injury to his person in the course of his service or employment with said company by the negligence, carelessness or incompetency of any other servant, employé or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company, and any contract or agreement expressed or implied, made by any employé of a railroad company to waive the benefit of said laws, shall be null and void under the said laws of the said state." The judge included in his charge the said statute of North Carolina in the words just quoted, and in his charge he stated that no such statute was in force as a statute of South Carolina, but that our law was different from the provision of the North Carolina statute.

In the first exception, the circuit judge is complained of in submitting to the jury whether the plaintiff and the brakeman, and engineer on this occasion, were fellow servants. The charge, when examined, will be found full in its definition of the terms "fellow servant" and "common undertaking," and these, being matters of fact, were properly left to the jury. In the second exception the same question is raised, and the third exception, so far as the facts were concerned, was properly submitted to the jury, and the same thing exists in exception 4. The circuit judges of the state are subjected to a very onerous responsibility in their charges to juries. The Constitution of the state inhibits them from charging upon facts—they cannot even state the testimony, and the judge

has, in the case at bar, very wisely contented himself with giving correct definitions of the terms "fellow servant" and "common undertaking," and left it to the jury to say whether the relation of "fellow servant" and "common undertaking" existed. The matters embraced in these exceptions are not where the difficulty in this case arises, as we shall see presently when we come to pass on others. These exceptions are overruled.

2. It is true that plaintiff himself swore that his contract of employment with the defendant was entered into at Abbeville, S. C., but he stated that it was as flagman, with a certain salary attached thereto, that he was employed, and that subsequently he was transferred to Monroe, N. C., as night conductor in the Monroe yard at a greater salary. Now, whether this contract of employment at Abbeville was the same both as flagman and as night yard conductor were matters properly left to the jury, for the testimony was oral and the circuit judge would have had no right to have announced to the jury that the employment of the plaintiff by the defendant was the same in both instances. The judge was exceedingly careful in his charge to the jury to discriminate betwixt the two employments, whether under the South Carolina law or that of North Carolina. These questions have been before the court quite recently in *Fraser v. Charleston and Western Carolina R. R.*, 73 S. C. 140, 146, 52 S. E. 964, where it was under discussion as to what law, that of Georgia or South Carolina, should apply. It was held as follows, quoting from the case of *Scudder v. Union National Bank*, 91 U. S. 406, 412, 23 L. Ed. 245: "Matters bearing upon the execution, the interpretation, or validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." In *Levy v. Boas*, 2 Bailey, 219, 23 Am. Dec. 134, approved in *Ayres v. Audubon*, 2 Hill, 604, it is declared: "That the *lex loci contractus* is to be observed on the nature, validity, and construction of the contract, but the form of the action, the course of the judicial proceeding, and the time when the action must be commenced, must be directed exclusively to the laws of the state in which the action is brought." This general rule is well settled and understood. * * * The contract was alleged to have been made in Georgia concerning a shipment from that state into South Carolina. It was, therefore, not to be fully performed in South Carolina, but was to be at least partly performed in Georgia, where made. It, therefore, falls within the

general rule stated in 4 Elliott on Railroads, § 1506: "That the law of the place where it is made and is to be performed either in whole or in part governs as to its nature, validity, and interpretation." To treat the question as relating to the remedy or the evidence of the contract is to assume that a contract has been made to be evidenced and enforced; whereas, the real question is whether any such contract exists." Thus it will be seen that there being some doubt as to the place where the contract was made, it was important for the circuit judge to leave that matter open for the consideration of the jury as well as to make a ruling upon the law as it would be—in the first place, if made in North Carolina, or secondly, if made in South Carolina. These exceptions must be overruled.

3. The circuit judge could not have charged as indicated in the tenth exception, because if the jury found the facts introduced at the trial, that the contract was governed by the laws of the state of North Carolina, he could not have charged as requested as to South Carolina. It seems to us that his charge in the alternative was correct; that is, he laid down the rule in case it was to be performed in the state of South Carolina, and also what should be the rule in case it was found in North Carolina. This exception is overruled.

4. In disposing of the eleventh exception, we find that it is bottomed on a misapprehension of the judge's charge; for, as we have heretofore remarked, he was very careful to lay down the law applying to such findings of fact as might be made by the jury. This exception is overruled.

5. We will now dispose of exception 12. We do not find, nor did the circuit judge find, that the jury failed or refused to regard the instructions on the law. His honor's charge on contributory negligence and as to assumption of risks will be found in the charge itself to have been exceedingly carefully performed. There is no doubt that if the jury had failed or refused to obey the law, as laid down by the circuit judge, that this court would not for a moment hesitate to correct such error, but they made no such mistake. This exception is therefore overruled.

6. Lastly, we will consider the thirteenth exception. We do not think this exception is well taken. It does correctly state the language used by the circuit judge in his order overruling the motion for a new trial, but therein he only gave the effect of the testimony upon his own mind, which he had a right to do in such order. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J., concurs in result.

(73 S. C. 487)

LA FITTE v. SOUTHERN RY.

(Supreme Court of South Carolina. March 15, 1906.)

1. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

An erroneous statement in an instruction as to defendant's claim of contributory negligence, which does not state the law of contributory negligence, is harmless error, where the court several times thereafter in the charge accurately defined the law of contributory negligence.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4219; vol. 46, Cent. Dig. Trial, § 718.]

2. NEGLIGENCE—WILLFUL INJURY—CONTRIBUTORY NEGLIGENCE.

Negligence of plaintiff is not a good defense to a willful injury inflicted by defendant.

[Ed. Note.—For cases in point, see vol. 87, Cent. Dig. Negligence, § 85.]

Appeal from Common Pleas Circuit Court of Bamberg County; Townsend, Judge.

Action by E. T. La Fitte against the Southern Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Jos. W. Barnwell and Robt. Aldrich, for appellant. A. McIver Bostick, for respondent.

WOODS, J. Plaintiff recovered judgment against the defendant in an action founded on allegation of injury to himself and his horse and buggy, due to the frantic efforts of the horse to escape from the steam which the engineer or some other servant of the defendant had willfully, maliciously, wantonly, and recklessly discharged on the horse from the steam cocks of a locomotive engine in passing the plaintiff, while he was sitting in his buggy holding the horse near a crossing on a public road running parallel with the railroad.

It is submitted the following sentences found in the charge constitute reversible error, because not a correct instruction on the law of contributory negligence: "The defendant denies that it was negligent or willful, and alleges further and sets up this affirmative defense, that the plaintiff was negligent himself, and that his negligence caused the trouble whatever it may have been, and if he suffered any damage it was caused by the plaintiff and not by them, that his negligence was the immediate, proximate cause. Of course, if the defendant company was guilty of an act of negligence by which the plaintiff was injured, they are liable, but if they committed no negligent act, they are not liable."

1. Obviously the first proposition was an inadequate statement of defendant's answer as to contributory negligence, but the circuit judge was not, at this time, giving his views on that subject. There was no error in charging the second proposition, because it is correct as a general statement of the law of negligence. Subsequently the law of contributory negligence was several times charged fully and accurately.

2. The charge to the effect that the negli-

gence of the plaintiff would not be a good defense to a willful injury inflicted by defendant, is in accord with the law as laid down in *Proctor v. Railway Co.*, 64 S. C. 491, 42 S. E. 427.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 489)

ROBINSON v. HARRIS.

(Supreme Court of South Carolina. March 15, 1906.)

WILLS—CONSTRUCTION—DEVISEES.

A devise to testator's sister and her own children, and to his nephew and his children, so long as they may live, to each share and share alike, vests the land in the sister and the nephew and such children as are living at the time of testator's death, and a child born to the nephew after such death takes no interest.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1116-1127.]

Appeal from Common Pleas Circuit Court of Anderson County; Prince, Judge.

Action by B. O. Robinson against Ezekiel Harris, individually and as executor of R. B. Robinson. From a decree sustaining demurrer to the bill, plaintiff appeals. Affirmed.

W. N. Graydon, G. B. Greene, and B. F. Martin, for appellant. Bonham & Watkins and Jos. N. Brown, for respondent.

POPE, C. J. The plaintiff's action was begun on April 11, 1905, and had for its object the partition of two tracts of land in Anderson county, in this state, between the plaintiff and the defendant, according to certain portions set up therein, and also the payment of \$1,861, alleged to be the share due to the plaintiff by the defendant of the rents and profits of said land from the 1st of June, 1883, to the commencement of this action. The defendant demurred to the complaint, which was heard and sustained by Judge Prince on the 5th of October, 1905. The plaintiff thereupon appealed from the decree of Judge Prince, and we now pass upon such appeal. In order that the contention between these parties may be understood, it would be well to reproduce said decree and the exceptions thereto.

Decree: "This case came before me at my chambers by agreement of counsel on the demurrer of defendant to plaintiff's amended complaint. The plaintiff by this action seeks to recover of defendant an interest in certain lands described in his complaint, which he alleges to be in defendant's possession, and he founds his right of recovery on the following facts which appear on the face of his complaint, to wit: That on the ——— day of ———, 1880, one R. B. Robinson died, leaving of force his last will and testament, a copy of so much of which as is here involved is as follows: '2d. I will and bequeath all my interest to and in the homestead whereon I now live, it being the old homestead of my father, John Barr Robinson, now dec'd., and

bought by my brother Jas. A. Robinson, now dec'd., at master's sale containing three hundred and twenty-four acres, more or less. This said tract of land I give and bequeath all my interest in to my sister, Hannah Kay, and her own children heirs of her body, and Benj. F. Robinson, my nephew, who lives with me, and his own children as long as they may live to each share and share alike in this said tract of land, and after the death of my sister Hannah Kay and her own children, and after the death of said B. F. Robinson and his own children, after all these deaths, then I will the same to Ezekiel Harris and his heirs, and also I will and bequeath my tract of land adjoining this aforesaid homestead known as the Evans tract containing fifty acres, more or less, to be disposed of just as the aforesaid homestead tract to the same persons herein named and in the same way.' The complaint on its face shows that the plaintiff is the son of the Benj. F. Robinson named in said will and therein described as the nephew of testator. That he attained his majority June 1, 1904. He was, therefore, born June 1, 1883, about three years after the death of the testator. That at the time of the death of testator, and also at the time of the making of the will, Benj. F. Robinson, the nephew therein named, was unmarried, and had no children. That after the death of testator, Benj. F. Robinson married, and there were born unto him two children, the plaintiff, and one other, who died in infancy. The defendant, by his demurrer, raises the question whether or not the plaintiff, who was not in esse at the time of the death of testator, and also at the time of the will. He contends that the devise to the children of Benj. F. Robinson, there being none in esse at the date of the testator's death, failed from the want of an object. The plaintiff, on the other hand, contends that he took under the will when he came into being by way of executory devise. After careful investigation and mature deliberation, I am forced to the conclusion that defendant's demurrer must be sustained. Had the devise been to B. F. Robinson and his children in fee and to none others, and at the death of testator B. F. Robinson had had no children in esse, there can be no doubt that B. F. Robinson would have taken a fee conditional in the whole. After born children would not have taken as purchasers, and the word 'children' would have been construed as a word of limitation, so as to enlarge the estate of the father. Had the devise been to the children of B. F. Robinson, and none others, and B. F. Robinson had had no children in esse at the time of the death of the testator, but had subsequently had a child born to him, the after-born children could probably have taken by way of executory devise, the vesting of the estate being future by operation from the nonexistence of the object, and not future limitation. 2 Jar. on Wills, (5th Ed.) p. 483; Gore v. Gore, 2 P.

Williams, 28; Bullock v. Stones, 2 Ves. Sr. 521. But this is not the provision of the will under consideration. Here the devise is to Hannah Kay and her children, and to Benjamin F. Robinson and his children, share and share alike, as long as they live. The gift is immediate and is to Hannah Kay and all her children and Benj. F. Robinson and all his children, share and share alike. The fact that Hannah Kay predeceased the testator cannot affect the construction. It is perfectly clear that testator intended each of the children of Hannah Kay and Benjamin F. Robinson to take per capita. Let it be observed that testator does not devise one moiety to Hannah and her children, and the other moiety to Benjamin and his children, but the entire tract of land is to be divided between these two ascertained individuals and their children, so that each child should share equally with the ascertained individuals, and every other child. The quantity of land to be taken by each was here made to depend on the total number of the children who were to share in the estate. The gift here being immediate, the share of each was fixed by the number in existence at testator's death. Whether the share of Hannah Kay, who predeceased testator, passed to the other devisees under the residuary clause of the will or failed from want of an object, it is not necessary here to decide. Her daughter, Elizabeth Kay Gaddis, and Benj. F. Robinson were entitled to partition and to their several shares of the land devised on the death of testator. This would necessarily exclude the after-born children of Benj. F. Robinson, just as much so as the children in esse at the death of the testator will take to the exclusion of after-born children in a case where lands are devised to an ascertained individual and children as a class, share and share alike, the gift being immediate, that the ascertained individuals and those children who are in esse at the death of testator would take to the exclusion of after-born children. It should be remembered that the testator here does not give any definite proportion of his estate to the children of B. F. Robinson, but provides that they shall share alike, not only with their father, but with Hannah Kay and her children. Had he devised a definite proportion, as one-fourth of the land, to the children of Benj. F. Robinson, then probably the position so ably maintained on behalf of plaintiff by his very learned and industrious counsel would be correct. As it is, I think his complaint clearly shows on its face that he has no interest in said lands, especially so as he bases his entire claim to the land on the will of R. B. Robinson. It is therefore ordered, adjudged, and decreed that the demurrer of the defendant to plaintiff's amended complaint be, and the same is, hereby sustained, and that said amended complaint be, and the same is, hereby dismissed. Let the grounds of the demurrer hereto attach

ed be filed with and recorded as a part of this decree."

Exceptions: "(1) Because his honor erred in sustaining the first ground of the demurrer herein, which is as follows: 'That it appears on the face of the complaint that the said R. B. Robinson departed this life before the birth of said plaintiff, and he, not being in esse at the time of the death of said testator, is not entitled to any interest in said real estate by virtue of said will.' It is respectfully submitted that the plaintiff, not being in esse at the death of said testator, takes under the will by executory devise. (2) Because his honor erred in sustaining the second ground of the demurrer herein, which is as follows: 'That by the will of the said R. B. Robinson only such child or children of the said Benj. F. Robinson living at the time of his death, took any interest with said Benj. F. Robinson under said will.' It is respectfully submitted that, as there was no child at all of B. F. Robinson in esse at the death of said R. B. Robinson, there was no one to take as the representative of the class (B. F. Robinson's children), along with B. F. Robinson, to the exclusion of after-born children of said class. (3) Because his honor erred in sustaining the third ground of the demurrer herein, which is as follows: 'That the plaintiff, born in the year 1883, could not become a tenant in common with his father, Benj. F. Robinson, under the will of the said R. B. Robinson, who died in the year 1880.' It is respectfully submitted that the plaintiff, born after the testator's death, and taking by way of executory devise, would take at his birth as a co-tenant of B. F. Robinson (or his assigns), under the terms of the will. (4) Because his honor erred in holding that no definite and determinate proportion of the real estate involved in this action was devised by the testator, R. B. Robinson, to children of B. F. Robinson; whereas, said proportion is fixed by law, under the will. (5) Because his honor erred in holding that under the will in this case, the entire tracts of land here involved are to be divided between the two ascertained individuals, Hannah Kay and B. F. Robinson, and their children, so that each child should share equally with the ascertained individuals, and with every other child; whereas, under the law, Hannah Kay having predeceased testator, B. F. Robinson, and Elizabeth Kay Gaddis, the only child of Hannah Kay, share equally, and the children of said B. F. Robinson (wholly unascertained at the death of R. B. Robinson, the testator) take collectively a share equal to the share of each of these other persons, B. F. Robinson and Elizabeth Kay Gaddis. (6) Because his honor erred in holding that the quantity of land to be taken by each of the devisees under the clause of the will here involved was made to depend upon the total number of children who were to share in the estate; whereas, each, by Elizabeth Kay Gaddis and B. F. Robinson, took one share, and the child-

ren of B. F. Robinson (being an unascertained class) would collectively take one share, said three shares being equal. (7) Because his honor erred in holding that the gift being immediate, the shares of each was fixed by the number in existence at the testator's death; whereas, only the shares of the ascertained takers were fixed at the testator's death, and the unrepresented class, the children of B. F. Robinson, would collectively take one share equal to the share of each ascertained taker. (8) Because his honor erred in holding that Elizabeth Kay Gaddis and Benj. F. Robinson were entitled to partition, and to their several shares of the lands devised on the death of the testator, and that this right of partition would necessarily exclude the after-born children of B. F. Robinson. It is respectfully submitted, (1) that Elizabeth Kay Gaddis and B. F. Robinson could have no right to partition said lands that would be paramount to the expressed will of the testator that B. F. Robinson's children should take an interest, and destructive of that expressed intention, since none of said children was in esse at the death of testator, and there could be no service of process upon them; (2) that if they, Elizabeth Kay Gaddis and B. F. Robinson, had the right to partition, it does not appear on the face of the complaint that they, or their assigns, ever, before the birth of plaintiff or afterwards, attempted to exercise this right and thereby bar this plaintiff. (9) Because his honor erred in holding that Benj. F. Robinson and Elizabeth Kay Gaddis took to the exclusion of the after-born children of B. F. Robinson, for the same reason that the children in esse at the death of the testator will take to the exclusion of after-born children, in a case where lands are devised immediately to children as a class. It is respectfully submitted that this is an incorrect rule, there being in esse at the death of testator, R. B. Robinson, no representative whatever of the class designated in his will as the children of B. F. Robinson. (10) Because his honor erred in dismissing plaintiff's complaint and in holding, in effect, that plaintiff has no cause of action herein, and that he takes no interest whatever under the will of R. B. Robinson; whereas, said will expressly provides that the children of B. F. Robinson take an interest in the lands herein involved, and it appears that the plaintiff is the first born and only living representative of that class. (11) Because his honor erred in sustaining defendant's demurrer on the grounds not raised by said demurrer, to wit: In holding that Elizabeth Kay Gaddis and Benj. F. Robinson were entitled to partition and to their several shares of the lands devised upon the death of the testator, and that his right of partition would necessarily exclude the after-born children of B. F. Robinson."

We will now pass upon the questions suggested by the appellant. It is clear to us that the testator by the language used in his

will, evidenced his purpose or intention that his sister, Hannah Kay, and her own children, heirs of her body, and his nephew, B. F. Robinson, and his children, as long as they lived should share alike the landed estate as described in the decree. When the testator died, his sister, Hannah Kay, was already dead, having one child, Elizabeth Kay, who afterwards married Gaddis; she still lives, and his nephew, Benj. F. Robinson, who was then unmarried and childless. This nephew two years after the death of his uncle, the testator, married and the issue of that marriage now alive is the plaintiff, B. C. Robinson, who was born the 1st of June, 1833. The serious question presented is: Was there any period of time or designation of event made by the testator as to when his devise went into effect other than the date itself of the death of the testator? We must confess that we can find nothing in the will which fixes another period than the date of the death of the testator. It is admitted that the testator might, if he had seen proper so to do, have fixed a period in the future to have the devises vested, this he could do in explicit terms, or he might have done so by the use of words affixing such vesting of the devises upon events in the future after his death. A very apt illustration is furnished by the cases of *Myers v. Myers*, 2 McCord Eq. 256, 16 Am. Dec. 648; *De Veaux v. De Veaux*, 1 Strober. Eq. 283; *Godard v. Wagner*, 2 Strober. Eq. 1. It will be noticed that in the case of *Gore v. Gore*, 2 P. Williams, 28, the time fixed for the vesting of devises was that of the birth of a son of a son, but the testator was careful in that case to place the fee in trustees in order that the devise might take place. In the case of *Barksdale v. Macbeth*, 7 Rich. Eq. 125, the testator provided that, only in the event of a child surviving testator's daughter, Sarina, the devise should become effective. As, also, in *Perdriau v. Wells*, 5 Rich. Eq. 20, it was provided that the devises should not take effect until after the death of a life tenant. And in the case of *Cole and Others v. Creyon*, 1 Hill's Eq. 311, 26 Am. Dec. 208, a life estate was carved out, and the devises therein provided were not to take place until after the death of a life tenant therein named. But it is claimed by the appellant here that if the plaintiff had been in esse at the time testator died, followed afterwards by the death of his father, B. F. Robinson, that no difficulty would have existed in regard to his share of testator's estate, and he also claims that notwithstanding he, the plaintiff, was not alive at the death of the testator, yet by reason of an executory devise he became entitled to hold as legatee.

An executory devise of lands is such a disposition of them by will that thereby no estate is vested at the death of the devisor, but only on some future contingency. 2 Blackstone, 173; Kent's Com., vol. 4, 279. Mr. Blackstone, in book 2, 173, lays down

three rules applicable to such cases. He distinguishes executory devises from remainders: First, that it needs not any particular estate to support it; second, that by it a fee simple, or other less estate, may be limited after a fee simple; third, that by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. No contingency in either one of these three classes can be said to exist. In order that an estate may vest during a life or lives in being and 21 years, it must not offend against perpetuities. B. F. Robinson, a young man, and his children, if his children should live, prevented the possibility at the death of the testator of tying up the estate for more than 100 years, or there was a possibility of the young man, B. F. Robinson, marrying and having children born to him more than 21 years afterwards, and a possibility of more marriages than one; those later in life to a younger woman than the first (a possibility of having children born to him up to 70 years or more) and a possibility of one or more of those children living to the age of 70 or 80 years, and as those children are born, each one would be entitled to come in and have a new partition made, in order to get their respective interests in said lands. Those possibilities are fatal to appellant's claim. It makes no difference if appellant happen to be born within the period. If possibly others might be born beyond the period, it is fatal to all. The fact that B. F. Robinson died within the 21 years, and the fact that the appellant was born within that period, cannot change the result. The law of the case fixed the rights of all parties at the death of B. B. Robinson, and at that date the possibility of B. F. Robinson becoming a father of one or more children 50 years afterwards and those children living 70 or 80 years, affects them all under the law against perpetuities, those born within the 21 years as well as those born after that period.

Again, when we look at the will in the case at bar, it will be seen that the devise to B. F. Robinson, and Elizabeth Kay Gaddis, the daughter of Hannah Kay, deceased, during their lives, share and share alike with the remainder in fee to Ezekiel Harris, the respondent, vested in said parties at the date of the death of the devisor. Applying the rule in *Wild's Case*, 6th Coke, 17, the case at bar will fall under the first proposition in said case, and that proposition is as follows: "If A. devises his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail for the intent of the devise is manifest and certain that his children or issue should take, and as immediate devises they cannot take because they are not *verum natura*, by way of remaining they cannot take, for that was not his intent, for the

gift is immediate, therefore such words are words of limitation."

It seems to us that the law regulating executory devises will shut out the plaintiff upon any reliance thereon, so, therefore, we must overrule the first exception because the plaintiff not being in esse at the death of the testator, does not take under the will by way of executory devise, nor can the second exception be sustained, for although there was no one to take as the representative of the class of B. F. Robinson's children along with B. F. Robinson, yet the will so required, as declared by the testator, who himself fixed the date at which all devisees should take. We cannot sustain the third exception, because the plaintiff cannot take by way of executory devise as a co-tenant of B. F. Robinson or his assigns.

The fourth exception is untenable, because no definite and determinate proportion of the real estate was devised by the testator, they not being in esse at testator's death, at which time the will took effect.

We cannot sustain the fifth exception, because under our view children of said B. F. Robinson could not take a share equal to the other two persons, B. F. Robinson and Elizabeth Kay Gaddis.

We hold the sixth exception is untenable, because the children of B. F. Robinson had no share of testator's lands when the will took effect.

In the seventh exception, we do not think his honor erred in holding that the gift here was immediate and the share of each was fixed at the testator's death.

On the eighth exception, we do not think his honor erred in holding that B. F. Robinson and Elizabeth Kay Gaddis were entitled to a partition of the lands devised on the death of the testator, and that this right of partition would necessarily exclude the after-born children of B. F. Robinson.

In the ninth exception, we do not think there was any error, as has been already pointed out in this opinion.

In the tenth exception, we do not think the circuit judge erred in dismissing plaintiff's complaint and denying that plaintiff has any cause of action.

Lastly, we do not think his honor erred in the eleventh exception in sustaining defendant's demurrer, and in holding that Elizabeth Kay Gaddis and Benj. F. Robinson were entitled to partition which would necessarily exclude the after-born children of B. F. Robinson.

As before remarked, the will takes effect at the death of the testator, and is governed by the provisions thereof. These exceptions are, therefore, overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is, hereby affirmed.

GARY, J., concurs in the result.

(125 Ga. 37)

McELROY v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. CRIMINAL LAW—INSTRUCTIONS—ASSUMPTION OF FACT.

The charge on the subject of the recent possession, not satisfactorily explained, of goods stolen from the house at the time the alleged burglary was committed, was not open to the criticism urged against it.

2. SAME—CIRCUMSTANTIAL EVIDENCE.

Generally, where the prosecution relies exclusively upon circumstantial evidence for a conviction, it is the duty of the judge, not only to charge upon the law of reasonable doubt, but also, whether requested or not, to state to the jury the rule of law applicable in such cases, to the effect that the evidence must connect the accused with the perpetration of the alleged offense, and must not only be consistent with his guilt, but inconsistent with every other reasonable hypothesis. But when a burglary is proved, and the defendant is shown to have been in the recent possession of goods stolen from the house at the time the alleged burglary was committed, and there is also evidence tending to show an implied admission by the accused of his guilt, and the jury are properly instructed as to the weight they are authorized to give to his explanation of his recent possession of the stolen goods, and as to the law touching reasonable doubt in a criminal prosecution, a new trial will not be ordered merely because of the failure of the judge to charge as to what weight the law attaches to evidence of a purely circumstantial nature.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1883-1885.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Herman McElroy was convicted of burglary, and brings error. Affirmed.

S. C. Crane, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

EVANS, J. The defendant was convicted of burglary and excepts to the overruling of his motion for a new trial. The evidence disclosed that the "pressing-club" house of one George Riley was broken into and various articles of apparel were stolen therefrom. The entrance was effected by the breaking of a pane of glass, making a hole large enough to enable a man to enter. On the night after the commission of the burglary the defendant was arrested, and at the time had on his person two of the garments which had been taken from the house. He was asked by the arresting officer where he got these garments, and replied that he purchased them from a boy named Oscar Wyatt, giving at the same time a minute description of the person from whom he claimed to have bought the garments. From this description furnished the officer he was able to identify Wyatt, who was arrested the next night. The defendant was confronted with Wyatt, and the latter was asked, in the presence of the defendant, why he sold these garments to the defendant. Wyatt said he did not, and thereupon the defendant said: "That is not the boy I

bought them from, anyhow. I bought them from another boy." Wyatt then said to the defendant: "You know you broke that glass, and you got them clothes, and you hid the clothes up behind that bar, and you got the overcoat." The defendant made no reply to Wyatt, but after they were separated and placed in different cells at the station house, immediately after this conversation occurred, the defendant remarked to the officer: "I will kill anybody that swears against me." The officer subsequently went to the bar designated by Wyatt, and there found the clothing referred to by him. The evidence further disclosed that on the night after the burglary the defendant sold a coat and a pair of pants for a small sum of money to a man who was working at a certain bar; these garments being other than those which the defendant was wearing when arrested. The clothing was positively identified as part of the apparel which had been stolen from the premises burglariously entered. In his statement to the jury the defendant gave a rather confused account concerning his possession of the stolen property, claiming that he bought the clothing from Oscar Wyatt in the presence of several persons, none of whom were present at the trial.

1. The first complaint in the motion for a new trial is based upon the following instruction of the court: "Now I charge you, gentlemen, that if it be shown by the evidence in this case, beyond a reasonable doubt, that some one did break and enter the pressing-club house of George Riley, in this county, and about the time charged in this bill of indictment, and it was his place of business, and you believe that there was valuable goods contained in that house at the time, and that this breaking and entering was done with intent to steal, or if, after breaking and entering, the parties did steal therefrom goods of the value as here charged and as here described, and if it be shown, gentlemen, that recently thereafter this defendant was found in possession of those goods, or a portion thereof, so stolen from that house, if there were any stolen, then, gentlemen, that would be a circumstance from which you would be authorized to find him guilty of the offense of burglary, unless he made an explanation of his possession of those goods consistent with his innocence in your opinion, of all of which you are to be the judges." The alleged error is in the intimation of an opinion that, in case the jury found a burglary had been committed, there must have been more than one person engaged in the commission of the offense, and because the jury were told they could presume the defendant's guilt from his possession of a portion of the stolen property, unless his explanation of such possession satisfied the jury beyond a reasonable doubt of his innocence. On the trial of the case it was admitted by the solicitor that "Oscar

Wyatt was indicted jointly with the defendant, and appeared in court and tendered and filed a plea of guilty for the same burglary and larceny as set out in the indictment in the case." But nothing in the language employed by the court could be fairly construed into an assumption that the defendant was one of two or more parties who broke and entered the house from which the goods were stolen. It was the theory of the state that both Wyatt and the defendant were guilty of the burglary. Wyatt had pleaded guilty, and his guilt was established. The defendant's guilt or innocence was the subject-matter of the investigation, and the charge was adjusted to the evidence. It amounted to no more than an instruction that, if the jury should find that the defendant and the other person, whose guilt was admitted, did break and enter the building and steal therefrom the goods described in the indictment, then the offense would be burglary, and, if the jury should find that some of the goods stolen from the house were found in the recent possession of the defendant they should consider this circumstance in passing upon his guilt or innocence, and would be authorized to find him guilty of the offense charged against him, unless he made such an explanation of his possession as was, in their opinion, consistent with his innocence. As to the criticism that the charge of the court placed upon the accused the burden of establishing his innocence beyond a reasonable doubt, the language of the charge itself is a refutation of the strained and unwarranted construction put upon it.

2. The court did not charge the jury on the subject of circumstantial evidence, and the omission to do so is made a ground of the motion for a new trial. Generally, in cases where the prosecution relies exclusively upon circumstantial evidence for a conviction, it is the duty of the judge, not only to charge upon the law of reasonable doubt, but also, whether so requested or not, to state to the jury the rule of law applicable in such cases, to the effect that the evidence must connect the accused with the perpetration of the alleged offense, and must not only be consistent with his guilt but inconsistent with every other reasonable hypothesis. *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528. But in the present case the evidence upon which the state relied was not entirely circumstantial in its nature. When the accused was confronted with Wyatt, the former was directly charged by Wyatt with having broken the window, stolen the clothes, getting the overcoat, and hiding the clothing in a barroom. Notwithstanding this criminal charge was made against the accused within his hearing and in his immediate presence, he made no reply to the accusation. Shortly afterwards he remarked to the arresting officer: "I will kill anybody that swears against me." Apparently, therefore, the accused had in mind what Wyatt had just said to him, and under-

stood that he was charged with having committed a burglary, and would be brought to trial. Nothing had transpired while he was with the officer, after the interview with Wyatt, to evoke this threat against any one who might appear against him as a witness. Pen. Code 1895, § 1003, declares that "acquiescence, or silence, when the circumstances require an answer or denial, or other conduct, may amount to an admission." This burglary had but recently been committed, and the defendant was arrested and called on to account for his possession of garments which he was wearing and which had been stolen from the house burglariously entered through a window. He told the arresting officer that he had purchased the garments from a negro boy whose name was Oscar Wyatt. When Wyatt and the accused were brought together in the station house, Wyatt denied that he sold the clothing to the accused, and positively charged him with having committed the burglary. The circumstances were such that, if the defendant had honestly come into possession of the stolen clothing he was then wearing, he would most probably have denied the imputation that he himself was the burglar and the thief. Instead of making any denial, he remained silent. The jury were authorized, under these circumstances, to construe his silence as an implied admission of the charge made against him. *Drumright v. State*, 29 Ga. 481; *Davis v. State*, 114 Ga. 109, 39 S. E. 906. While his silence could not properly be styled a confession, still it amounted to an implied admission of guilt, which made the case one not wholly dependent upon circumstantial evidence. It was decided in *Mangham v. State*, 87 Ga. 549, 13 S. E. 558, that "recent possession, not satisfactorily explained, of goods stolen from the house at the time the alleged burglary was committed, may be sufficient as a basis of conviction of burglary, where the burglary has been established and the jury believe from all the evidence beyond a reasonable doubt that the accused is the guilty party." Where the evidence relied on consists solely of proof of the burglary and the recent and unexplained possession of goods taken from the house at the time of the burglarious entry, the court should always instruct the jury, without formal request, under what circumstances a conviction upon circumstantial evidence is warranted. But where there is evidence tending to show an implied admission by the accused of his guilt, and the jury are properly instructed as to the weight they are authorized to give to his explanation of his recent possession of the stolen goods, and as to the law touching reasonable doubt in a criminal prosecution, a new trial will not be ordered merely because of the failure of the judge to charge as to what weight the law attaches to evidence of a purely circumstantial nature. *Jones v. State*, 105 Ga. 649, 31 S. E. 574. The evidence against the ac-

cused in the present case was sufficient to authorize the jury to infer his guilt, and his conviction should be allowed to stand.

Judgment affirmed. All the Justices concur.

(124 Ga. 884)

PRINCE v. NEAL-MILLARD CO.

(Supreme Court of Georgia. Feb. 19, 1906.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—MECHANICS' LIENS.

The law creating liens in favor of materialmen furnishing materials to a contractor for the improvement of real estate, embodied in section 2801, subsec. 2, of the Civil Code of 1895, as amended by the act of 1897 (Acts 1897, p. 30) and the act of 1899 (Acts 1899, p. 33), as hitherto construed by this court, is not in violation of the section of the Constitution which declares that no person shall be deprived of his property without due process of law, or the provision which guaranties that protection to property shall be impartial and complete.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 940.]

2. MECHANICS' LIENS—MATERIALMAN'S LIEN—PAYMENTS TO CONTRACTOR.

Where an owner of property entered into an agreement with a contractor to make improvements thereon, and the contractor, after partly completing the work, abandoned it, and the owner took charge and completed it at a cost less than the total contract price; and where a materialman who had furnished material to the contractor which was used in the improvement, proceeded to foreclose his lien on the property, for an amount less than the balance left after deducting the cost of completion from the contract price, if the owner sought to defend against such proceeding on the ground that he had made advances or payments to the contractor, it was incumbent on him to show that he had done so in accordance with the provisions of the law creating materialmen's liens, or that amounts advanced by him to the contractor had been properly appropriated, in the manner indicated in the decision in *Green v. Farrar Lumber Co.*, 46 S. E. 62, 119 Ga. 30.

3. SAME—APPLICATION OF PAYMENTS—EVIDENCE—SUFFICIENCY.

The evidence in the present case failing to establish a defense, a verdict in favor of the plaintiff was not contrary to law or the evidence.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by the Neal-Millard Company against E. L. Prince. There was judgment for plaintiff, and defendant brings error. Affirmed.

The Neal-Millard Company, a corporation doing business as a materialman, proceeded to foreclose a lien on certain property belonging to E. L. Prince for material furnished by it and used in building on the lot, which material was furnished upon the contract and employment of one Herb, a contractor employed by the owner and engaged in erecting the improvement. Herb made no defense. Prince defended on the ground that the contractor abandoned his contract before its completion, leaving the house in an unfinished condition; that at the time of such

abandonment the owner had more than paid him for what had been done; and that it was necessary to expend more than the balance due under the contract in the completion of the work. A motion was made to dismiss the proceeding on the ground that the act of 1899 amending section 2801 of the Civil Code was unconstitutional because opposed to the principle that no person shall be deprived of property except by due process of law, and the principle that protection to property must be impartial and complete; and that if the act were constitutional the declaration was fatally defective in not alleging that Herb, the principal contractor, completed his contract or did not abandon the same, or that the material furnished was such as the contract required. The motion was overruled and the defendant excepted *pendente lite*. On the trial the evidence disclosed that the contract price of the work was \$1,862.50; that while Herb was at work Prince advanced to him amounts aggregating \$1,245; that after he abandoned the work Prince necessarily expended \$850.40 in completing it. The furnishing of the materials by the plaintiff on the order of Herb, their use in making the improvements, the revoking of the lien, and the proceeding to foreclose it in the manner pointed out by the statute appeared. Herb testified, that he was engaged in carrying on several building contracts for different people at the same time; that he received money from all the contracts, and paid it out on all the contracts in the ordinary course of business; that he never made any attempt to pay for each job out of money derived from that alone, and could not say what proportion of the money received from Prince was applied to the accounts due for his house, and that he had no data on hand as to parties, amounts or debts. The jury found for the plaintiff. The defendant moved for a new trial, which was overruled, and he excepted.

Adams & Adams, for plaintiff in error.
Twigg & Oliver, for defendant in error.

LUMPKIN, J. (after stating the above facts). In the civil law certain creditors were declared to be privileged. Among these were persons who had contributed to the preservation, repair, enlargement, or creation of an improvement on land. Domat says: "Architects and other undertakers, and artificers, who bestow their labor on buildings or other works, and who furnish other materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those who have advanced money for these kinds of work, and which the seller has for the price of the thing sold." Domat's Civil Law (Cushing's Ed.) 683, § 1744. At common law there was no lien in favor of a mechanic or materialman doing work or furnishing material for the

improvement of land or buildings. The earlier statutes passed for this purpose generally gave a lien to persons having direct contractual relations with the owner, but not to persons furnishing materials or performing labor for the contractor. Other statutes were in time passed extending the right to assert a lien to persons who did not have a direct contractual relation with the owner, but furnished labor or materials for the improvement of the real estate through contracts with the contractor. As stated by Judge Lurton in *Jones v. Great Southern, etc., Co.*, 86 Fed. 373, 30 C. C. A. 108. "This was accomplished in two ways: (1) By giving to creditors of the contractor a derivative lien, whereby they were substituted to the rights of the contractor as they existed when notice was given of the claim. Such statutes were in the nature of mere garnishee or attachment proceedings, and were subject to no criticism as doing injustice to the owner. Payment in advance was a defense under such statutes, for the contractor's creditors could stand in no better situation than he did. So, if he had no lien, his creditors had none, as their utmost right was to be substituted to the contractor's place. (2) Or by statute which gave to those who furnished such labor or materials to the contractor a direct or independent lien upon the building and land of the owner." On account of the fact that two leading commercial states respectively adopted substantially these two liens of legislation, which others have followed, resulting in decisions apparently conflicting, the two methods have frequently been referred to as the "New York system" and the "Pennsylvania system." The one gives a lien to the subcontractor by way of subrogation, made effectual by notice; the other gives a direct lien to the materialman or laborer, which has sometimes been said to result from an agency created by statute, and sometimes from an implied agency vested in the original contractor. Another statement is that the contract is made in view of the law which, if valid, enters into it, rather than that there is the creation, strictly speaking, of an agency, unless the statute so declares. The Supreme Court of Missouri decided that the statute of that state created no agency, and that the owner was not bound by the price agreed upon between the contractor and materialman, but only for the market value of the materials. *Deardorff v. Everhart*, 74 Mo. 37. See, on this subject, *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837, 838; *Hunter v. Truckee Lodge*, 14 Nev. 33-46 (on rehearing); 20 Am. & Eng. Enc. L. (2d Ed.) 850. Phillips on Mechanics' Liens (8d Ed.) § 57, after referring to the two systems (of which he says the Pennsylvania system was the first), adds: "The plan of conferring on them a right of lien for all sums which may be due them, irrespective of payments already made by the owner to the contractor, has not met with much favor in later legislation. The tend-

ency has been rather to confine their right to what may be owing by the owner at the time of notice to him of their claims."

In considering the general nature of a lien given to mechanics and materialmen furnishing labor or materials to the contractor under the law of Tennessee, though not discussing the Constitution of the law it was said in *Central Trust Co. v. Condon*, 81 U. S. App. 887, 67 Fed. 84, 14 C. C. A. 314: "A subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. *Green v. Williams*, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478. It is independent of and superior to his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company." In *Central Trust Co. v. Richmond Co.*, 31 U. S. App. 675, 688, 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, the case dealt with was one arising under a statute of Kentucky, and it was said that "the clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent, direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractor does not spring out of the lien of the contractor, and is not derived therefrom or subordinate thereto." Though Pennsylvania is treated as the parent of the direct lien system, Judge Lurton in the decision above referred to declares that "the state of the decisions in Pennsylvania is quite peculiar." *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. 377, 378, 30 C. C. A. 108. Thus in *Waters v. Wolf*, 162 Pa. 153, 29 Atl. 646, 42 Am. St. Rep. 815, a contractor agreed neither to have a lien nor to create one in favor of others. A subcontractor who had not consented to the stipulation asserted a lien. The court held that the act of 1891, which provided that the owner should make no contract with the contractor which would operate to defeat the rights of subcontractors and materialmen to file liens, and that they should have a lien notwithstanding any stipulation to the contrary between the owner and the contractor, was unconstitutional as interfering with the right of "acquiring, possessing, and protecting property." On the subject of stipulations against liens and the conflicting decisions as to them, see 20 Am. & Eng. Enc. Law (2d Ed.) 363, and notes.

In general, direct lien laws have been held constitutional, although certain extreme laws or provisions in laws seeking to protect mechanics and materialmen have been held unconstitutional. *Bolsot on Mechanics' Liens* (3d Ed.) §§ 22-24; *Phillips on Mechanics' Liens* (3d Ed.) §§ 30-33a; *Hightower v. Bailey*, 108 Ky. 198, 56 S. W. 147, 49 L. R. A. 255, 94 Am. St. Rep. 350; *Smith v. Newbauer*, 144 Ind. 95, 42 N. E. 40, 33 L. R. A. 685. The two conflicting views as to the constitutionality of an act which gave to sub-

contractors, laborers, and those who furnished machinery or material to the contractor an independent lien will be clearly seen by comparing *Overton on Law of Liens*, 578, § 553; *John Spry Lumber Co. v. Sault Savings Bank Co.*, 77 Mich. 199, 43 N. W. 778, 6 L. R. A. 204, 18 Am. St. Rep. 396; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 813; and, on the other hand, the exhaustive opinion in *Jones v. Great Southern Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108. For an instance of extreme provisions held unconstitutional, see *Randolph v. Builders' & Painters' Supply Co.*, 106 Ala. 501, 17 South. 721. Two provisions of that act were specially attacked, first, that persons declared to be entitled to a lien should also have a lien for attorney's fees; and, second, a declaration that the fact that a person furnishing materials was not notified in writing not to furnish such materials, by the person in whom the title was vested at the time such materials were furnished, should be prima facie evidence that they were furnished by and with the consent of the owner. This was held to be an unconstitutional interference with property, under the guise of fixing a rule of evidence. See, also *Meyer v. Berlandt*, 39 Minn. 438, 40 N. W. 613, 1 L. R. A. 777, 12 Am. St. Rep. 663. In the last case cited it was said: "The basis of the right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to subcontractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract." In the *Randolph Case* it is said: "Nor is it denied, that the owner's contract is made under and subject to the provisions of the existing lien law, provided these provisions do not infringe his constitutional rights."

A review of the legislation which has been enacted in this state on the subject of liens of mechanics and materialmen may not be uninteresting. The first act which I have found creating liens of the character now under consideration is that of December 18, 1820, entitled, "An act to give master carpenters and master masons a lien on buildings erected by them in the city of Savannah." *Dawson's Compilation*, p. 301, No. 851. On December 22, 1834, an act was passed declaring that all debts should thereafter become due to any mason or carpenter in the counties of Richmond and McIntosh and the cities of Savannah, Macon, and Columbus for work done and material furnished for building or repairing any house, when no personal security should be taken, should constitute an incumbrance on the house and premises. All other laws giving masons and carpenters liens were repealed. On December 28, 1837, the provisions of this act were extended to all the counties of the state.

See Cobb's Dig. Laws, pp. 555, 557. When the original Code (which was adopted by the act of 1860, to take effect January 1, 1862, and the operation of which was suspended by the act of 1861 until January 1, 1863) became the law, it was provided in section 1971 that "all mechanics who have taken no personal security therefor, shall have a lien on every house, and the premises to which it shall be attached, for work done or materials furnished in building or repairing such house, which lien shall be superior in dignity and of higher claim than any other incumbrance without regard to date. And such lien upon the improvements made by the mechanic shall attach to them without regard to the title." An act was passed in 1866 which it is unnecessary to set out, as it contained nothing material to the present consideration. On February 24, 1873 (Acts 1873, p. 42), a general act was passed regulating the law of liens in this state. After providing for a lien in favor of mechanics, contractors, and materialmen, it proceeded: "When work done, or material furnished for the improvement of real estate, is done, or may be furnished upon the employment of a contractor, or some other person than the owner, then, and in that case, the lien given by this section shall attach upon the real estate improved, as against such true owner, upon written notice given to him, stating the amount claimed, before he settles with or pays such contractor or employer, and when he has settled or paid in part only, for the balance still unpaid at the time of such notice." This act was incorporated in the Codes of 1873, and 1882, beginning with section 1972. On October 19, 1891, an act was passed "to provide additional security to materialmen and laborers; to provide a penalty for making false affidavits, and for other purposes." Acts 1890-91, p. 233. This was codified in the Code of 1895, in sections 2802, 2803. But it has been held not to have created a lien or amended the lien laws. *Wilder's Sons Co. v. Walker*, 98 Ga. 503, 25 S. E. 571. On December 18, 1893 (Acts 1893, p. 34), an act was passed amending section 1979 of the Code of 1882. It provided that when work was done or material furnished upon the employment of a contractor or some other person than the owner, the lien should attach upon the real estate improved, as against such true owner, for a lien of 25 per cent. of the contract price of the work done or material furnished, upon written notice given, within 30 days, to the owner, of the amount of work done or material furnished. On December 16, 1895 (Acts 1895, p. 27), section 1979, of the Code, as amended by the act of 1893, was again amended, by providing that such liens should attach upon such real estate as against the owner to the extent of no more than 25 per cent. of the contract price agreed to be paid by the owner to the contractor or person other than the owner,

and by providing further for the distribution of said 25 per cent. The act of 1873, as amended by the acts of 1893 and 1895, was incorporated in the Code of 1895, in section 2801, which was divided into four subsections. On December 18, 1897, an act was passed repealing paragraphs 3 and 4 of section 2801 of the Code, and also sections 2802 and 2803, and making additions to paragraph 2 of section 2801. This struck out the 25 per cent. clause, and provided for the lien of materialmen to attach as against the true owner upon written notice given to him, within 30 days, of the amount of work done or material furnished, provided that in no event should the lien attach for a sum greater than such balance as the owner might be indebted to the person having the contract, at the time of the service of such notice. On December 19, 1899 (Acts 1899, p. 33), paragraph 2 of section 2801 of the Code was still further amended so as to read as follows: "When work done, or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other person than the owner, then, and in that case the lien given by this section shall attach upon the real estate improved, as against such true owner, for the amount of the work done, or material furnished, unless such true owner shows that such lien has been waived in writing, or produces the sworn statement of the contractor, or other person, at whose instance the work was done or material was furnished, that the agreed price or reasonable value thereof has been paid; provided, that in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made." Thus the law still stands, and in regard to it the later decisions referred to herein were made.

From this it will be seen that numerous and important changes have been made in the laws of this state giving liens to mechanics and materialmen. There has not always been an adherence to the Pennsylvania system or to the New York system, but our lien laws have sometimes approximated one and sometimes the other, and have sometimes included special and peculiar provisions. In the beginning they were more like the Pennsylvania system, then they changed into a greater similarity to the New York system, and again changed so as to more nearly approximate the Pennsylvania system. It has been held that the existence of the relation of owner and contractor is necessary as a basis for a lien in favor of one furnishing materials to the contractor (*Sheehan v. South River Brick Co.*, 111 Ga. 444, 36 S. E. 759; 20 Am. & Eng. Enc. Law [2d Ed.] 250); that the statute does not modify the general principle that the title of the true owner cannot be incumbered by a lien, without some act on his part signifying his assent (*Reppard v. Morrison*, 120 Ga. 28, 47 S. E. 534);

and that the creation of a lien in favor of a person furnishing material to a contractor, "or some other person than the owner," means some person occupying a relation to the owner similar to that of a contractor, and does not include a lessee or stranger. *Pittsburgh Plate Glass Co. v. Peters Land Co.*, 123 Ga. 723, 51 S. E. 725. In this connection compare 20 Am. & Eng. Law (2d Ed.) 814, 815, 850, 362 (56). As construed by this court, we think the law referred to is not violative of the section of the Constitution which declares that no person shall be deprived of his property without due process of law, or that clause which guarantees that protection to property shall be impartial and complete.

2, 3. In *Hunnicut v. Van Hoose*, 111 Ga. 518, 36 S. E. 669, which was decided when the law required the owner only to retain 25 per cent. of the contract price of the building, it was held that he might make partial payments to the contractor, provided he retained such per cent.; that if before the completion of the building according to the contract the contractor abandoned the work and left the building uncompleted it was the right of the owner to take possession of the same and complete it; and if in doing so, the amount required for the completion, when added to the sums properly paid to the contractor, exceeded the original contract price, such owner of his property was not liable to a materialman for any amount. All the Justices concurred, except Fish, J., who dissented. In *Green v. Farrar Lumber Co.*, 119 Ga. 30, 46 S. E. 62, it was held that "the owner of property improved by a contractor is bound to see that money paid by him to the contractor is applied to claims for material or labor unpaid at the date of the payment to the contractor, or else he will be liable for such claims in the event the contractor fails to pay them. When no claims of lien have been filed, the materialmen and laborers may be paid in such order as the contractor determines. If a claim of lien has been filed and recorded, then the owner must see that such materialman or laborer is satisfied out of the money paid by him to the contractor, or he will be held liable for the amount in the event, upon suit brought, it should be determined that the claim was valid. The owner is not in any event required to pay more than the contract price of the improvement to materialmen and laborers, but it is incumbent upon him to see that payments to the contractor are, to the full amount of the contract price, appropriated to materialmen and laborers, if they are valid claims to this extent." In that case payments were made by the owner in the absence of any affidavit by the contractor that he had paid for materials and labor. In *Rowell v. Harris*, 121 Ga. 239, 48 S. E. 948, it was said: "In proceedings under Civ. Code 1895, § 2801, as amended, laborers, materialmen,

and subcontractors can recover only to the extent that the owner of the property became liable to the contractor under the contract for the improvement of the real estate." But this must be taken in connection with the facts of the case then under consideration. Lawson contracted to build and alter a house for Harris for \$725. Harris paid Lawson \$25 or \$40 on account. Lawson did about \$200 worth of work, and thereupon abandoned the contract. Rowell was an employé of Lawson and recorded his lien within three months after performing the services, for \$20; the amount of work he had done. After Lawson abandoned the contract, Harris got bids from other contractors to complete it and awarded it to J. B. Hagler at \$825, he being the lowest bidder. It will thus be seen that, after the abandonment of the work by Lawson, it cost the owner more than the entire contract price to complete it; and as under our statute the owner is in no event liable for an amount in excess of the contract price, he could not be held liable either by the contractor or the laborer. As construed this case is in line with that of *Hunnicut v. Van Hoose*, supra. If the contractor abandons his contract, the owner may have it completed and charge the necessary cost of completion against the contract price before being liable either to the contractor or to the materialman. Whether or not an owner is bound at all events to complete a job only begun and abandoned by the contractor, so as perhaps to entail upon himself serious loss, merely in order to demonstrate that none of the contract price is available for the purpose of paying materialmen and laborers, is not now in question. But if he does complete the work, the necessary cost of doing so may be deducted from the contract price, and the property will only be subject to the lien of the materialman to the extent of the balance. In *Stevens v. Georgia Land Co.*, 122 Ga. 317, 50 S. E. 100, it was held that as the aggregate amount of liens set up could not exceed the contract price of the improvements made, it was incumbent on one foreclosing a materialman's lien to show that the amount for which he asserted the lien came in whole or in part within the contract price. In *Arnold v. Farmers' Exch. (Ga.)* 51 S. E. 754, it was held that it was not necessary for a materialman to allege that the contractor had completed his contract with the owner of the premises or that the owner had not paid the contractor for the improvements made, upon his sworn statement that he had paid for the material used. This recognizes the fact that the right to a lien by a materialman is not one strictly of subrogation to the right to a lien by a contractor. See, also, on the general subject, *Lombard v. Trustees*, 73 Ga. 322; *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772.

If such balance has been lawfully paid

out upon the making of an affidavit as provided by the statute, or has been advanced to the contractor and applied as indicated in the case of *Green v. Farrar Lumber Co.*, supra, there is no liability on the part of the owner or his property. But if such balance has been advanced by him to the contractor, and has not been properly applied, there is such a liability. Where the owner has made advances to the contractor, the burden of showing their proper application rests on him, in order to defeat a lien claimed by a materialman. In this case he failed to carry such burden. The only evidence on the subject was that of the contractor, who testified, that the owner paid him \$1,245, that he was building another house for a different owner and was repairing a third at the same time; that the money received by him from all contracts was paid out in the ordinary course of business, using money from all contracts to pay on all contracts; that he never made any attempt to pay for each job out of money derived from that alone, so that he could not say exactly what proportion of the money received from the owner was applied to the accounts due for his house, as the money was received on different contracts and paid out on all bills as they fell due; and that he had no data on hand as to parties, amounts or dates. The verdict was therefore, not contrary to law or the evidence, and there was no error in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur, except ATKINSON, J., not presiding.

(125 Ga. 21)

ROBINSON v. STATE.

(Supreme Court of Georgia. March 22, 1906.)
INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

The evidence being insufficient to support the verdict, the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

B. Y. Robinson was convicted of selling intoxicating liquors, and brings error. Reversed.

The accused was convicted at the January term, 1906, of the city court, under an accusation dated April 3, 1905, charging him with having sold spirituous liquors without a license. The evidence was substantially as follows: Sue Williams was drinking, but not drunk, on an occasion which she "thinks" was "last summer," and at that time, in Muscogee county, she bought some whisky at a store "up there on the corner," which she "reckons" was the defendant's store. She did not know whether he was the man from whom she bought or not. She "got it" from a man with jet-black hair and black mustache, while the defendant's hair is not black, nor has he any

mustache. The man who sold the whisky was just inside the back door and she was outside. She carried the whisky to Mr. Moore. Palmer, who was in the employ of the police department, testified that Moore had given a negro woman some money to buy whisky from the defendant's store, and that Sue Williams brought back a pint of whisky. He then, with Moore, went and searched the defendant's store, and found a box containing "a good many half-pint bottles of whisky; several bottles of beer, and two jugs, containing white whisky which looked like that which Sue Williams said she had bought. Moore's testimony agreed substantially with that of Palmer. This was about March 17, 1905. Pearce, a negro boy, testified that he worked for the accused, and that he saw Sue Williams come there drunk and buy from the accused a bottle of "Coca-Cola," which she drank on the spot. She did not buy any whisky, nor anything else that she carried away. McCrory testified that he examined all the whisky, and that the whisky obtained by the policeman from the defendant's store was of a different grade from that which Sue Williams claimed to have bought. The accused, in his statement to the jury, said that Sue Williams came to his store, but that he did not sell her any whisky; that the bottled whisky obtained by the police was intended to be sent to his brothers in the country, and that the whisky found in the jug was kept for his personal use.

The motion for a new trial, to the overruling of which the accused excepted, was on the ground that the ground that the verdict was contrary to law and the evidence.

J. E. Chopman, for plaintiff in error. H. H. Swift, Sol. for the State.

ATKINSON, J. The defendant enters upon the trial with the presumption of innocence in his favor, which can only be removed by evidence which affirmatively demonstrates to a moral and reasonable certainty, and beyond a reasonable doubt, the guilt of the accused. It may be that the state's witness, Sue Williams, did not tell the whole truth, but truth unexpressed can be no aid to the prosecution. She is the only one who claims to have any knowledge of any sale of whisky, and she would not say that she bought from the defendant. She was not even positive that the store was his. She did not enter the store, but stood without the back door, and bought from some one within of different description from the defendant. It is not shown who that person was, or whether he was in the employ of the defendant. If she was not mistaken as to the place from which she obtained the whisky, and if some stranger, in the manner which she described, had sold the whisky, that would certainly not authorize the conviction of the defendant. The burden would be upon the state to show

affirmatively such relation between the defendant and the person selling as would make the act of the seller the act of the defendant. There is no evidence from which it could be inferred that he was the agent of the defendant, or had anything to do with the operation of the store. Had the alleged sale been within the store, and had the person selling been shown to be a regular salesman transacting business by the usual methods, there would have been some semblance of authority from the owner for making the sale; but certainly no authority for the illegal sale of whiskey in a dry goods or grocer's store could be presumed from a transaction through the back door, such as that described in the present case.

Fairly construing the evidence, the state has failed to support the burden, and a new trial should have been granted.

Judgment reversed. All the Justices concur.

(125 Ga. 23)

FORRESTER v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—REFUSAL OF NEW TRIAL.

The verdict being without evidence to support it, the trial court erred in not granting a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2297, 2298.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Jack Forrester was convicted of crime, and brings error. Reversed.

Payton & Hay, for plaintiff in error. J. H. Lipton, for the State.

BECK, J. Judgment reversed. All the Justices concur.

(125 Ga. 16)

FORTSON v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. CRIMINAL LAW—ALIBI—EVIDENCE—INSTRUCTIONS.

Where, upon the trial of one accused with the offense of carrying concealed weapons, it is sought by the state to make certain the time of the commission of the offense, not by proving the commission upon the dates specifically alleged in the accusation, but by showing its commission to have been coincident with the happening of a certain other event, occurring at a certain place, and the defendant, in reply, undertakes to establish an alibi, the range of the evidence in support of the alibi need be such only as will exclude the possibility of defendant's presence at the particular place at the time of the happening of the particular event relied upon to establish the time of the commission of the offense; and a charge of the court upon the subject of alibi, which imposes upon the defendant the burden of accounting for his presence during every day for two years next preceding the date of the accusation, is erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1289-1291.]

2. SAME—PRISONER'S STATEMENT.

The charge on the subject of the prisoner's statement was modeled somewhat on the charge dealt with in *Hackett v. State*, 33 S. E. 842, 108 Ga. 46, and, while not approved, yet, under the ruling in that case, is not sufficient ground for a new trial.

(Syllabus by the Court.)

Error from City Court of Lexington; P. W. Davis, Judge.

William Fortson was convicted of carrying concealed weapons, and brings error. Reversed.

E. P. Shull, for plaintiff in error. Hamilton McWhorter, for the State.

ATKINSON, J. Judgment reversed. All the Justices concur.

(125 Ga. 8)

BROWN v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—EVIDENCE—SUFFICIENCY—NEW TRIAL.

The evidence was not of such character as to show the guilt of the accused beyond a reasonable doubt, and a new trial should have been granted on this ground.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2297, 2298.]

Error from Superior Court, Richmond County; H. O. Hammond, Judge.

Clara Brown was convicted of crime, and brings error. Reversed.

Geo. S. Jackson, for plaintiff in error. J. S. Reynolds, Sol. Gen., for the State.

FISH, C. J. Judgment reversed. All the Justices concur.

(125 Ga. 43)

MONTGOMERY v. FOUCHE et al. (two cases).

(Supreme Court of Georgia. March 22, 1906.)

1. ABATEMENT—ANOTHER ACTION PENDING—MORTGAGE FORECLOSURE.

"The pendency of a proceeding to foreclose a mortgage, whether upon realty or personalty, is no hindrance to a regular action upon the notes to secure which the mortgage was given."

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1156, 1184.]

2. JUSTICES OF PEACE—APPEAL—TRIAL—VERDICT.

When a suit is brought on an unconditional contract in writing, in a justice's court, and the defendant appears at the first term and files a plea, and the case is appealed to the superior court, and such plea is there stricken, it is error for the judge to enter judgment against the defendant without the verdict of a jury.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by Sproull Fouché and H. T. Reynolds against A. A. Montgomery. Judgment for plaintiffs, and defendant brings error. Reversed.

Henry Walker, for plaintiff in error. R. L. Fouche, for defendants in error.

FISH, C. J. Sproull Fouché and H. T. Reynolds, as holders of a promissory note executed by Mrs. A. A. Montgomery, brought suit thereon against her in a justice's court. The defendant pleaded in abatement the pendency of proceedings in the superior court instituted by plaintiffs to foreclose a mortgage on realty given to secure the payment of the note sued on, and alleged, in her plea, that by reason of the pendency of such proceedings, the action in the justice's court was brought in bad faith, and that she had thereby been put to unnecessary trouble and expense, and she prayed judgment against the plaintiffs for her counsel fees. The case was appealed to the superior court, how or by whom the record fails to disclose. On motion of plaintiffs' counsel, the plea was stricken by the judge of the superior court, who then entered judgment against the defendant, without the verdict of a jury, for the principal and interest due on the note, and for costs. Defendant excepted, assigning error upon the striking of her plea and upon the rendition of a judgment against her by the judge, without the verdict of a jury.

1. "Upon principle, as well as authority, the pendency of proceedings to foreclose a mortgage, whether upon realty or personality, is no hinderance to a regular action on the notes to secure which the mortgage was given. The two actions are unlike, the causes of action are not the same, and the results are dissimilar." *Juchter v. Boehm*, 63 Ga. 71, 74. Therefore, the court did not err in striking the plea in abatement.

2. In *Howell v. Glover*, 59 Ga. 774, it was held: "No issuable defense is required to be filed on oath in an action *ex contractu* in the justice court. Therefore none is required in such case when carried by appeal to the superior court, and judgment will only be entered upon a verdict rendered." It was held, in *Seibels v. Hodges*, 65 Ga. 245: "Where it appears upon the face of the papers presented to the court, in a proceeding by *scire facias* to revive a judgment, that the original judgment was rendered in an appeal case by the court without the verdict of a jury, it is not error to dismiss the same upon the ground that it was illegal and void, and therefore could not be revived." And in *Blain v. Hitch*, 70 Ga. 275, it was said: "Appeals from a justice court to the superior court should be tried by a jury, and a judgment by the court would have been illegal, had the case not been submitted to the judge by consent." From the opinion in *Howell v. Glover*, supra, we quote: "How is an appeal from a justice court to the superior court to be tried? The 3630th section of the Code declares that all appeals to the superior court shall be

tried by a special jury, at the first term after the appeal has been entered, unless some good cause be shown for a continuance. * * * We are not aware of any law in this state which requires a defendant in a justice court to make oath to his issuable defense in that court before he can avail himself of it, and why should that restriction be imposed upon him in the appellate court? By what authority is he required to make oath to his issuable defense in the appellate court, which he was not required to do in the justice court? In order to preserve the right of trial by jury as contemplated by the Constitution, the safer and better rule, in our judgment, is to hold that the trial of appeal cases from a justice court in the superior court, including the facts which will authorize the assessment of damages, should be tried by a special jury, and not by the court, and that is the interpretation which we give to the existing law of the state applicable to that question."

Under Civ. Code 1895, § 4472, "all appeals to the superior court shall be tried by a jury at the first term after the appeal has been entered, unless good cause be shown for continuance." The only change made in section 3630 of the Code of 1873, cited in *Howell v. Glover*, supra, is that appeals are not now tried by a special jury. There is no law now which requires a defendant in a justice's court to make oath to his issuable defense in that court before he can avail himself of it. Nor is he required to file a written plea in that court to an action upon an unconditional contract in writing (*Booz v. Batty*, 94 Ga. 669, 21 S. E. 848; *Heyward v. Field*, 95 Ga. 714, 22 S. E. 653), though he must make his defense in such a case at the first term (Civ. Code 1895, § 4134). If in response to the summons he appear and mark his name, or the name of his counsel, on the docket, it is equivalent to filing the plea of the general issue; it is a making of his defense at the first term. *Heyward v. Field*, supra. When the case is appealed to the superior court the defendant is required to reduce his defenses, other than the general issue, to writing before the case proceeds to trial in that court. Civ. Code 1895, § 4139. Civ. Code 1895, § 4141, provides: "In all cases in a justice's court where an appeal can be entered to a jury in the superior court, it shall be lawful for such appeal to be entered to a jury in either the justice court or the superior court; any case appealed to a jury in one court shall not be appealed to a jury in the other court." The defendant was entitled to a jury trial and it was therefore error for the judge to render judgment for the plaintiff, on the ground that no issuable defense had been filed under oath.

Judgment reversed. All the Justices concur.

(60 W. Va. 9)

GOFF v. GOFF.(Supreme Court of Appeals of West Virginia.
May 1, 1906.)**1. DIVORCE—CRUEL AND INHUMAN TREATMENT.**

Such conduct and acts by a husband toward his wife, such treatment of her by him, as produces reasonable apprehension in her of personal violence, or produces mental anguish, distress, and sorrow, and renders cohabitation miserable, impairing, or likely to impair, the wife's health or mind, is cruel and inhuman treatment authorizing a divorce from bed and board, under Code 1899, c. 64, § 6, though there be no personal violence.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 62-83.]

2. SAME—PERMANENT ALIMONY.

Permanent alimony decreed in a fixed annual sum, the defendant appearing in the case or served with process, is a personal decree and a lien on his land, though such alimony be payable in installments in the future.

3. SAME.

Quære. Can a court, in a divorce case, declare alimony a lien on specific land brought before the court in case the defendant is a nonresident, so that no personal decrees can be had, under section 11, c. 64, Code 1899?

4. FRAUDULENT CONVEYANCE—DEED IN CONTEMPLATION OF MARRIAGE.

A voluntary conveyance made by a man under engagement to marry, made before and in contemplation of marriage, without the knowledge of the intended wife, with intent to free the land of the marital rights of the wife, is void as to her dower rights, and as to the alimony decreed against him in a suit for divorce.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by Louise L. Goff against Charles P. Goff for divorce. Decree for plaintiff. Defendant appeals. Affirmed in part, and reversed in part.

Ice & Ice and W. B. Maxwell, for appellant. C. W. Dalley and E. D. Talbott, for appellee.

BRANNON, J. Louise L. Goff sued Charles P. Goff, her husband, in 1902, in the circuit court of Randolph county for a divorce a mensa et thoro on the ground of cruelty and inhuman treatment. The case came here on interlocutory orders, not material on this appeal. 54 W. Va. 364, 46 S. E. 177. When the case went back to the circuit court, Goff filed an amended answer charging a desertion by his wife of three years' duration, and asking that an absolute divorce be granted him. The case resulted in a decree giving the wife the divorce which she asked, allowing her \$1,200 annually for alimony during the joint lives of the parties, and denying Goff the absolute divorce asked by his answer. Goff appeals.

I make from the great volume of evidence a summary of the material facts. Louise L. Schultz and Charles P. Goff, when children, lived and went to school together in Beverly, Randolph county, where a mutual attachment between them began. Miss Schultz's

family removed from Beverly to Omaha, then to Albany, Or. Miss Schultz and her sister were engaged at \$60 per month each in a large store in Oregon. The parties met later at Omaha and at Beverly, while she was visiting, and made an engagement to marry, which lasted several years. The parties with their friends met at Chicago, and were married September 9, 1901. Goff took his wife to his home in Beverly at once. He was 36 and she 35 years of age when married. Goff's father died leaving a large personal and land estate, which he willed to his wife, which she increased, and she died without will; her entire estate passing to her only child, the defendant, Charles P. Goff. One Charles M. Kittle, a leading person in this unfortunate drama, when a boy of 15 years, was taken into the home of Mrs. Goff, the mother of the defendant, and he made it his home. He is about 12 years the defendant's junior. After the death of Goff's mother, Kittle continued to live with Charles P. Goff in the family residence at Beverly. Kittle was maintained by Goff's mother and later by Goff. Kittle, as Goff's best man, was present at the wedding, and remained at his brother's in Chicago for some days after the wedding. He is frequently called "Charlie" in the record of this case. For 10 days after Goff and his bride reached the family home in Beverly they lived happy; but Kittle came back and resumed his home with Goff, and from that moment began the unfortunate trouble between groom and bride. Goff and his wife occupied a room on the first floor, Kittle on the second. The very first night after Kittle's arrival Goff said to his wife that he would like to sleep with "Charlie." She thought this strange, and objected; but she says he begged and pleaded so hard that she consented. The next night he roomed with his wife, and after retiring Goff told his wife that he thought so much of Kittle, and was bound to sleep with him at least once a week, that he would die if he did not, and that, if she wanted to make him happy, that was the only way in which she could do so, and wanted her to consent of her free will. He told her he was devoted to "Charlie," and wanted her to love him for his sake, and if she mistreated Charlie it would be the same as if she mistreated himself, and "it would be all off between you and I." A few days later he accused his wife of being jealous of Charlie, and, when she would say anything about him, Goff would "cut her off." The wife was taken with diphtheria and was confined to her bed 8 or 10 days. He slept with Kittle while she was sick. He spent no time in her room, going in for a few minutes only with the doctor, showing her no care or attention, manifesting no solicitude. He claimed that he was afraid of catching the disease. While she thus lay he moved his wearing apparel little by little from his wife's room to Kittle's room, until none of his things were left in her room.

After her recovery he slept with Kittle, never rooming with his wife, except when Kittle had a friend to lodge with him, which was rarely the case. She was left alone, the only person sleeping on the first floor of the large building. She protested against this treatment, but he continued to lodge with Kittle. She says that he told her that if she objected to his going to Kittle's room "he would go now," and she says that he would not allow her to speak of his rooming with Kittle. She swears that her husband neglected her, never gave her a kind word, treated her only as a housekeeper, gave her no authority in the house, found fault with her as to everything, caused servants to disobey her openly in their presence, telling them not to do so, countermanding her order in so small a thing as bringing a bucket of water, and humiliating her in their presence. She states that one night at the close of her attack of diphtheria, when alone in her room, far in the night, when weak, miserable, and sleepless, a dog barked, she became frightened, thought some one was trying to open the outside door of her room opening on the porch. She ran upstairs calling her sister, and stayed with her. Goff and Kittle paid no attention to her, though she says she heard them walking on the floor above. The next morning at breakfast she narrated the occurrence, and both denied having heard her. She declared that she did not intend to sleep alone in that room any longer, as she was afraid. Goff became angry and said that she would have to do so, or go upstairs and stay with her sister. When hogs were slaughtered Goff told her that she must get to work with the meat. She told him that she was willing to do all she could, but had no experience with cutting up meat, rendering out lard, and making sausage. She asked him if he and Kittle would not help. He said, "No." He said she could hire her own help. She told him she was a stranger, did not know whom to get to help, but if he would get help she would do all she could, and he became angry, and told her she would do the work with the meat and had to do it, "and he acted perfectly horrible." She swears that she told him that she was willing to do anything and everything, if he would treat her kindly, but she could not stand "this kind of life." She says he did hire a colored woman, and she and the woman worked with the meat from nine in the morning till five in the afternoon; that he was in and out, but never noticed her, never spoke to her, but conversed pleasantly with the woman. She says he was always kind to servants, treating them better than he did her. Goff bossed the job, but did no work. Kittle was upstairs doing nothing. Goff scarcely denies this. The hired woman confirms Mrs. Goff's evidence. Says she thought strange of Goff's not speaking a word to his wife, especially as they were newly married. The day when the meat was saved, Goff and wife and sister

were invited by a neighbor to dinner. She went, but Goff, angry because she said she could not work the meat alone, wrote a note declining the invitation. For several days, she says, Goff ignored and would not speak to her; but finally she spoke to him kindly and asked him why he so treated her, saying she had always been kind to him and tried to do her duty. He mentioned the dinner in the conversation, and said that he would not have gone to that dinner with her to save her soul from hell. They had a jar about a servant she had discharged for disrespect to her. She says Goff never spoke for a week, spending all his time upstairs with Kittle, ignoring her. Shortly after, when passing through the library where Goff was sitting, he requested her to sit down. She says she said to him that she was too unwell to talk on this subject then, but would soon do so. The next day she went to him in the library, and told him she could then talk with him. She says that she said: "Charlie, I can't stand this way of living any longer. You know that I have been perfectly devoted to you, and there isn't anything in the world that I would not do for you, and how have you treated me? You have brought me away from a good home, where I have always been used to kindness, and you have treated me, abused me, worse than any one in the house. You know that I have always done my duty, been good and kind to you, thinking in time you would be the same toward me. You took advantage of my kindness. The better I was to you, the worse you were to me. You have left me entirely and completely for Charlie Kittle. He is the cause of all our trouble. You know it, I know it, and he knows it. He has separated us, which I believe had been his intention all along, or all the time. Although Charlie Kittle has treated me very kind, and I have been the same to him, you are so infatuated over him, he has so much power over you, that he has succeeded in turning you completely against me. I have always liked Charlie Kittle until I saw and knew he was causing trouble between you and I. I said, 'Now, Charlie, you know I have been as good to Charlie Kittle for your sake as his own sister would have been; but the way you have treated me, and knowing that it is his fault, my feelings have turned against him until I despise him. There is only one thing to do. He will have to leave the house. I cannot live this way any longer.' Charlie Kittle was away at that time. He was at Elkins at a ball. I asked Charlie Goff when Charlie Kittle would return. He said, 'To-morrow.' Then he [I] said: 'When he comes back, I want you to tell him to leave. If you don't, I shall.' The minute I spoke of Charlie Kittle, and of his leaving, Charlie Goff became perfectly wild, and vowed that Charlie Kittle should never leave as long as there was a breath of life in his body—meaning his own. He said, 'I will never tell him to leave.' I re-

marked, 'You have fully decided on that.' He said, 'I have. Then I said, 'Remember that I shall do so.' Then he said, 'He is liable to slap you in the face.' I asked during this conversation: 'What is Charlie Kittle here for? He doesn't do anything. He seems to have a most wonderful influence over you, which I cannot understand. You are so infatuated over him that you are perfectly blind where he is concerned.' I said, 'I can tell you what he is here for. He is after your money, as every one knows. When that is gone, your friend will go also.' I said, 'I believe this is all I have to say on the subject at present. Only one thing more: Charlie Kittle must leave the house, for he has been the cause of all my trouble.' As I went to leave the room, he said, 'You have fully made up your mind to tell Charlie Kittle to leave.' I said, 'I certainly have.' And he remarked, 'You need never prepare another meal for me in this house.' And as I left the room, he said, 'Remember we are not on speaking terms now.'"

On another occasion he threatened to "beef" his wife. On another occasion he was eating breakfast as she passed through the room, when he called her a "damned thick-headed Dutchman." Once, when she called a servant boy to breakfast, Goff told her not to dare give Albert orders; then began to rave and swear, and said before the servant that he had no more respect for her than for a dog, repeated it, and said: "I want you to get out of here just as quick as you can. How any one can sit and eat at a man's table when they have been ordered to leave I can't see." Afterwards, in an interview, he repented of this, and begged her to give him one more trial. She answered that she would do so, and forget and forgive, asking only one thing, that he should give up Kittle, telling Goff that Kittle had caused all the trouble between them. She told him that he had admitted to her that he had married her as a convenience, but she wanted to give him another trial; but that he could not live with both Kittle and her, and he must choose between them. He replied that he could not part with Charlie. On another occasion, when Goff was sitting in the kitchen talking to the girl, his wife went in, but he did not notice her, and the phone rang to a call from Kittle at Elkins, and she went to the kitchen door and told him Kittle wanted to speak to him, and Goff said to her: "God damn you! Go to hell! I haven't any use for you." Then after breakfast he went to her room, where her sister was, whom he admits he invited to his house, and swore and abused his wife, shook his fist in her sister's face, and ordered her out of the house. The wife was crying. He shook his fist in his wife's face and said, "You get out of here, get your divorce, and get out of here as quick as you can," and cursed and abused her, and called her all sorts of names, saying over and over again: "Such a God damn woman!" He said: "I will give everything I have to

Charlie Kittle. I will deed this house and lot to him today." This is proven by a boy who was present. Goff admits it. His counsel do not question or deny his thus cursing and abusing his wife, but would apologize for it and say Goff afterwards repented of it. On 21st January, 1902, a little over four months from the marriage, Mrs. Goff left her home and went to the home of a neighbor in Beverly. Goff left Beverly 10th February, went to Cumberland, where he was shortly followed by Kittle, and they occupied the same bed there. Later both went to Chicago, where they still dwell together. Within 20 days before marriage, Goff conveyed to Kittle a fourth share in a tract of 6,606 acres of land, the fourth of the value of \$33,000; it being the "Goff-Arnold land." Goff says he saw his wife several times after she left the house go in and out of the house. He does not say, nor is there any show, that he went to her, or said anything in repentance or friendship. It is proven that when she was packing her trunk in the house for final departure, some days after she went to the neighbors, he knowing she had gone, he knew she was packing her trunk. He took no step toward her, spoke no word to her. Kittle was in the hall at her room during the packing of the trunk whistling, apparently in contempt, the tune "There'll be a hot time in the old town to-night." Kittle gives evidence that Goff, as an explanation of his not rooming with his wife, made a statement too indecent to state. It is only mentioned as showing that Goff had no love, no respect, no regard for his wife. Why should he degrade her to a stranger? It bears on its face incredibility. So improbable, so unlikely! Who would believe it? It was inhuman and cruel to make the statement.

More of the matters appearing in the evidence of this regrettable case might be given. Too much, perhaps, has been given. It is given as pertinent to an important legal question arising and contested in the case, that is, Does this summary of the case give the plaintiff a decree of separation under our statute, which grants such a decree "for cruel or inhuman treatment, (or) reasonable apprehension of bodily hurt"? Observe there is no violence to the wife's person. Once the law demanded this, but advancing civilization and right reason have changed the law. What is cruelty? "It has frequently been defined as actual personal violence, or conduct causing reasonable apprehension of it, or such a course of treatment as endangers life, limb or health, or renders cohabitation unsafe. * * * It is established in all jurisdictions, however, that mere want of congeniality or incompatibility of temper and the consequent wranglings of the parties will not justify a charge of cruelty on the part of either. Nor is jealousy or overbearing conduct on the part of the husband ground for divorce. The conduct of one of the parties must at least be such as to render

cohabitation intolerable to the other; and, although in some states actual bodily harm or apprehension thereof need not be shown, there must have been such treatment as so to destroy the peace of mind and happiness of the injured party as to endanger the health or utterly to defeat the legitimate objects of marriage." 14 Cyc. 599. "The rule that there must be personal violence, or apprehension of personal violence, has been changed in some states by enactment and decisions in effect overruling earlier cases. At present the great weight of English, Scotch, and American authority is to the effect that any misconduct which tends to impair health, or which creates an apprehension of bodily injury, is cruelty, although no personal violence was inflicted." 9 Am. & Eng. Ency. L. (2d Ed.) 788. Nelson on Divorce & Separation, § 270, is to the same effect. On a statute in the same words as ours it was held, in *Latham v. Latham*, 30 Grat. (Va.) 307, that: "There may be cases in which the husband, without violence, actual or threatened, may make the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults and annoyances in all the forms that malice can suggest, which may as effectually endanger life and health, as personal violence, and which therefore would afford grounds for relief by the court; but what merely wounds the feelings, without being accompanied by bodily injury or actual menace, does not amount to legal cruelty." To the same effect is *Myers v. Myers*, 83 Va. 806, 6 S. E. 630. See *Reinhard v. Reinhard* (Wis.) 71 N. W. 803, 65 Am. St. Rep. 66, and note. There we see that neither actual violence, nor immediate danger of it, is absolutely essential. If the husband's treatment be coarse, unnatural, abusive, so as to render life a misery, prey on the wife's mind, produce mental anguish, impair her nerves, and endanger her health, it is enough. As Bishop says, in his *Marriage, Divorce & Separation* (volume 1, § 1547), we cannot say that mere mental anguish from mistreatment is cause for divorce, because the courts have favored the continuance of wedlock, no matter about mere unhappiness, and have been disinclined to separate man and wife, except for bodily violence, or well-grounded fear of it, and, under the rule of stare decisis, we cannot say that mere unhappiness, mental suffering, is ground. Bishop, § 1551, justly criticizes the logic of this position of life-long continuance of misery, quoting from *Rice v. Rice*, 6 Ind. 105: "If it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight—then we think that conduct which produces perpetual social sorrow, although physical food be not withheld, may

well be classed as cruel, and entitle the sufferer to relief. And in point of fact we have no doubt that mere cold neglect has sent broken-hearted to the grave hundreds of wives, where the dagger, poison, and purposed starvation has sent one. Men generally supply a sufficiency of food to their brute animals." In sections 1552, 1561, 1562, 1563, he says that an escape from this unreasonable rule is that wherever this mental anguish produces, or is liable to produce, ill health, cruelty exists calling for a divorce. The science of physiology tells that continued mental pain will wreck health. We almost take judicial notice of this fact. It requires no science to tell us this. In this case we have ground for reasonable fear of bodily harm. Goff shook his fist in his wife's face, and threatened to "beef" her. Did not this mean to slaughter her? And in the paroxysms of anger, which the evidence shows would come over him, was there not reason to fear personal violence? And then that awful abuse. What woman's nerves could stand it? What anguish of heart would it not produce? Must a frail woman submit to it through life? How long would life last? All the books say that if it tear down, or endanger, health it is cruelty. Mrs. Goff says and proves that it greatly injured her health. She was healthy before marriage. During those troubles she had headache, nervous prostration, sleeplessness, and loss of appetite. And add to abusive language the abandonment of cohabitation; the husband's refusing to room with his wife, and betaking himself to the bed of Kittle, and giving his heart and soul and estate to him, and declaring that he would give Kittle his home and lands, as he had already done in the conveyance of real estate, just before the wedding, worth \$33,000, which might leave the wife without support. Could a woman be in a more lamentable condition? Is this not cruelty? And our statute means to do something by using not only the word "cruel," but also "inhuman." And notice the word "treatment" in our statute. Does it, in connection with the adjective "inhuman," mean more than "cruelty" as used in the books? It may. It is not necessary in this case to say. But it certainly goes to render easily applicable the doctrine that bad treatment telling on health comes under it, if mere enduring sorrow and mental pain do not. Clearly the wife's divorce is justified under the words of the statute "cruel or inhuman treatment." It is not necessary to inquire whether she is entitled to a divorce for abandonment or desertion.

The defense, admitting Goff's wrong, seeks to show that he sought and offered reconciliation. I do not follow the many facts bearing on this question. I dismiss it with the declaration that the evidence clearly shows that Goff soon tired of his marriage under some strange influence, which his wife, and even Goff's kin, attribute to Kittle. Under

oath he swears she loved him, but he could not love her. He told a witness there was no chance of reconciliation. Goff wanted to get rid of his wife, for no earthly reason, so far as the evidence tells; for she seems to stand before the court with fair character, conduct, and amiable disposition, having performed her full duty in her short married life. Every show of a desire for reconciliation on Goff's part was met with entire assent by the wife, but he never made any show that was not insincere and designed to put his wife in the wrong. He left the state. He wrote a note to his wife saying he would dismiss Kittle, if she would return, and asking her return. This is greatly relied on in defense. But was it sincere? That note required an answer by 4 o'clock that same day. The wife received it only about 1 o'clock. She wrote asking a short time to reflect. He got up before day next morning, drove seven miles to catch a 7 o'clock train for Cumberland, though by waiting till noon next day he would get a train. He says he had no pressing demand to hasten. But several days before, as he admits, he had made up his mind to go. Had sent Kittle to Elkins to draw \$3,500 from bank, and he purchased a New York draft for \$3,000. If sincere, if desiring reconciliation, why not wait a few hours anyhow? He left when reconciliation was pending. Must we not say that he did not desire it? A request to return must be in good faith. *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11. And we must note that, when Goff wrote that note, he was in consultation, at his house, with an attorney from Elkins. The attorney saw the note. Was it a design of Goff's to put his wife in fault? Friends later tried to persuade him to put Kittle away. He refused. Friends tried to get them to meet. She told them she was ready—that she must have a personal meeting. This was reasonable. A friend fixed Oakland, Grafton, his house, for a meeting of reconciliation. Goff would not go. He declined to meet his wife. He said he must act by attorneys. What had attorneys to do with the confidential, sacred negotiation of estranged husband and wife for reconciliation? If sincere, he would want no stranger intermediary. This very refusal of interview, and wanting to treat only through counsel, affords a fair inference that desire of reunion is not sincere. 1 Nelson on Divorce, § 74. When she wrote him affectionately, even after suit, begging him to eliminate Kittle as the only apple of discord, and promising, on that one condition, love and devotion, he answered that, as she was going on with her depositions, "no reply was necessary." She had only said her letter should not compromise her in her suit, if he would not return. He added that he would consider "seriously what course I will now pursue. I will let you know." He never let her know. He would not meet her as friends suggested. Kittle himself proves this.

So he never intended or sincerely tried to bring about reunion. But really, after once she had by cruelty been driven from house and home, she was under no obligation of reconciliation. How long would it last? By the evidence it would be a frail reliance. If it could, as it cannot, be said she declined reconciliation, it is no bar to her. 1 Nelson on Divorce, § 73.

Much is said by counsel against Mrs. Goff, to the effect that her aim was only money, not reconciliation; that she demanded, as a condition, \$20,000. It is not proven. Goff had as much hand in this money settlement as she, and more; for the evidence shows that, to get rid of his wife, he was willing to pay \$10,000. But suppose that she, after months of bad treatment; after Goff had refused to put off Kittle, after he had given him a costly diamond ring and realty valued, as agreed facts show, at \$33,000; when from the past she was without hope for the future of the marriage; she, a wife without home or estate, being poor—suppose she did ask money. The fact cannot impeach her. It was her legal right. When Goff married her, did he not, in law and fact, promise her home and support? By agreed facts he had estate worth \$85,000, with great prospective value from real estate in the development of that section, besides the \$33,000 worth of land given Kittle. Was the wife's demand, if she made it, illegal or unfair? Mrs. Goff did demand that Kittle be eliminated from the home. That might seem an unreasonable condition by some. We do not so regard it. There is not one young wife in a thousand that would not have done the same under the circumstances stated above. The mass of evidence shows that Kittle was the wedge that divided these people, and would continue to do so. Relatives of Goff so looked upon the trouble. Why should Goff, of family most prominent in all that section, who had spent three years at the West Virginia University, and wealthy, be bound in the toils of this young man of 24 years? What the bond of union binding these men together? A bond that broke the link of marriage between persons in their 30's, when the honeymoon was scarcely gone? A bond that induced Goff to convey away from himself and his engaged wife and prospective children, only 20 days before marriage, real estate then valued at \$33,000, and now, with the coal being brought out of its bowels in the great development of Randolph county, a princely fortune? A bond which induced Goff to salary Kittle without service and clothe him "in purple and linen"? A bond which induced Goff to give to Kittle a precious ring set with jewels owned by his dead father and mother who had conferred so much upon him, which would be sacred beyond money to most men? A bond which induced Goff to bear insult from Kittle with composure? A bond which induced Goff to be a servile menial to patch Kittle's pantaloons and wash his socks? What was this

bond? It was weird and potent, stronger than steel. It made then as close as Damon and Pythias. Its grasp unyielding. He was: "Like a poor prisoner in his twisted gyves." "His very will seems to be in bonds and shackles."

It follows from what has already been said that Goff was properly denied a divorce. He demanded that his wife leave his table and bed. As to the claim that \$1,200 annual alimony is too much: We so conclude. We do not deny that the amount of alimony is in the discretion of the court, but we as well know that it must be based on income. *Heninger v. Heninger*, 90 Va. 271, 18 S. E. 193. It is for the wife's support, not the husband's punishment. Of the \$85,000 value of Goff's estate, \$48,000 is unproductive realty. He has to live. Everything cannot be taken from him. He has to pay taxes. The interests of the plaintiff demand that they be paid. His income must be rated at \$1,800. We have considered this matter seriously and have concluded to reduce the alimony from \$1,200 to \$1,000 per annum.

The decree declared the alimony a lien "on all the real estate owned by defendant Goff." The decree made the future alimony payable quarterly. It is said by counsel that the strong weight of authority seems to be that future payments are not a lien, citing 2 Am. & Eng. Ency. L. (2d Ed.) 132, 133, 134. It may be so in some states. It is clear, as stated in that volume, that a pending suit for divorce and alimony is not in itself a lien. But how is it after decree for alimony? We are cited to 14 Cyc. 783, for the proposition that a decree for permanent alimony does not become a lien, unless so provided by statute, and the jurisdiction of equity cannot authorize the creation of such lien. But much authority is cited in 2 Am. & Eng. Ency. L. (2d Ed.) to show that a decree is no lien, unless the decree fixes it on specific property brought before the court. But it is there asserted that the court may so declare a lien. No particular property is before the court or subjected by the decree. The decree declares a general lien. The decree adjudges Goff to pay fixed sums at fixed times in future. Our Code says that "every judgment for money rendered in this state heretofore or hereafter against a person shall be a lien on all real estate of or to which such person shall be entitled at or after the date of such judgment." Does the fact that payment is to be made in future change the matter? Why should it? Here is a final adjudication of present liability, only it is to be discharged in future. Of course, a decree for a gross sum as alimony is a lien by the letter of the statute. *Renick v. Ludington*, 14 W. Va. 367. The lien of alimony recovery is discussed in *Conrad v. Everich* (Ohio) 35 N. E. 58, 40 Am. St. Rep. 679. By reason of our statute making "every judgment" a general lien on all the defend-

ant's land, there need be no specified property charged by the decree. The only question is whether future installments are a lien. We think they are. Should the door be left open so that Goff might by conveyance dispose of his property and wholly defeat his wife's alimony? She has, by law, right to look to her husband's estate for reasonable support. The law shares the property, to the extent of alimony, between them. He has exiled himself from the state voluntarily. According to *Holmes v. Holmes*, 29 N. J. Eq. 9, nonresidence gives a court power to make the alimony a lien. As the decree is by law a lien without the decree's so saying, its declaring it such is not error. A glance at section 11, c. 64, of the Code of 1899, tells us that the powers of the court are broad in making, in addition to the divorce, "such further decree as it shall deem expedient concerning the estate and maintenance of the parties." Under the view above taken, it is unnecessary to say whether or no the inherent powers of a court of equity in divorce cases would not under that section alone authorize a court to decree the future alimony a lien, a power exercised in many states. Where a nonresident has estate here, but not served with process so as to enable the court to render a personal decree constituting a lien, and where no attachment is sued out, can a lien be declared? If the bill brings specific property before the court, and asks the court to declare alimony a lien on it, cannot the court do so? It is done in many states. It seems to be a power in divorce cases, under authority cited above. But, as the bill brings no specific real estate into the case, except the land conveyed to Kittle, we cannot properly say what we could do, in a proper case, under section 11.

Complaint is made that the plaintiff was not charged with rent of house and with some provisions consumed and furniture used by her pending suit and sold cows. She was in possession by order of the court, as receiver. She took care of the property and furniture. Her occupation was before the alimony began, and, it being found that her husband was in the wrong, not she, her right of support pending suit would excuse her from payment of rent for house and furniture. If she sold property, that is an open matter not involved here.

We cannot sustain the complaint against the decree that it allows the plaintiff costs. The claim is that defendant had once paid such costs in the interlocutory order compelling him to pay \$500 for expenses and attorney's fees. That allowance was not for the taxable costs. The order so shows.

Cross-Error.

Appellee cross-assigns error in the refusal of the court to cancel the deed mentioned above from Goff to Kittle for a fourth interest in a tract of 6,606 acres of land.

which fourth, as shown by the agreement of facts, was then of the value of \$33,000. It dates 20th August, 1901, and was recorded 18th November, 1901. When made the intended wife was far from Beverly, where it was made, knew nothing of it, and she says first learned of it by noticing it in a newspaper. Goff never told her of it, as she says. He proposed to put in the deed a consideration of love and affection; but, as Kittle was not kin to him, counsel told him this would not do. Counsel advised him against making the deed, but he persisted. The deed states the consideration as "personal services heretofore rendered me and to be rendered me during a contemplated trip and return to Beverly." This trip was going to Goff's wedding; all expenses being paid by Goff. Being to the great city of Chicago, it was a pleasure trip. Does a bridegroom pay his best man at the wedding? As to past services, Goff and Kittle both say that Kittle was on a salary, and it had been paid by Goff. In conversation with Phillips, Goff did not pretend a real consideration. He said that he had told the attorney to make the deed state a consideration of love and affection, and blamed him later for not so doing. He declared he wanted to make provision for Kittle and would convey this land to him. He admitted that he was careful to convey to Kittle before marriage. He says he did so in pursuance of a request of his mother. He said he had provided for Kittle in his will. (Was this more property?) When asked what services Kittle had rendered for which he had not paid he replied: "I do not know that I can say." When asked if Kittle had rendered service for which he had not been paid, his reply was: "I cannot say he had." Kittle swears that he never requested Goff to make the deed. Thus, we have a great estate conveyed without consideration, in secret from the wife, in contemplation of a marriage, under a promise of marriage made long before and executed a few days after the deed. The bill attacks it as made in fraud of the wife's rights. Of course, on the facts stated in the bill, the wife had, upon marriage, a contingent dower, and upon the occurrence of cause of divorce she by law had a demand for alimony. In *Waller v. Armstead's Adm'rs*, 2 Leigh (Va.) 11, 21 Am. Dec. 594, the rule is stated that deeds made by a woman giving her property just before marriage, without the knowledge of the intended husband, are void as to him. In *Gregory v. Winston's Adm'r*, 23 Grat. (Va.) 102, is a discussion of such conveyances by the woman. The rule is stated that it depends on the circumstances. If the conveyance be bona fide, free of bad intent, or for value, it is good. In that very valuable late work, *Am. & Eng. Decisions in Equity* (volume 3, 525), a great many cases are cited on the subject of "Fraud on Alimony." The case

of *Bouslough v. Bouslough*, 68 Pa. 495, is cited, saying that "there is no reason why a wife whose husband has deserted her and refused to perform the duty of maintenance, or who by cruel treatment has compelled her to leave his house and commence proceedings for divorce, should not be viewed as a quasi creditor in relation to the alimony which the law awards her." There it is laid down, on many authorities, that any such conveyance or disposition of the husband's property is void as to her, in the hands of a voluntary purchaser, or purchaser with notice. "A judgment or decree awarding alimony to the wife is sufficient to establish her rights as a creditor of the husband to impeach a conveyance made by him with intent to defraud her of alimony." 14 Cyc. 798. As to dower, this rule is established. A voluntary conveyance just before marriage, with intent to defraud dower, is void. *Thayer v. Thayer*, 39 Am. Dec. 211, and full note; *Scribner on Dower*, 588. Is it said that no alimony right, or cause for it, existed when the deed was made? Neither did inchoate dower exist. Both are future and contingent. There is no difference between them in this matter. I would assert that, when a man marries a woman, the law gives her home and support at his expense. Such are his contract and liability. So the law gives dower. Now, if he gives cause of divorce, alimony is given by law. Dower does not come till death of the husband; but right of support or alimony comes at once on marriage, and is a stronger claim than dower. The law from the instant of marriage says that, if there shall fall a cause for alimony, it shall be given. Is this sustained by law as it is by justice? Dower is protected against fraudulent transfer—so is alimony. 14 Am. & Eng. Ency. L. (2d Ed.) 252. There we find both assimilated. "A right to alimony is incident to divorce and consequent upon it, and a wife having cause for divorce, though not in strict language a creditor of her husband, stands to him in the relation of a creditor, having an inchoate right of payment of whatever alimony may thereafter be decreed her, and is consequently within the statute." "Alienations of real property by a man about to be married, made without the knowledge of his intended bride, and with the intent and object of depriving her of the rights which she would otherwise acquire in his property by the marriage, may be avoided by the wife as fraudulent." *Wait on Fraud. Conveyance*, § 314. It was Goff's duty to inform the wife of this conveyance. Had she for herself and prospective children no right in it? *Bigelow on Fraud*, 610, 611. *Leach v. Duvall*, 8 Bush (Ky.) 201, holds a conveyance of a valuable portion of the husband's estate, just before marriage, without the woman's knowledge, a fraud on her right. But it is said no cause

of alimony existed when the deed was made. That is no difference, as there was an engagement, which if carried out would invest rights. A conveyance to defraud future creditors is void. Under a statute avoiding conveyances, "made with intent to hinder, delay, and defraud creditors or other persons of lawful suits and demands, a wife may maintain a suit to set aside a conveyance by her husband, made with such fraudulent intent, so as to enable her to collect alimony awarded in a divorce suit against him, though the cause for such divorce did not arise until after the conveyance." Gregory v. Filbeck, 12 Colo. 379, 21 Pac. 439. Our Code of 1899, c. 74, § 1, avoids acts to defraud "creditors, purchasers or other persons of or from what they are or may be lawfully entitled to." Very broad. Think of a gift of \$33,000, just before marriage, to one having such unlimited influence over the grantor. What could have been the intent, except to get it out of the legal right of the intended wife? If Goff's mother did request it, why did he wait for two years until just before marriage? But the plaintiff has no right to annul the deed in toto. It is good between Goff and Kittle. We hold it void, as if never made, as to the alimony and the dower of the plaintiff, should it ever become consummate. The alimony is a lien on the realty so conveyed to Kittle.

We reverse, as to that feature of the decree refusing plaintiff relief as to the conveyance to Kittle; and modify it, as to the amount of alimony; and in other respects affirm.

(60 W. Va. 27)

DAY et ux. v. LOUISVILLE COAL & COKE CO.

(Supreme Court of Appeals of West Virginia. May 1, 1906.)

1. WATERS AND WATER COURSES—POLLUTING STREAM—INJURY TO RIPARIAN OWNERS.

A company, mining coal and making coke, casts slag and other refuse materials into or near a stream, and they are carried by its waters and deposited on land of a riparian owner, doing damage to the land. The company is liable therefor to the landowner.

2. TORTS—JOINT AND SEVERAL LIABILITY.

When the negligent acts of two or more persons, though acting independently of each other, concurrently result in injury to the property of another, they are liable either jointly or separately.

3. LIMITATION OF ACTIONS — ACCRUAL OF CAUSE OF ACTION.

The cause of action to an owner of land damaged by deposit on it of refuse material put into a stream by a person in operations of mining coal and making coke, and thence carried by its waters and deposited on the land, first accrues when the material is deposited upon the land, and the statute of limitations does not run against such action until such material is deposited on the land.

(Syllabus by the Court.)

Error from Circuit Court, Mercer County. Action by Joshua Day and wife against the Louisville Coal & Coke Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Rucker, Anderson & Hughes and R. C. & Bernard McLaugherty, for plaintiff in error. J. M. McGrath and C. W. Smith, for defendants in error.

BRANNON, J. Joshua Day and his wife, S. E. Day, filed a declaration in trespass on the case in the circuit court of Mercer county against the Louisville Coal and Coke Company, a corporation, alleging that S. E. Day owned a tract of land situate on Blue Stone river, about 60 acres, consisting of river bottom, very fertile for agricultural purposes; that the river flowed through the bottom land, and that the river, before damaged from the cause stated in the declaration, had been one remarkable for its beauty and the purity of its water, and contained a great number of valuable fish of many varieties; that the defendant became operator and owner of a coal mine and coke ovens located upon Flipping creek, which flowed into Blue Stone river at a point above the plaintiff's land; that the defendant wrongfully and negligently deposited large quantities of the slag, cinders, tailings, and other waste and refuse from its mine and coke ovens in said creek, and so near it that its water, both during low water and ordinary freshets, caused said material to flow into the stream, and the waters of the creek and river carried large quantities of the slag, cinders, tailings, and other waste and refuse down said stream, and deposited them on the land of the plaintiff, S. E. Day, by means whereof 40 acres of the bottom land was covered up with said slag, cinders, tailings, and refuse, and rendered worthless, and by means whereof 20 acres of corn, 20 acres of wheat, 20 acres of grass, and 20 acres of oats, there growing, were covered up and destroyed; and that said materials were by the waters of said stream carried down and deposited in their beds, and discolored and polluted the water of said stream, rendering it unfit for agricultural and domestic purposes. The defendant pleaded the statute of limitations of five years. A jury found a verdict for the plaintiff for \$300, on which judgment was rendered, and the defendant brings the case to this court.

This case involves principles very important everywhere, but especially important in this state at present and in the future; but those principles are old, and have been called into requisition through many, many years in actions for the pollution of streams, and casting into them hurtful things, and depositing them upon lands of riparian owners on the stream below. The defendant contends that as it was using its property in carrying on a lawful business very useful to the public it is exempt from liability, as it was only exercising its rights. We are told by the able brief of the defendant's counsel that the affirmance of this judgment will be vastly hurtful and disastrous to the mining and

coke interests of West Virginia, and have a tendency to detract from the value of our land, and hinder the development of the great wealth of coal and iron in the bowels of our mountains, and will be subversive of great public policy, which demands the development of our wealth therein, and tends to the weal of the whole people of the state, and that a few individuals injured thereby must be without redress. We cannot accede to this broad proposition. The established maxim of centuries is "Sic utere tuo ut alienum non lædas (so use your own property that you do not injure another)." That rule is almost equal to the Golden Rule in importance, and must never be lost sight of in the daily doings and transactions of organized society. A man has land upon a stream. He is its sole lord. No one has a right to injure that land. It is protected by the Constitution. If one up the stream in his works, be they ever so lawful, honorable, and necessary for private weal or public weal, do thereby injure the land of that owner further down by unlawful invasion of it, by casting upon it things damaging it, or by polluting the purity of the water, rendering it unfit for the owner's consumption as it passes through his land, the man up the stream must answer in damages. One man without fault is injured by another. That is enough for liability. This is the general principle of the common law. One man cannot thus injure another. Especially is this so in this state, where the Constitution says that private property shall not be damaged for public use without compensation. How, then, can it be damaged for private interests or to promote a supposed public policy? The authorities are ample on this subject to sustain this position. "The doctrine stated in the preceding section, that the importance of the business of the upper proprietor was not enough to justify him in polluting the water of the stream to the injury of the lower proprietor, has been tested and fully sustained in cases involving the right of persons engaged in mining operations to pollute the streams. In the operation of any mine there are large quantities of refuse which must be moved and stored, and an easy method of disposing of them was found to be to permit them to be washed into the streams, to be carried away by the action of the water; and this was especially true with respect to hydraulic mining, where the earth was actually removed from its place by the force of the water. When the system of hydraulic mining became perfected, it was found that the débris from the mines was being carried down the streams with disastrous effect. Large stretches of country, covered with buildings and hamlets, were buried, in some instances above the tops of the houses. Even cities had to fight to maintain their existence, and the navigability of some of the largest streams was being impaired. In this condition of affairs resort was had to the

court for relief. After a severe fight the lower proprietors finally obtained a decision from a United States court in which, with an exceedingly valuable historical opinion, it was held that persons mining with the hydraulic process may be enjoined from discharging the débris into a river, whence it flows to the valley below, burying valuable farms and creating a public and private nuisance. And this rule prevents the casting of débris from the mine into the stream, or abandoning it so that it will find its way there in such a manner as to injure the lower proprietor. So it prevents the miner from casting his tailings into the stream in such a way as to injure lower owners. The same rule applies to culm from a coal mine.

* * * A mill for the reduction of ores cannot be permitted to throw its refuse into the stream to the injury of lower property." Farnham on Water, § 518. In the well-considered case of Columbus & H. Coal & Iron Co. v. Tucker, 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577, 29 Am. St. Rep. 528, the rule is thus laid down: "In an action brought by a riparian owner to recover of a mining company damages to his lands, and for polluting the water of a stream, which runs through them, by depositing on its own lands coal slack, dirt, and refuse, in places from which the same had been washed down and onto the lands of the plaintiffs, the evidence showing substantial injury to have been produced thereby, that the deposits were made intentionally, and that such results might, at the time the deposits were made, have been anticipated by a person of ordinary intelligence and prudence, a right to recover is established, and it is not a defense to show that the operation of the mines, and the deposit and disposal of the slack, etc., was conducted in the mode in general practice in the operation of similar coal mines in the surrounding mining districts, and that such deposits were made without malice, and upon the only feasible place or places the company could deposit the same, and carry on the business of coal mining." See 30 Am. & Eng. Ency. L. (2d Ed.) 380; Trevett v. Prison, 98 Va. 332, 36 S. E. 373; 50 L. R. A. 564, 81 Am. St. Rep. 727; Tennessee v. Hamilton (Ala.) 14 South. 167, 46 Am. St. Rep. 48; Elder v. Lykens (Pa.) 27 Atl. 545, 37 Am. St. Rep. 742; Fricke v. Quinn (Pa.) 41 Atl. 737. "No person, natural or artificial, has the right to cover his neighbor's land with débris from his mine or mill, nor to permit any of his refuse matter to flow or be placed upon the land of another." Snyder on Mines, § 1073. Of the subject of dumping tailings from mines and débris from coal mines into a running stream, that work, in section 1076, says that it has been a fruitful source of litigation, and "it may be laid down as a general rule that whoever causes an injury to another's land by any of the means above enumerated must respond in damages." Thus the liability in this case is clear.

But in defense the defendant showed that various other coal and coke works separate and distinct from that of the defendant's, carried on by other operators, threw their refuse into the same creek and river, and that the injury to the plaintiff's land came as well from the acts of others as from the defendant, and that the plaintiff cannot maintain his action against the defendant and make it responsible for damage which came from the act of others. It contends that it is not liable further than the damage caused by its act. There are some authorities to support this proposition, but the authorities against it very decidedly preponderate, and they harmonize with right, reason, and the established law of centuries. This damage comes from tort, not contract, and it is a rule of law as old as the hills that in a tort all participating or contributing in the wrong, working the injury, are liable, and any single one is liable. One can be sued, or more can be sued. It is contended for the defendant that the acts of these different operators were independent of each other, the defendant's act separate and distinct from the others, and that it is only where tort-feasors act jointly that one or all may be sued. This proposition cannot be sustained, as will appear from the following authorities: In 21 Am. & Eng. Ency. L. (2d Ed.) 796, it is laid down that, "where the negligence of two or more persons, acting independently, concurrently results in injury to a third, the latter may maintain his action for the entire loss against any one or all of the negligent parties; it not being essential, it has been held, to the maintenance of a joint action against several for negligence that they should be engaged in a common enterprise or sustain any relation whatever between themselves." The same doctrine is laid down in 15 Ency. Pl. & Prac. 557. Wharton on Neg. § 144, says: "The fact that another person contributed, either before the defendant's interposition or concurrently with such interposition, in producing the damage, is no defense." 1 Shearman & Redfield on Neg. (4th Ed.) § 122, says: "Persons who co-operate in an act directly causing injury are jointly liable for its consequence, if they act in concert or unite in causing a single injury, even though acting independently of each other." Cooley on Torts, p. 79, says: "A fourth proposition may be stated thus: That, if the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury." In 16 Am. St. Rep. 251, we find this: "Where one act of negligence unites with another and like act, or with any other cause, in inflicting injury upon the person

or property of another, whose negligence has not also contributed to his injury, and there exists no means of determining the extent to which the injury resulted from either negligent act, it is obvious that each person guilty of negligence must be either held entirely exonerated, or as answerable for the whole damages inflicted in part by his negligence. In all the instances in which his negligence can be regarded as the proximate cause, or one of the proximate causes, of an injury, he is answerable for the whole thereof, either separately or jointly and severally, with any other person whose negligence or other wrongful act may also have been one of the proximate causes of such injury." The same principle is laid down in *Grand Trunk Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266: "Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this, although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of another." *Slater v. Mersereau*, 64 N. Y. 138; *Boyd v. Watt*, 27 Ohio St. 259. But why cite other authorities, when we have the case of *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744, holding that, where two contiguous buildings fall upon a third because of co-existent and concurring negligence of the separate owners to keep their separate walls in repair, they are liable in joint or separate suits. Judge Dent aptly said, "It is not a question of comparative negligence, but of contributory; for, if the negligence of one of two defendants contributed toward the injury, he cannot escape liability by showing greater negligence on the part of his codefendant." If it were required in this case that plaintiff show just how much the act of defendant contributed to his injury, what fraction of his total damage, he could not do so. It would deny him relief.

As to the plea of the statute of limitations for five years: The time did not begin to run against this action until the actual happening of the damage. It is contended earnestly that the time began to run from the deposit of the refuse in the stream. That is plainly an untenable position. What right had the plaintiff to sue until she was actually damaged by the deposit on her land? None. It is needless to discuss this question. I refer to *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863; *Eells v. C. & O. R. Co.*, 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787; *Austin v. Anderson* (Tex. Sup.) 15 S. W. 484, 23 Am. St. Rep. 350.

Therefore we must affirm the judgment.

(59 W. Va. 449)

TETER v. TETER et al.

(Supreme Court of Appeals of West Virginia.
April 17, 1906.)

1. CANCELLATION OF INSTRUMENTS — UNDUE INFLUENCE—MENTAL INCAPACITY — BURDEN OF PROOF.

In a suit, brought by a son after the death of his father, to set aside, for mental incompetency and undue influence, deeds made by the father, while aged, infirm, and feeble in mind, by which he had granted the whole of his real estate to his wife and a daughter who resided with him, to the exclusion of his other children, all of whom were of mature age, married, and residing elsewhere, the burden of proving both undue influence, and mental incompetency is upon the plaintiff.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 100.]

2. DEEDS—MENTAL CAPACITY OF GRANTOR—INFIRMITY OF MIND.

Mere infirmity of mind and body is not sufficient to overcome the legal presumption of mental capacity in a grantor. In order to have such effect, the evidence must show that he did not have sufficient understanding to clearly comprehend the nature of the business he was transacting.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 149, 151.]

3. EVIDENCE—COMPETENCY OF GRANTOR — OPINION EVIDENCE.

On the question of the competency of a grantor to execute a deed, the value of the opinions of nonexpert witnesses, who have had opportunity to form intelligent opinions, respecting his competency, depends upon the reasons therefor afforded by the facts upon which they are predicated, as stated by the witnesses. Where the opportunities of such witness to obtain knowledge of the grantor's mental condition have been but slight, and the facts given are meager, such evidence is entitled to but little weight.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2393.]

4. DEEDS—VALIDITY—UNDUE INFLUENCE.

Old age, physical infirmity and disease, and feebleness of intellect, on the part of a grantor, together with the fact that he granted the whole of his estate to his wife and one daughter, who resided with him and upon whom he was dependent for personal care and attention, to the exclusion of all his other children, raise no legal presumption of undue influence. They are only circumstances slightly tending to establish it.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 190, 193, 198.]

5. SAME—EVIDENCE.

That in such case the disposition made of the grantor's property is wholly different from what had previously been intended, as shown by a will executed by him at an earlier date, is a circumstance from which undue influence may, under certain conditions, be inferred; but if it further appeared that at the time of the execution of the deed proceedings were pending for the enforcement of liens upon the grantor's real estate, for the discharge of which no funds were at hand or within reach, and that such indebtedness weighed heavily upon his mind at the time of the execution of both the will and the deed, this circumstance, together with other facts set out in detail in the opinion in the case, affords ground for a strong inference to the contrary.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.
Bill by W. W. Teter, trustee, against Eliz-

abeth Teter and others. Decree for defendants, and complainant appeals. Affirmed.

E. D. Talbott and J. Blackburn Ware, for appellant. Fred O. Blue, for appellees.

POFFENBARGER, J. From a decree of the circuit court of Barbour county, pronounced May 25, 1904, dismissing a bill in equity in a suit instituted for the cancellation of two deeds, the plaintiff in said bill, W. W. Teter, trustee, has appealed. The deeds in question bore date, respectively, May 1, 1901, and May 13, 1901, the first one of which, executed by Jesse Teter, purported to convey all of his real estate to his wife, Elizabeth Teter, and his daughter, Mertie E. Teter, in consideration of constant services rendered to him and other good and valuable considerations, not named, and the other of which, executed by Jesse Teter, Elizabeth Teter, and Mertie Teter, conveyed to the Valley Coal & Coke Company, a corporation, the coal under three tracts of said land, containing, respectively, 165½ acres, 26.77 acres, and 4.93 acres. The grounds for cancellation set up in the bill are mental weakness and incompetency on the part of the grantor, and undue influence exerted upon him, in obtaining the execution of the deeds, by his wife and daughter, Mertie, a married daughter, Mrs. Ida M. Huff, and her husband, Dr. M. M. Huff. The issue thus presented very naturally brought into the record, in addition to the opinions of witnesses respecting the mental competency of the grantor, his situation and circumstances. Besides the two daughters, he had three other living children, the plaintiff, W. W. Teter, Floyd Teter, and Thomas Benton Teter, all of whom had reached mature manhood and had left his home. Of his family, there remained with him only the wife and the daughter, Mertie E. Teter. Mrs. Huff and her husband lived some 18 miles away at the town of Philippi. His home farm consisted of a tract of 250 acres of land, in addition to which he owned the three tracts above mentioned, situated on Zebb's creek, in Barbour county, and an interest in a 300-acre tract of timber land, known as the "Lime Hill Farm," and some other real property. It seems that the larger part of the Zebb's creek land, particularly the 168 acres, described in the deed conveying the coal as containing 165½ acres, and a 19-acre tract adjoining it, had at one time belonged to said W. W. Teter, from whom it was sold in 1895, in a creditors' suit brought by the father, Jesse Teter, and purchased by him at the sale; the son, W. W. Teter having been unfortunate in business and lost all his property. Some advancements seem to have been made to Thomas Benton Teter, but nothing to Floyd Teter or Mrs. Huff, so far as the record shows. Jesse Teter, however, by reason of indorsements from time to time, became liable for debts of Dr. M. M. Huff in considerable amounts, for which judgments had been taken which con-

stituted liens upon the land. In the year 1896 Teter was stricken with paralysis, which seems to have disabled him for some time and from which he never fully recovered. His purchase of the W. W. Teter land seems to have antedated this misfortune by about a year. Some time afterwards, August 22, 1896, he executed a will by which he gave the home place and some other property to Mrs. Huff, Mertie E. Teter, and Floyd Teter. He also gave to Mertie Teter a 20-acre tract of the Zebb's creek land, and to Thomas Benton Teter 5 acres of land on Zebb's creek, in trust for the benefit of his children, explaining that the gift was in addition to advancements he had previously made to said son. The other Zebb's creek land he devised to his son, W. W. Teter, "as trustee * * * to be used in the maintenance, education, and support of the children and heirs of his body by his beloved wife, Mattie V. Teter," and authorized and directed his said son, as such trustee, "to use said lands in whatsoever manner or form he may deem most fit in the maintenance, education, and support of his said children," and further authorized him to make sale of the lands and convert them into money or bonds, and use the proceeds for the purposes aforesaid. Some time in the year 1897 he was afflicted with another stroke of paralysis which, for a time, it was thought, would be fatal; but he rallied from that to some extent. On the 1st day of May, 1901, he executed the deed first above mentioned, whereby he conveyed all his real estate to his wife and the daughter, Mertie. Immediately afterwards the coal in the Zebb's creek land was conveyed as aforesaid. He died in September, 1901, aged 78 years. At the time of the execution of these deeds there was a suit in equity pending against him for the subjection of his real estate to the payment of judgment liens, but for what amount the record does not accurately disclose. During the period of his sickness he was attended by the son-in-law, Dr. M. M. Huff, who resided, as above stated, at Philippi, a place distant from Teter's residence about 18 miles, although there were other physicians residing in the neighborhood whose services could have been procured. Dr. Huff, his wife, Mertie Teter, and Elizabeth Teter, were the only persons who were with him, to any considerable extent, at his home, from the time at which he received his first stroke of paralysis until he died. The three sons and some of the grandchildren were there occasionally, as were other persons. The deed of May 1, 1901, instead of being admitted to record, was put into the custody of Dr. Huff, who retained it until after the grantor's death. It was admitted to record January 13, 1902.

The evidence relating to the physical and mental condition of Jesse Teter, from 1896 until the time of the execution of these deeds, seems to fairly establish the following facts: After the first stroke of paralysis, his phys-

ical health was very much impaired, and he had difficulty in speaking because the use of his tongue was affected. From that time he never had his former mental vigor and capacity. His mind seemed to wander, so that he was at times unable to pursue a given subject in conversation, and occasionally he did things which indicated insanity. The condition of his mind seems not to have been uniform, for the statements of the witnesses who saw him at different times vary somewhat, not only in expressions of opinion as to his mental condition, but in descriptions of his conduct also. After the second stroke, which occurred in 1897, his condition, both physical and mental, was probably worse than it was between that date and the date of his first stroke; but after that he still went from home occasionally unattended, and transacted some unimportant business. Witnesses testify to having gone to his home to see him on business, relating to his lands, and to his having been away from home on business. As to the preparation and execution of the deed of May 1, 1901, the evidence fairly establishes these facts: Jesse Teter did not participate extensively in the preparation of it. What directions he may have given, or whether he gave any, is not disclosed, except by the evidence of Dr. Huff. It was prepared at his home by Warren B. Kittle, at the request of Dr. Huff. It seems not to have been written in the presence of Teter, but in a room other than the one in which he was; but it was read to him. The only persons present at the time were Teter, his wife, his daughter, Mertie, Dr. Huff, Mrs. Huff, and Kittle. From the evidence of Kittle, it is clear that the mother, daughters, and son-in-law participated actively in the preparation of it. The directions must have been given by them, for he says about the only thing he remembers having heard Jesse Teter say was that he wanted to get his debts paid before he died, if he could. In view of the preparation of the deed, W. W. Teter was mentioned, and the mother said she would see that he got some of the property; but this discussion was not in the presence of Jesse Teter. The merits of Miss Mertie Teter, and what was due her, were discussed in the same connection, and it was assigned as a reason for the conveyance to her that she had staid at home, worked hard, and taken care of Mr. Teter and his property during his illness. Kittle, the scrivener, was cautioned not to reveal the transaction to other members of the family. The deed was not signed in his presence, but, according to the testimony of Dr. Huff, on the same day. The acknowledgment was taken, three days later, by A. F. Rohrbough, at the request of Dr. Huff. When he first saw the deed, it bore the signature of Jesse Teter. He made no explanation of the deed to Teter, but the latter acknowledged it. The circumstances of the preparation of the deed of May 18th

are not shown. It does not appear who wrote it. But Gordon B. Teter, a second cousin of Jesse Teter, took the acknowledgment. There seem to have been two deeds prepared for the conveyance of the coal, the first of which was defective in some respect. Gordon Teter went there on two different occasions for the purpose of taking the acknowledgments; the last time on the 18th of June, 1901, and the first time about two weeks earlier. He says that, from what he saw of Jesse Teter at the time he took the two acknowledgments, he does not think he was able to understand what he was doing. On the second occasion, Dr. Huff handed him the deed, telling him it was all signed up and nothing remained for him to do but to write the certificate of acknowledgment, and, after having taken the acknowledgments of Mertie and Elizabeth Teter, he started to the room of Jesse Teter to take his, but was stopped by Dr. Huff, who told him to sit down a minute until he went in to see whether he was up yet. Dr. Huff remained in the room so long the notary became restless, and had Miss Teter tell him he was becoming impatient. When he went into Jesse Teter's room, he found him lying in bed, and, after explaining the deed to him, asked him if he acknowledged it; but he looked as if he did not understand the notary, and he again explained it, and then Teter nodded his head, and, being asked if he acknowledged his signature to the deed, he said "Yes, that is all right." This witness says that about the 1st of May, 1901, Jesse Teter was confined to his bed all the time and was under the care of Dr. Huff.

Chief among the specific instances of alleged insane conduct is one related by W. S. Steerman, which he fixes about the year 1898. He says Teter came to his place riding a horse, without either bridle or saddle, and, unable to dismount in the usual way, rolled off on a platform, where he lay during the whole afternoon, seemingly unconscious. He went to him and tried to talk to him, but was unrecognized. Another is given by Thomas Benton Teter, who says on one occasion his father came to his mill on horseback and rode through the river when it was so high as to make it dangerous, and that the act was so rash he knows his father would not have done it if his mind had been in its normal condition. He does not give the date of this incident, but says: "My father's mind was affected to such an extent as to incapacitate him for business as early as 1899." He further says that, when he went to see his father about the 1st of May, 1901, his condition was so bad that when he would go into the room and tell him who he was, he would call for the servant girl, Belle. The evidence for the defendant consists of the depositions of Dr. M. M. Huff, Robert Rinehart, Henry England, and Creed Day, all of whom expressed the opinion that Jesse Teter was mentally competent to transact

business and to execute deeds. Rinehart says he went to see him on business, namely, the pasturing of some land on Zebb's creek, three times in April, May, and June, 1901, and could notice no difference in his mental condition through those months. England's testimony relates to conversations had with him in 1899, which, he says, were intelligent, but that the condition of Teter's tongue interfered seriously with his talking. Day says he sheared his sheep for him in the years 1897 to 1901, inclusive, and saw him last in May, 1901. He thinks he was capable of transacting business. Dr. Huff's testimony relates principally to the execution of the deed and the reasons assigned by Jesse Teter for disposing of his real estate in the manner in which he did by the deed of May 1, 1901. He denies all fraud in connection therewith and the exertion of influence in said transactions, and says what he did in that connection was done at the request of Jesse Teter. He says Jesse Teter conveyed the land to his wife and daughter, Mertie, under the belief that it was his duty to do so, in view of their services to him and the faithful care and attention which they had bestowed upon him. In addition to the evidence of intention to make provision for the children of W. W. Teter, afforded by the will made in 1898, the testimony of witnesses clearly indicates the existence of a strong desire on the part of Jesse Teter to bestow upon them the Zebb's creek land hereinbefore mentioned. One witness says he talked to him about the land, soon after the first stroke of paralysis, and regretted that he had not previously conveyed it to W. W. Teter for them, because it was then free from liens, but had since become incumbered so that he could not make the disposition of it he had intended and desired to make. Other witnesses testify to this desire on his part, as well as to his expressions of appreciation of the kindness shown him by W. W. Teter. He contrasted his conduct with that of his other sons, saying he had done much more for him, and that he felt that he ought to do something for his children.

The first inquiry is whether the legal presumption of sanity and mental competency of the grantor has been overcome by the evidence adduced for that purpose. That old age and sickness are not of themselves sufficient has been repeatedly decided by this court. *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 738; *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211. Nor is mental distress sufficient. *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246. The witnesses seem to have been unanimous in the opinion that the once strong mental vigor of the grantor had been impaired and broken by his affliction. All seem to admit that from the date of the first attack his mind was never as strong as it had formerly been, and that his powers of mental concen-

tration and adherence had been weakened to an extent that was noticeable. How far this impression was due to the impediment of speech from which he suffered as a result of his physical ailment it would be difficult to tell; but it would be fair and reasonable to say that his peculiarity of expression, no doubt, in some instances, was attributed to mental weakness. Conceding that the evidence established feebleness and weakness of the intellect, these qualities are insufficient to prove incompetency to execute a deed. See the cases above cited. A just criticism upon the evidence offered to show incompetency is that it consists almost wholly of opinions of nonexpert witnesses. That this is an unsatisfactory kind of evidence has been repeatedly declared by this court, as well as by other courts. In *Jarrett v. Jarrett*, 11 W. Va. 584, it is said: "The mere opinions of witnesses are entitled to little or no regard unless they are supported by good reasons founded on facts which warrant them, and if the reasons and facts upon which they are founded are frivolous the opinions of such witnesses are worth but little or nothing." The expressions of opinion in this case are based upon mere observation of the physical condition of the grantor, made upon occasions of casual visits to him, and slight conversations. In a few instances witnesses have said he did not seem to recognize them or know anything. These may have been occasions on which he was suffering more than was usual, or when his mind was in its worst condition. That he was not always in such a condition of imbecility is evident from the fact that some of the witnesses who testify to his mental incompetency say they visited him on these occasions in reference to business matters and discussed them with him. It is true they say he was not capable of transacting business; but these conclusions were based, to some extent, no doubt, upon their peculiar views and conceptions as to what amounts to sufficient capacity for that purpose. Mental weakness and feebleness do not constitute incapacity in a legal sense. A vast amount of business is transacted by people who do it unskillfully and unsuccessfully; but they are not considered, for that reason, lacking in mental capacity, so as to render their acts void or voidable.

Several witnesses say the mental condition of Teter was very bad in the months of April and May, 1901. As the time given is very near the date of the two deeds, such a condition of mind is a matter for serious consideration in reviewing this decree. A grandson says he and his father were there to see him, in the latter part of April or first part of May, for two hours or longer, and that he recognized neither of them. If the testimony of this class were uniform and without variation, it would be impossible to say there was sufficient capacity to exe-

cute a deed. But it is not. Lloyd Wilson saw him about the same time, according to his testimony, and, though he says Teter was not, in his opinion, competent at that time, he appears not to have been by any means oblivious to his surroundings; for he says he conversed with him, and, in specifying the evidence of mental weakness which he noticed, he says his mind would wander and he seemed to be unable to confine himself to one subject of conversation. John Booth, another strong witness for the plaintiff, while expressing the opinion of mental incapacity, in April, 1901, admits that he conversed with Teter, and that, though confined to his bed most of the time, he was able to be up part of the time. With him, as with other witnesses, the noticeable defect was inability to pursue a subject of conversation. He says Teter would fail to recognize him at times; but, as to this, he is very general and indefinite, and stops short of showing, by a recital of facts and conduct, such incapacity. It amounts to no more than belief that he was occasionally unrecognized. W. A. Streets visited him after the execution of the deed of May 1, 1901, for a few minutes. He says he did not stop 20 minutes in all. Mrs. Huff took him to the bedside of her father and told him who he was. He opened his eyes, but showed no sign of recognition and no desire to converse. The conclusion he gives is based upon a very short and hasty observation. The physical weakness of Teter, together with difficulty in speech, may have accounted for his silence, and his silence may have constituted largely the ground of belief on the part of Streets that the sufferer did not recognize him. But he did respond to the question of his daughter and look up at Streets. Against this kind of testimony we have that of Kittle, who wrote the deed and read it to Teter, and who expresses the opinion that he was capable of understanding it. Rohrbough, who took the acknowledgment of that deed, said he asked him if he acknowledged it, and that he responded in the affirmative. His observation was but slight, and both sides refrained from taking his opinion as to the mental condition of Teter at that time.

But the fact of Teter's response to the inquiry contradicts the theory of absolute unconsciousness, advanced by some of the other witnesses. Gordon B. Teter took his acknowledgment twice in the month of June, 1901, and, while he expresses the opinion that Teter was not capable of executing a deed or transacting business, he shows, not only that he was conscious, but that he was able to grasp the matter in hand. He says he did seem, at first, not to understand, but that, upon repeating to him his statement as to what the paper was and asking him if he acknowledged it, he responded, "Yes, that is all right."

This evidence opposes the theory of total loss of mental power. The evidence adduced by the plaintiff is, as a whole, unsatisfactory in this: that, while it consists of opinions and belief on the part of the witnesses, it fails to set out or disclose what Jesse Teter did during the four or five years of his affliction. Who attended to his business during that period is not shown. What he did is a far better index to the condition of his mind than what people thought of him. *Ward v. Brown*, 53 W. Va. 227, 263, 44 S. E. 488; *Beverly v. Walden*, 20 Grat. (Va.) 147; *Mercer v. Kelso's Adm'r*, 4 Grat. (Va.) 106; *Temple v. Temple*, 1 Hen. & M. (Va.) 476. He had considerable property, and maintained a household which, no doubt, as in other cases, required considerable attention. There seems to be a tacit admission throughout all the testimony that during the greater part of this time Jesse Teter attended to his business as best he could. *Steerman* says he came down and looked after his (Zebb's) creek land numerous times within that period. Other witnesses testify to his having been in Belington and elsewhere. One witness says that in the month of November, 1900, he attended religious services at a church some distance from his home, dined after the services with a neighbor, and then rode back home and dismounted from his horse without assistance. *John Booth* strongly intimates in his testimony that for a long time he went about his business. He says: "I know from the time he was first paralyzed he was out going about different places, at least I have seen him away; but for a while, I could not tell just how long, he was confined to his room mostly. He could cane around some in the house." *W. A. Streets* says he saw him going along the public road alone in the year 1900. Our conclusion, from the whole evidence, is that it establishes nothing more than feebleness and weakness of mind, and fails to make out a case of absolute mental incapacity. According full credibility to all the witnesses, it appears that there were, notwithstanding the weakened condition of mind, lucid intervals during which there was sufficient capacity to appreciate and understand the subject-matter of a business transaction, and that the two deeds in question were executed at such times.

This, however, does not dispose of the case. It remains to consider the evidence of undue influence. Upon this inquiry, the extent of mental weakness must be kept in view as a material circumstance. Naturally it would require more evidence to overthrow a deed executed by one whose mental faculties were only slightly impaired than that of a person laboring under serious impairment of mind. Under the peculiar circumstances of this case, however, this distinction is probably not very important, for the evidence of undue influence is not direct and positive. It consists almost wholly of presumptions

arising from relationship and conduct, bearing remotely upon the transactions which this bill seeks to overthrow. That there was persuasion on the part of the beneficiaries of the deed is a matter of inference only. No witness testifies to any specific act of that kind. The circumstances principally relied upon are that the grantees in the first deed resided with the grantor at his home and were in constant touch and communication with him, that the deeds were prepared by the scriveners at the request of Dr. Huff and the grantees, that the disposition made of the property is different from that which the grantor previously intended to make, and that the whole estate is bestowed upon two members of the family to the exclusion of all the others. To these circumstances are added the facts that Dr. Huff's presence was considered necessary on the occasions of the preparation and acknowledgment of the deeds, that no witness testifies to the time and manner of the signing of the deed except Dr. Huff, that the deed was concealed until after the death of the grantor, and that Huff was the principal debtor in some of the judgments which constituted liens on the land. The relationship of the parties, the grant of the whole estate to certain members of the family in exclusion of others, and the circumstance of solicitation on the part of the grantees, if there was any, do not, either singly or collectively, raise any legal presumption of undue influence. *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; 29 Am. & Eng. Ency. Law, pp. 132, 133. At most, they are mere circumstances to be weighed with other evidence in determining the issue. "Moderate solicitation to procure a deed, even when accompanied with tears, does not constitute undue influence." *Doran v. McConlogue*, 150 Pa. 93, 24 Atl. 357. In that case the grantor was afflicted with paralysis, resulting in an impediment of speech, as in this case. A medical witness testified that the physical condition of the grantor was one of great feebleness, and that at times he was not able to talk intelligently. There, as in this case, there was a combination of physical and mental feebleness, difficulty of speech, occasional mental wandering, and positive proof of unequivocal and indisputable solicitation on the part of the grantee, and yet the court upheld the deed, saying the evidence wholly failed to show sufficient ground for overthrowing it. "Though the mere fact that the parent is old and feeble and dependent upon the child is insufficient to cause a court to presume that transactions favorable to the child resulted from undue influence, it is clear that it may be important in connection with other circumstances on the question of undue influence, as where the parent is illiterate, or conveys everything to one child to the exclusion of other children." 29 Am. & Eng. Ency. Law, 133. But the two facts of dependence and exclusion combined raise no legal pre-

sumption. They constitute mere evidence. In the case of *Bogges v. Bogges*, 127 Mo. 305, 29 S. W. 1018, a deed was set aside on the ground of mental incompetency, and the evidence tended to establish a condition of things worse than is disclosed by the evidence in this case. There was some conflict in the testimony, perhaps as great as there is here. But the appellate court, in reviewing the action of the trial court, did not regard it as a clear case of either want of capacity or undue influence. In concluding their opinion the court said: "Under these circumstances this court must and should defer largely to the trial court. Cases of this character, cases in which the weight to be accorded to the different witnesses must largely determine the issue, evoked from this court the rule that it would defer in such matters to the trial court. It is peculiarly appropriate that we should do so, unless the record presents some very convincing reason for varying from this usual course."

Nor does the difference between the disposition of the property made by the deed, and that which the grantor had previously intended to make, as shown by the will executed in 1897, combined with the evidence of previous declarations of intention, raise a presumption in law of undue influence. Page on Wills, § 422. The revocation and alteration of wills by testators is of frequent and common occurrence. That a disposition previously intended is wholly changed and altered amounts to a circumstance, a fact, having direct and important bearing on the question of undue influence, where there is other evidence having a like tendency, is plain; but if there is a reason for it, or if there are facts and circumstances which the court can see may have been deemed by the grantor or testator a sufficient ground for the change, the force and effect of the circumstances are, in reason, seriously broken and impaired, if not wholly overthrown. It appears from the testimony of a witness that, before the will was made, Jesse Teter expressed doubt and fear as to whether it was in his power to do anything for the children of his unfortunate son, because the property had become incumbered by liens. He regretted that he had not conveyed it to them before this occurred. He was conscious of his financial, as well as his physical, condition at the time these deeds were made. At the time of the execution of the deed, he expressed to Kittle a desire to provide for the payment of his debts, and that seemed to be the one subject to which his mind went more strongly and directly than any other. It may be that his property was amply sufficient to pay all of his debts and still leave something for all of his children, and that there was no necessity for putting his property into the hands of those members of the family whom he deemed competent to handle

it and satisfy the debts and save something out of the estate; but this argues lack of judgment, discretion, and business capacity in the ordinary sense of the terms, rather than lack of competency to execute a deed, or that his act resulted from undue influence. Some four years elapsed between the date of the will and the making of the deed, during all of which Jesse Teter was oppressed by the knowledge of his indebtedness and his inability to relieve himself. A suit was pending then for the enforcement of judgment liens against his property. He knew the lack of business capacity on the part of his son, W. W. Teter. That had been demonstrated. For some satisfactory reason he never had intended to leave anything to Thomas Benton Teter. The five acres of land mentioned in the will was devised to him as trustee for the benefit of his children. There is nothing in the evidence which shows that he had any special inclination to favor the other son, Floyd Teter. As he was not, so far as the evidence shows, in these years of disease and distress, called in as a business adviser, it may be assumed that there was a lack of confidence in his business capacity. In view of this condition of things, and of the hope which Jesse Teter may have entertained of recovery, to a great extent, of his former mental and physical vigor, at the time he made the will in 1897, it is not unreasonable to attribute the alteration of his intention to them rather than to the exercise of any influence upon him by the grantees. An indebtedness, for the payment of which there is no money at hand, and for the collection of which legal proceedings are pending, is a circumstance which weighs heavily upon persons who are in the full possession of the vigor of manhood, both physical and mental, and often impels them to do things which, to others, may seem unnecessary, wasteful, and improvident. Why should it not powerfully operate upon the mind of one who is completely broken in health, utterly hopeless of recovery, and fully cognizant of the near approach of death? Its potency, as well as the recognition thereof by courts, is illustrated in *Argo v. Coffin*, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86. If it were a case in which reason and proper motive for the change were wanting, such an alteration as is shown here would be entitled to great weight.

That the scriveners and officers came at the request of Dr. Huff and Miss Mertie Teter is a circumstance entitled to but slight weight. It is not inconsistent with entire propriety on their part. Dr. Huff says everything was done at the request of Jesse Teter, and his statement may be absolutely true. There is no evidence of any protest or hesitancy on the part of the grantor. Not a witness testifies that he was urged or importuned to acknowledge either of the deeds. On the contrary, so far as there is any di-

rect testimony, everything was perfectly voluntary and free. Nor is the fact that Dr. Huff was present, on all these occasions, anything more than a mere circumstance. It is not inconsistent with proper motives and proper conduct; nor is the fact that the deed was withheld from record and that Mr. Kittle was requested not to mention it to other members of the family. The persons who made this request may have had full and perfect belief in the competency of the grantor, and no desire or purpose in the concealment of the deed other than that of avoiding annoyance to the grantor, in his enfeebled condition, as well as unseemly wrangling and controversy among the members of his family at his deathbed. We do not think the circumstance of liens on the property for debts of Dr. Huff, which were discharged out of the proceeds of the coal, taken with all the others, sufficient to overthrow the deed. All this evidence is indirect and remote in its bearing upon the issue raised. As to mental weakness, the evidence is lighter in weight than in the case of *Buckey v. Buckey*, and less satisfactory, in that it is lacking in specification of the facts on which the witnesses base their opinions, and, as to undue influence, it is entirely presumptive. It is a case of presumption of fact against presumption of fact, while the witnesses who were present at the execution and acknowledgment of the deeds detail facts and circumstances indicating the presence of sufficient mental capacity and absence of any hesitancy or reluctance on the part of the grantor and of coercion on the part of those by whom he was surrounded.

Unable to see that the circuit court erred in its finding, we affirm the decree, with costs to the appellees.

(59 W. Va. 649)

SCHWARZCHILD & SULZBERGER CO. v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia. April 17, 1906.)

1. ERROR, WRIT OF—RECORD—BILL OF EXCEPTIONS.

When, upon the hearing of a case in the appellate court, one of the parties tenders and asks to file in the case, as a part of the record thereof, a paper purporting to be the original bill of exceptions taken in the case on the trial, and it is admitted in open court by the opposing party that it is the paper it purports to be, the court will consider it as a part of the record, in the same manner as if brought up on certiorari.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2821.]

2. SAME—DISMISSAL.

Upon a motion in the appellate court to dismiss a writ of error as improvidently awarded, upon the ground that "there is, and was, no legal bill of exceptions signed and sealed by the trial judge in said cause," the writ of error will not be dismissed for such reason, where the bill of exceptions as it appears in the record as certified is sufficient on its face.

3. EXCEPTIONS, BILL OF—INCORPORATING EVIDENCE—SKELETON BILL.

A case in which the bill of exceptions, as signed by the judge, did not make the evidence taken at the trial a part of the record.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 30.]

(Syllabus by the Court.)

Error from Circuit Court, Greenbrier County.

Action by the Schwarzchild & Sulzberger Company against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, defendant brings error. Affirmed.

Simms & Enslow, for plaintiff in error. Henry Gilmer and T. N. Read, for defendant in error.

McWHORTER, P. Schwarzchild & Sulzberger Company, a corporation, brought its action in the circuit court of Greenbrier county in trespass on the case against the Chesapeake & Ohio Railway Company, for damages sustained by the plaintiff because of the failure of the defendant to promptly furnish cars and transport certain cattle shipped by plaintiff from Ft. Springs, W. Va., to Jersey City, N. J., in September and October, 1903. The defendant appeared and demurred to the declaration and each count, which demurrer was overruled. Defendant then entered a plea of not guilty. The issue was tried before a jury, which returned a verdict in favor of the plaintiff, and assessed its damages at \$1,840. The defendant moved to set aside the verdict of the jury and grant a new trial, because the verdict was contrary to the law and the evidence in the case, which motion was overruled, to which ruling of the court defendant excepted. The court rendered judgment for said damages so assessed and the costs of the suit. The defendant tendered its bill of exceptions which was signed, sealed, and made a part of the record. The defendant procured from this court a writ of error and supersedeas to said judgment. The plaintiff gave notice to the defendant that it would move this court to dismiss the writ of error and supersedeas as improvidently awarded "because there is, and was, no legal bill of exceptions signed and sealed by the trial judge in said cause." When the case was called for hearing the defendant in error moved to dismiss the writ of error upon the notice given, and the plaintiff in error moved to quash the notice and writ and moved to dismiss said motion. The defendant in error then tendered and asked to file as part of the record in the case the original bill of exceptions. The plaintiff in error admitted in open court that the paper presented was the original bill of exceptions taken by it in the court below, but objected to the filing of it, when the case was fully heard upon said motion and upon the transcript of the record of the judgment and submitted. The record does not disclose any reason given in support

of the demurrer to the declaration, neither is it contended for in the brief of counsel for the plaintiff in error, and an examination of the declaration does not disclose any serious defects in it. The demurrer was properly overruled.

The assignments of error as set out in the petition for writ of error relate to the giving of instructions for plaintiff and complained of, which instructions were based upon the evidence given in the case; and another assignment is where it is contended that the court erred in refusing to set aside the verdict and grant the defendant a new trial because the evidence clearly showed that the verdict was wrong. The bill of exceptions, as it appears in the record, is sufficient to bring up all the questions upon the exceptions made by the defendant below, and therefore the appeal cannot be dismissed as improvidently awarded. The original bill of exceptions, as it was signed by the judge of the court below, and which was admitted in open court to be the original bill, is as follows. "Schwarzchild & Sulzberger Co. v. The Chesapeake & Ohio Railway Company, a Corporation. T. O. C. Be it remembered that on the trial of this case, after F. M. Arbuckle had been duly sworn to report the testimony in shorthand to be taken herein, the plaintiff, to maintain the issue on its part joined, introduced before the jury the following evidence: [Here insert stenographer's report]—and rested. And the defendant, to maintain the issue on its part joined, introduced before the jury the following evidence: [Here insert stenographer's report]—and rested. And thereupon the plaintiff in rebuttal introduced the following evidence: [Here insert stenographer's report]—and rested. And the above was all the evidence introduced before the jury on behalf of the plaintiff and of the defendant. And thereupon the plaintiff asked the court to give to the jury instructions marked Nos. 1, 2, 3, 4, and 5, to the giving of which and each of them the defendant objected, which objection the court overruled and gave to the jury instructions marked plaintiff's instructions Nos. 1, 2, 3, 4, and 5 asked for by the plaintiff, to which ruling of the court in giving said instructions and each of them the defendant excepted. And thereupon the defendant asked the court to give to the jury its instructions marked defendant's instructions Nos. 1, 2, and 3, which the court gave and after argument of counsel the jury retired to its room to consider its verdict and after awhile came into court with a verdict in the words and figures following, to wit: [Here insert verdict of the jury.] The defendant moved the court to set the said verdict aside, because the said verdict is contrary to law and the evidence. The court overruled the defendant's motion to set the verdict of the jury aside, to which

ruling of the court the defendant again excepted and asked the court that this, its bill of exceptions to the various rulings of the court and each one thereof, as set out above, be saved to it and this, its bill of exceptions, be signed, sealed and made a part of the record, which is accordingly done. J. M. McWhorter. [Seal.]" There is nothing shown from this skeleton bill of exceptions that at the time it was signed by the judge he had before him the evidence as taken by the stenographer. It also appears that the evidence taken in the case was not incorporated into the body of the bill nor annexed to it or so marked by letter, number, or other means of identification, or so described in the bill as to leave no doubt when found in the record that it was the evidence taken in the case, and it does not appear from the record as it is printed that the evidence was certified by the stenographer. It has been held in several cases by this court in the last few months that such skeleton bill of exceptions as that herein set forth is insufficient to bring up the evidence. While the said bill of exceptions was sufficient as far as the instructions were concerned having designated them in the bill as marked by numbers, but as it is impossible to pass upon the correctness of the instructions asked for without having the evidence in review, and the evidence not being before the court, the appellate court will not presume that the circuit court erred in giving such instructions. In *Tracey v. Carver*, 50 S. E. 825, 57 W. Va. — (Syl., point 3), it is held: "Evidence taken down and transcribed by a shorthand reporter is not a part of the record, and can only be made so by a proper bill of exceptions." And, in *Dudley v. Barrett* (recently decided by this court, but not yet officially reported) 52 S. E. 100 (Syl., point 3), it is held: "Where a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, or so described in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions." And also, in a recent case here decided of *Coal & Coke Railway Company v. Joyce*, 52 S. E. 498, the syllabus is entirely applicable to this case, where it is said: "The skeleton bill of exceptions, relied on in this case for the purpose of making the evidence a part of it, does not do so, and the evidence is not a part of the record, under the authority of the cases of *Parr v. Currence*, 58 W. Va. —, 52 S. E. 496; *Dudley v. Barrett et al.*, 58 W. Va. —, 52 S. E. 100; *Tracey's Adm'r v. Coal Co.* (W. Va.) 50 S. E. 825; and *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909."

For the reasons herein given the judgment complained of is affirmed.

(59 W. Va. 408)

GENTRY et al. v. POTEET et al.(Supreme Court of Appeals of West Virginia.
April 10, 1906.)**1. ESTOPPEL—WHAT CONSTITUTES — AGREED STATEMENT OF FACTS.**

Where an action of ejectment is brought and submitted upon an agreed statement of facts, and before the decision thereof the defendants move to withdraw such agreed statement of facts, and file a bill in equity setting up a matter of equity not cognizable in such action, and praying for an injunction restraining the prosecution of the action of ejectment, such agreed statement of facts will not estop them from setting up such equity and enjoining the prosecution of such action.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Estoppel, § 8.]

2. TRUSTS—EVIDENCE.

Where land is purchased and paid for by one who takes a title bond therefor and who dies before obtaining a deed, leaving surviving him a widow and children, and the widow, on account of such purchase, procures the vendor of her husband to convey the land to her, she will be treated in equity as a trustee, holding the legal title for the heirs, the equitable title thereto having, immediately upon the death of the father, vested in them, subject to the widow's dower.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 108.]

3. SAME—EXPRESS TRUST—ESTABLISHMENT.

A verbal statement of one holding the equitable title to land to the effect that he wants the same conveyed to his wife will not operate to pass equitable title to her, and where, after the death of the husband, his vendor, on account of such statement, conveys the land to the widow, such deed does not thereby vest the equitable title to said land in the widow, but it will operate only to convey the legal title, to be held by her in trust for the heirs, which a court of equity will enforce, upon proper bill filed for that purpose.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 94.]

4. EQUITY—LACHES.

The plaintiffs and those under whom they claim are not guilty of laches in asserting their rights.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 241.]

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County.

Action by T. J. and C. D. Gentry against W. C. Poteet and Isabella Blake. Judgment for complainants, and defendant Poteet appeals. Affirmed.

R. T. Hubbard, Jr., and Dillon & Nuckolls, for appellants. Payne & Hamilton, for appellees.

SANDERS, J. Dickinson Blake, in 1872, purchased of A. B. Duncan two adjacent tracts of land in Fayette county, containing 60 and 51 acres, respectively, taking a title bond therefor. He paid the purchase money, entered into possession of the land, and resided thereon until his death, in 1877, but never obtained a deed. Blake left surviving him his widow, Isabella Blake, and four infant children, and another child was born about six months after his death. In De-

cember, 1879, Duncan conveyed the land so purchased by Blake from him to "Isabella Blake, widow of Dickinson Blake, and the heirs of her body by said Dickinson Blake, deceased." By conveyances from two of the heirs of Dickinson Blake, a two-fifths undivided interest in this land passed to and was vested in C. T. and G. W. Jones, and by conveyance Ella D. Blake, one of the heirs, became the owner of an undivided one-fifth interest in the surface. She retained the interest which descended to her, as did also Robert Blake, another of the heirs, and on the 18th day of October, 1890, C. T. and G. W. Jones and Robert and Ella D. Blake entered into an agreement of partition, by which there was allotted to the two latter parties 41 acres of the surface of said land. On the 7th day of January, 1902, Robert and Ella D. Blake conveyed to T. J. and C. D. Gentry five acres of the surface of the land so acquired by them. This land was, in the year 1900, sold by the Blakes to Jerry Fitzpatrick, who made him a deed therefor, which, however, he failed to record. The Gentrys purchased from Fitzpatrick and at the time of the purchase the deed to him was destroyed, and a deed taken as before stated. On the 27th day of February, 1904, the Gentrys procured a deed to the property from Fitzpatrick, and placed same upon record, thereby becoming vested with the title of the heirs of Dickinson Blake to the property. On July 20, 1903, Isabella Blake conveyed to W. C. Poteet five acres of surface land. This is the same land which T. J. and C. D. Gentry acquired by their purchase, and subsequent deed, from Fitzpatrick. In this condition of affairs, Poteet claiming under his deed from Isabella Blake, and the Gentrys claiming under the heirs of Dickinson Blake, W. C. Poteet brought, in August, 1903, in the circuit court of Fayette county, an action of ejectment against the appellees, T. J. and C. D. Gentry, to recover the tract of five acres, and on the 23d day of February, 1904, the first day of the February term of the circuit court, the parties to the action of ejectment, by their attorneys, entered into an agreement by which it was provided that the action should be submitted for determination to the court, in lieu of a jury. The agreement stipulated that the defendants in the action claimed title to only five-sixths of the land in controversy, and disclaimed as to one-sixth; that the title to said land had been regularly derived from the commonwealth, and that both parties claimed title under the conveyance from A. B. Duncan to Isabella Blake; that the only question to be determined was the legal construction of said deed—if the court should hold that it vested the fee-simple title to the whole of the land in Isabella Blake, the judgment should be for the plaintiff, and if it should be held that it conveyed a joint estate to Isabella Blake and her children, then judgment should be for the defendants, except as to the one-sixth

interest which they disclaimed. Upon the agreement the case was argued and submitted for decision on February 24th. On the morning of February 26th, the defendants asked leave of the court to withdraw the agreement, on the ground of after-discovered equities, and in support of their motion filed the affidavits of A. B. Duncan, C. D. Gentry, and W. D. Payne. The record does not show that this motion was acted upon. On the 4th day of March, following, the defendants applied for and obtained an order restraining the plaintiff from using as evidence in the action of ejectment the deed made to him by Isabella Blake, and from further prosecuting the action until the further order of the court. In the bill filed, upon which this order was issued, it is alleged that the conveyance to Isabella Blake by Duncan vested in her only the legal title to the estate, and that the conveyance from her to Poteet was not upon valuable consideration, but was made for the purpose of enabling him to extort money from the plaintiffs in the bill. Poteet and Isabella Blake answered, controverting the construction placed upon the deed from Duncan to Mrs. Blake, and alleging that the transaction between them was bona fide. On the final hearing, the court enjoined W. C. Poteet from using in the action of ejectment the deed from Isabella Blake to him, directed a conveyance by Poteet to the Gentrys of the five acres of land, and, in default of his making the conveyance, appointed a commissioner to do so, but reserved the question as to whether or not Mrs. Blake had waived her right of dower for further determination. From this decree, W. C. Poteet has appealed.

The appellant contends that the demurrer to the bill should have been sustained. The first criticism of the bill is that it alleges that the plaintiffs are both the legal and equitable owners of the land, and, if this be so, they had an adequate and complete remedy at law, by defending the action of ejectment. While it is true the plaintiffs in their bill allege they are informed and believe that they own both the legal and equitable title to the land, yet, when the bill is construed in all its parts, it clearly appears that the defendants have only the equitable title, and that the legal title is held by Isabella Blake in trust for them. And it is urged that if the allegation of the bill is not true, and the plaintiffs do not have the legal title, they are not in a position to maintain a suit to remove a cloud, but, in order to maintain such suit, they should have the legal title and actual possession. This is unquestionably true, and has been decided by this court repeatedly. But counsel for the appellant seem to entirely misconceive the purpose and scope of the bill. Its object is not to remove a cloud from the title, but is to enforce a trust. The gravamen of the bill is that Dickinson Blake purchased and paid for the land, in his lifetime, taking a title bond therefor, but

died without having obtained a deed, and that after his death his vendor, Duncan, on account of such purchase, conveyed the land to Isabella Blake, his widow, and that, this being so, she holds the naked legal title as trustee for the heirs of Dickinson Blake, which a court of equity will declare and enforce in their favor. This matter could only be set up in a court of equity, and the demurrer to the bill was properly overruled.

Complaint is made that the court erred in not dismissing the bill on the ground that the plaintiffs are estopped from setting up any matter inconsistent with their solemn agreement in the ejectment suit. It is unnecessary to determine whether this agreement was withdrawn, or whether the defendants, in that action, had the right to do so. It was made in the action of ejectment, for the trial and disposition of that case. The matter of equity set up in the bill was not cognizable in such action, and the plaintiffs could not have set such matters up as a defense. The agreement is not materially inconsistent with the matters set up in the bill. Its material parts are that the title under which both plaintiff and defendants claim was regularly derived from the commonwealth of Virginia; that both claim under the deed from Duncan to Isabella Blake, and that the only question in dispute and to be adjudicated was the legal construction to be placed upon the deed from Duncan to Isabella Blake, and that, if the court in construing it should hold that the deed passed a fee simple title to the widow, then judgment should be given for the plaintiff, but, on the other hand, if it should be so construed as to pass a joint estate to Isabella Blake and her children, then judgment should be given for the defendants. By this agreement the controversy was so reduced as to invoke the judgment of the court upon the construction of the deed only. In other words, the true scope of this agreement was to place the title papers before the court for construction and decision as to who had the legal title to the land. This did not and could not in any sense affect the equitable title of the defendants. The court was only called upon to pass on the question as to who had the legal title to the property. Not being able to set up such equitable defense in the action of ejectment, the fact that the appellees entered into an agreement, whereby the judgment of the court was invoked upon the construction of certain title papers, cannot destroy their right to resort to a court of equity to enforce the trust, and require the conveyance of the legal title to them. None of the material facts of the agreement are controverted by the bill, but by it are practically admitted. The bill, however, goes further and shows that, although the deed, upon its face, appears to pass a fee simple estate to Isabella Blake.

yet, as Dickinson Blake, in his lifetime, acquired the equitable title to the land, and did not obtain a deed, the equitable title, subject to the widow's dower, immediately upon his death descended to and vested in his children, A. B. Duncan, his vendor, holding the legal title in trust for them, and he so holding the legal title, and having conveyed the same to Isabella Blake, she took nothing by the conveyance except the naked legal title as trustee for the heirs, which in equity she will be compelled to convey to them.

The appellant claims that, under the deed from him to Isabella Blake, both the legal and equitable title passed to and vested in him. We deem it unnecessary to review the authorities to show that the deed from Duncan to Isabella Blake had the effect of passing to her a fee simple estate in the land. The words in the deed create an estate in fee-tail special, under the statute *de donis conditionalibus* (1 Tucker's Comm. pt. 2, p. 45; Bl. Comm. vol. 1, bk. 2, pp. 111-114) which by our statute is converted into an estate in fee simple. Section 9, c. 71, Code 1899: "Every estate in lands so limited that, as the law was on the seventh day of October, in the year, one thousand, seven hundred and seventy-six, in the state of Virginia, such estate would have been an estate tail, shall be deemed an estate in fee simple; and every limitation upon such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple created by technical language." While this deed passed the legal title to the land to Isabella Blake, and upon its face appears to have passed to her a fee simple estate, yet, if her vendor only held the legal title in trust for the heirs of Dickinson Blake, it could only have the legal effect of passing to her such title as he held. The facts conclusively show that Dickinson Blake, in his lifetime, purchased and paid for the land, taking a title bond therefor, and that after his death, on account of such purchase, Duncan conveyed the same to the widow, Isabella Blake. If this were all, there could be no question but what the equitable title, immediately upon the death of the father, passed to and vested in the children, and, the widow having taken the deed to the land, a court of equity will declare her a trustee for the children, holding the legal title, and will compel her to convey the same to them, or their vendees. But it is asserted that Dickinson Blake, before his death, authorized and directed a conveyance of this land to his wife, and that thereby the equitable title immediately became vested in her. There is no claim, however, that Blake personally directed his vendor, Duncan, to convey the land to the wife, and what he did say upon this subject is difficult indeed to determine. The evidence is vague, indefinite, and uncertain.

Mrs. Blake, in her testimony, says that her husband, in his last sickness, had a conversation with her, his father, Adam Blake, and his brother James Blake, in which he told them that he wanted the property deeded to her. J. R. Huddleston testifies that Blake, during his last sickness, told him and his father, Adam Blake, that he wanted his father to go to Duncan and get a deed to his wife as long as she remained his widow. L. J. Smith testifies that Blake, before his death, said that he wanted one Mahoney to take charge of and manage his property—that his wife had no business ability. Viewing it, however, in the strongest light for the defendant, and assuming that Dickinson Blake made the statement which he is claimed by his widow to have made, it would not be such a promise or contract as could be enforced, even in his lifetime. To do so would be in violation of the statute of frauds, and, it not being capable of enforcement, it is difficult to see how the equitable title, by reason of such statements, could vest in the widow. The most that can be claimed is that it was a gift to the wife, which remained wholly unexecuted, and which was revocable at the pleasure of the donor, and it not having been executed by Blake in his lifetime, and not being such promise as could be enforced by the widow, the equitable title, immediately upon his death, vested in his heirs. The case of *Coleman v. Cocke*, 6 Rand. 618, 18 Am. Dec. 757, is cited as authority to sustain the position that, upon the request of the husband to convey the land to the wife, the equitable title thereby immediately was transferred to and vested in her. There, the father, who had purchased the land and held the equitable title, directed the vendor to convey the same to his son, which was done in the lifetime of the father, and the son conveyed a part of the same to a brother, and the brother conveyed a part of the land which was conveyed to him to another, for a valuable consideration, and the question arose between a creditor of the father, and the purchaser for a valuable consideration, as to who had the prior equity, and the court held that the equity of the purchaser was paramount, and, in dealing with the question, said: "The equitable title of the father was not transferred to the son by the execution of the deeds to him by the Cockes, but by the previous authority given by him to them to execute those deeds. And if such an authority had been given by the letter, and the deeds never made, a bona fide purchaser of the equitable interest from Wm. A. Bentley would have had a better right now to call upon the Cockes for their conveyance of the legal title than any creditor of Wm. Bentley getting a judgment against him after the transfer of his equitable right to his son. Such a transfer was valid with-

out deed, and was not necessary to be recorded to make it available against his creditors." In what way this transfer by the father to the son was made does not clearly appear, but we observe from the quotation above that it is said: "If such authority had been given by the letter, and the deeds never made, a bona fide purchaser of the equitable interest from Wm. A. Bentley would have had a better right," etc. And then, again, it is said that such a transfer was valid without deed, and was not necessary to be recorded, to make it available against creditors. Therefore, from these statements of the opinion, it would seem that there had been a written request by the father to his vendor to convey to the son.

Again, in that case, the gift by the father to the son had been fully consummated by the vendor carrying into effect the direction given by the father. This being so, it had the effect of passing both the legal and equitable title to the son, whether the equitable title had been previously transferred to the son by the father or not. Where the gift or direction is not executed, then it is not susceptible of enforcement, unless it be such as to transfer the equitable title, and the test as to whether or not the equitable title was transferred by the promise here is whether or not Isabella Blake would have had the right to have enforced such promise. If she could not have specifically enforced it, then it could not have the effect of transferring to her the equitable title. Did she have such right? This was a verbal promise, without valuable consideration, and to have enforced it would have been in direct violation of the statute of frauds, and would also mean nothing more nor less than that one can, by verbal direction, control the disposition of his property after death. If the gift or promise had been carried into effect by Duncan, in the lifetime of the husband, conveying the land to the wife, then the conveyance would have had the effect of passing both the legal and equitable title to her. While the promise, it is true, was verbal, and not such as could be enforced by the wife, yet, if the land had been conveyed by direction of the husband, he would be estopped to deny that he had given such direction. It is true that Duncan, after the death of Blake, upon her request conveyed the land to the widow, but the conveyance not having been made in the lifetime of Dickinson Blake, and the promise or gift not being such as could be enforced, and not having passed to Isabella Blake the equitable title to the land, immediately upon the death of Dickinson Blake the legal title passed to and vested in his heirs, and, this being so, the conveyance by Duncan to Isabella Blake only operated to convey to her the legal title, which was held by him as

trustee, and, being so held by him, would upon a conveyance to her be likewise held in trust by her for the heirs.

It is charged that the plaintiffs, and those under whom they claim, are guilty of laches, and for this reason they should be denied relief. Upon what claim this assignment is predicated we do not know. No reasons are given by counsel to support it, and there is nothing appearing in the record to vindicate this position. As we have observed, the widow held only the legal title to the land, in trust for the heirs. She, together with her children, lived upon the land until it was sold to Fitzpatrick, and ever since then it has been in possession of Fitzpatrick and the plaintiffs, claiming under him. It is difficult to arrive at any other conclusion from the testimony of Isabella Blake alone but that she has all along, since her husband's death, recognized the equitable title as being in the heirs. At the time of the father's death, the oldest child was only eight years old; the youngest being born about six months thereafter. And at the time they became of age, or shortly thereafter, they began to dispose of their respective interests in this land, which apparently met with the approval of their mother. Nothing to the contrary was asserted, and just in what way the delay in bringing this suit to extract the legal title, and vest it in the heirs, could affect her, is difficult to determine. Then, again, W. C. Poteet, claiming under her, is in no position to complain. He is not a purchaser without notice and for a valuable consideration. And not only this, but he married one of the heirs of Dickinson Blake about 20 years ago, lived with the family a great deal of the time, and from his testimony we must conclude that he was perfectly familiar with the title, and with all the facts and circumstances surrounding it. He knew the heirs and those holding under them were claiming the land, at the time he took his deed. In fact, he joined with his wife, one of the heirs, in conveying all her right, title, and interest in this land, thereby recognizing her interest therein. Also, at the time he took his conveyance, this land had been conveyed by the heirs, and the deeds of conveyance had been put upon record.

Complaint is made that the court, upon the final hearing, read the ex parte affidavits of A. B. Duncan, C. D. Gentry, and W. D. Payne. Whether or not this was error it is entirely unnecessary to determine, because, upon the whole case, it is perfectly clear that the decree was proper. Exclude the affidavits, and the result would have been the same. Therefore, if it was error to read them, it was certainly not prejudicial to the defendants.

Upon the whole case, the decree is right, and is affirmed.

(59 W. Va. 296)

TAHANNEY v. WASHINGTON NAT. BLDG. & LOAN ASS'N et al.

(Supreme Court of Appeals of West Virginia. March 13, 1906.)

1. BUILDING AND LOAN ASSOCIATIONS—CONTRACT OF LOAN—USURY.

A contract of loan with a building association, without naming a lump sum of premiums, provides that monthly premiums of fixed sums shall be paid for a fixed number of months. This fixes the amount and duration of payment of premiums with certainty, and the contract is not open to the charge of usury.

2. SAME—USURY.

A contract of loan with a building association requires continuance of payment of lawful interest on the sum advanced after cessation of dues and premiums, until the stock matures, unless it sooner matures. This does not make the contract usurious.

3. SAME—COMPETITIVE BID.

When an application for a loan on stock by a building association makes a bid of premium and it is accepted, and the deed of trust securing it states that a certain premium was bid for the advance, the loan is not illegal as not being a competitive bid.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County.

Bill by Mary A. Tahaney against the Washington National Building & Loan Association and others. Decree for complainant, and defendant loan association appeals. Reversed.

Forrest W. Brown, for appellant. J. P. Scott, for appellee.

BRANNON, J. Mary A. Tahaney subscribed for five shares of installment stock in the Washington National Building & Loan Association, a Virginia corporation, requiring payment of 60 cents per month per share for 96 months, unless the stock matured earlier. After so subscribing for stock, she obtained from the corporation an advance of \$500 on her stock, she giving a bond with condition to pay dues, interest, and premiums, secured by a deed of trust on real estate in Tucker county. This trust required payment of 60 cents per share of stock monthly, and interest on the \$500 at 60 cents per share of stock monthly, and also a monthly premium of 50 cents per share for the first year, and for each succeeding year a monthly premium of 10 per cent. thereof less than the preceding year, that being the premium bid for the advancement, and such fines, charges, and assessments as might be imposed under the charter, by-laws, and regulations until such time as the shares should be paid up, "with the proviso that no payment on account of stock or premium shall be exacted for a longer period than 96 months from the date of said stock, but should said shares of stock fail to mature on or before the expiration of said period of 96 months then 6 per cent. per annum on the original amount advanced thereon shall continue and be paid in monthly installments until said stock shall mature, when all payments shall cease, and the deed of trust securing said bond be canceled." Thus pay-

ment of dues and premiums stopped after eight years. Mrs. Tahaney paid for some years money to the association according to contract, and then ceased, and filed a bill in equity claiming that she had paid \$489.61, with interest from 1st of February, 1896, the date of the advance of money on her stock, and owed only a balance of \$10.39; but that the association claimed an indebtedness against her of \$335. She asserts that the contract is usurious, and that it should be held as a straight loan of \$500, and that all her payments, including premiums, should be applied as partial payments, and not treated as premiums under the bond and trust. She prayed that an account be had of her debt by purging the contract of usury, and for a decree on that basis. A decree was pronounced in accordance with the claim of Mrs. Tahaney finding her balance \$35.43, whereas the commissioner's report, under the claim of the association, showed a balance of \$335.62. The association appealed.

It is conceded that this association had complied with the requirement of section 30, c. 54, of our Code of 1899, and was authorized to do business in this state, and was possessed of the same right to contract as a domestic building association. It may therefore contract for premiums without impeachment of usury, if such premiums be payable as dictated by law, as section 28, c. 54, Code 1899, exempts a building association from the imputation of usury. This contract is claimed to be usurious in that no lump sum is fixed. It is admitted that there may be by section 26 minimum premium payable either in advance or in periodical installments, but it is claimed that there must be a lump sum fixed. Why? Do not periodical monthly sums of fixed amount for a fixed number of months make up a lump sum? Such a process is the same as if a lump sum were fixed. It is mathematically certain. Our cases interpret section 26, c. 54, Code 1899, as demanding that the extent of payment of premiums be definite, and to answer that demand there must be a lump sum, but that it may be taken out of the advance in advance, or be distributed in stated periodical payments; but such lump sum need not in words be specified, and then distributed, because if the periodical payments be fixed in amount and number they make up a lump sum. The case of *Gray v. Baltimore, etc.*, 48 W. Va. 164, 37 S. E. 533, 54 L. R. A. 217, does not contravene this. It only means that the sum to be paid for premiums be definite—that is, capable of being known, not running indefinitely—and that, if it is indefinite, the contract is open to charge of usury. A simple calculation tells what the premiums in this instance come to. They can run only eight years, and are of fixed monthly amounts. They are entirely consistent with the *Graves Case*. The same may be said of *Floyd v. Loan Association*, 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 806, *McConnell v. Cox*, 50 W. Va. 469, 40

S. E. 349, and *Prince v. Building Association*, 55 W. Va. 19, 46 S. E. 708. They do say that there must be a "lump" sum, certain and definite, not percentage payable indefinitely at fixed periods; but they recognize right to periodical payments. The by-laws of this company provide for stated payments. It is a mere play on words to say that where the premiums are not to be paid in advance, but in periodical certain sums, the calculation must be made of what total or lump sum the payment aggregated and insert it in the papers. Would it make the party pay any more or any less? Does he not know just what he has to pay? The trouble with the contracts in the cases just named was that no lump sum was named, nor were there periodical payments fixed in amount and number. But all disputation as to this is foreclosed by the late case of *Thompson v. National Mutual Building Association*, 50 S. E. 756, 57 W. Va. 551. It says that where the contract calls for "monthly payments for a stated and definite number of years, or until the maturity of the shares, should they mature before the close of the years stated, the amount of the premium is sufficiently certain and definite," and the contract as written is valid. That case is consistent with former cases, and rules the case we have in hand. It would answer no purpose to go over the ground again in this case. And *Archer v. Baltimore, B. & L.*, 45 W. Va. 37, 30 S. E. 241, does not in words call for a lump sum, but allows periodical payments.

Counsel says that our statute contemplates that the by-laws fix a minimum premium, but in this case it is a maximum. The by-laws fix a premium of 50 cents. If Mrs. Tahaney bid with competitors, she could not get a less premium, but might pay more. How is she thus injured? Counsel cannot mean that a maximum and minimum must be put in the contract. That would make it uncertain. The statute does not mean this, but that the by-laws fix a minimum. The papers prove that Mrs. Tahaney got the loan by bidding; but say that the loan was awarded her as the value of her shares in default of bidders. We may presume so. She elected so to take. And she is not hurt as she got the minimum. The by-laws provide for such competitive bidding, and her application for the advance stated her bid, and the deed of trust says her bid was as above stated. But it is contended that the contract is tainted with usury because it provides that if the shares of stock should not mature in eight years, then 6 per cent. interest of the original amount of the loan should continue until the stock should mature. This is no usury. It is interest only on the actual money received by the borrower until the debt shall be discharged by the maturity of the stock. We must not fail to remember that interest is one thing, its purpose being to keep down lawful interest while the stock is maturing from dues, premiums and dividends. Premiums and dues are different things from interest, their of-

fice being to mature the stock, which when mature, pays the principal of the debt. *Endlich on Building Associations*, § 409, is cited to show that a loan can only be by competition for the loan; but our statute says it may be otherwise in default of bidders, and we have right to say this was the condition, though the papers say Mrs. Tahaney got the advancement by bid. It seems, too, from the books that the requirement of competitive bidding has the purpose of enabling the borrower to get as low a premium as he can. If the loan is governed by a fixed premium, he cannot get it lower. *Endlich on Building Associations*, § 410. But our statute expressly gives power to fix a minimum. And it forbids a loan by open bidding at less than the premium, since if no one bids it, the association may award the money, without bidding to a shareholder to the value of his stock at that premium. We do not see any force in this view of competitive bids. It would seem to be required, under our statute for the mutual benefit of members, for the association, not the borrower.

Brief of counsel enters into argument to show that this association by reason of want of mutuality and other features is not a building and loan association, meaning, as I understand, that it is not entitled to contract as such. It has West Virginia authority as such. It is a corporation under the law of Virginia, and accredited as such in this state. Can its powers be thus collaterally attacked, when neither state contests? And, again, after Mrs. Tahaney, by her deed, has contracted with it as such corporation, she cannot deny its corporate existence. *Singer Co. v. Bennett*, 28 W. Va. 16. An impression is abroad that a loan by a building association is nothing but a simple loan at 6 per cent. interest, with right to apply all money paid for interest, dues, and premiums as partial payments. Under that impression likely Mrs. Tahaney ceased payments, and disaster followed, whereas, if she had gone on, her debt would likely have been paid by her stock. If members do not pay according to contract the whole plan or nature and object of the contract must be defeated. These associations were authorized in order that poor persons by sobriety, energy, and frugality might get homes and be lords of their castles by small payments from time to time; but if members do not conform to the requirements the project fails them. Courts cannot overthrow valid contracts. The Legislature has made these contracts, conforming to legal regulation, valid, and whether the moneys paid exceed legal interest or not, and though they do, the Legislature, to attain the purpose of such institutions, has said that these contracts shall not be subject to the defense of usury.

We therefore reverse that part or provision of the decree of 10th of June, 1905, fixing the debt of the Washington National Building & Loan Association at \$35.43; and it is adjudged, ordered, and decreed that the debt

of said association, in the record specified, constituting the first lien in order upon lot No. 16, in said decree mentioned, is \$355.62, with interest from the 7th day of March, 1905, and that said decree be modified accordingly.

(80 W. Va. 37.)

KOBLEGARD et al. v. HALE et al.

(Supreme Court of Appeals of West Virginia. Jan. 23, 1906. Rehearing Denied June 2, 1906.)

ADJOINING LANDOWNERS — INJUNCTION — LIGHT AND AIR.

The owner of land cannot maintain a bill for an injunction against the owner of adjoining land, to restrain him from maintaining a fence of unusual height on his land, on the sole ground that such fence deprives a building on the land of the former of light and air coming laterally from such adjoining land.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adjoining Landowners, §§ 74-78.]

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County.

Bill by Jacob Koblegard and others against Susan Hale and others. Decree for plaintiffs, and defendants appeal. Reversed.

W. W. Brannon, for appellants. Robert L. Bland, for appellees.

COX, J. The appellees, trustees of the Methodist Episcopal Church of Weston, W. Va., filed their bill in the circuit court of Lewis County against appellants, Susan Hale and A. C. Hale, her husband, for an injunction to remove and prevent the maintenance of a plank fence 12 feet high along the line of the lot of said Susan Hale, which fronts on Third street, in the town of Weston, and adjoins the piece of land or lot, fronting on the same street, upon which the congregation of said Methodist Episcopal Church has in course of construction a beautiful and costly church edifice, to be used as a place of religious worship. The bill alleges, in substance: That the fence, erected and being erected, is a high, rough, and ugly plank fence; that immense unhewn posts have been planted in the ground; that the fence has been erected alongside of the large church windows, being 10 in number, reaching nearly, if not entirely, to the top of said windows; that after the work of building the church was commenced the defendant A. C. Hale became much incensed, and declared that the church would have the effect to cut off his light, and that the same was built in order to spite him, but that he would "get even" with the church by building a high fence in front of the windows on the east side of the church building; that he would "shut off their light," and would paint the proposed fence black on the side next to the church; that, pursuant to such threats, and from motives of pure malice and spite, and to annoy, harass, and damage the congregation of the church, the fence was commenced and erected; that the fence is unnecessary, and serves no good or proper purpose to the defendants; that the effect of the erection and mainte-

nance of the fence is to shut out the light and air from the said church building on the eastern side, where such light and air are absolutely necessary and essential to the peace, comfort, and health of the members of the congregation of the church and others who may attend there for the purpose of engaging in religious worship. The bill contains many other allegations, but we deem it unnecessary to repeat them here. The bill does not allege that the fence was built on the church lot, or that it was not wholly on the lot of appellant Susan Hale, and it does not allege that the side of the fence next to the church was painted black. The appellees do not allege that they, or those for whom they hold the church property, have any interest in the Hale lot, or in the light and air therefrom, other than such rights as they may be entitled to as adjoining landowners. Upon presentation of the bill, in vacation, to the judge of the circuit court, a preliminary injunction was awarded, preventing further work towards the completion of the fence. Afterwards appellants filed their demurrer to the bill, and also their answer, and moved to dissolve the injunction, and appellees moved for a mandatory injunction. The cause was heard in term on the 9th day of March, 1905, in the circuit court of said county, and a decree was entered, overruling the demurrer and adjudicating that the fence, so far as it operated as an obstruction of light and air in and about the building of appellees, constituted a nuisance, and awarding an injunction against the maintenance and to compel the removal of the fence. From this decree Susan Hale and A. C. Hale appeal.

The first question is as to the sufficiency of the bill upon demurrer, considering the allegations of the bill as true. By the bill the appellees must show their right to maintain the suit. What legal right of the appellees, or of those for whom they hold, has been invaded? What legal right has an owner of one lot or piece of land to the light and air unobstructed, coming laterally to his land or building from his neighbor's land, which the neighbor is bound to respect? The common law of England, touching ancient lights, is not and never has been in force in this state. Section 13, c. 79, Code 1899; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Cunningham v. Dorsey*, 3 W. Va. 293. The doctrine of ancient lights is not relied on to afford plaintiffs' relief. Outside of the doctrine of ancient lights, under the common law, it seems that the owner of land has no legal right, in the absence of an easement, to the light and air unobstructed from the adjoining land. At common law, one has the right to build a fence on his own land as high as he pleases, notwithstanding it obstructs his neighbor's light and air. Judge Holmes, then a member of the Supreme Court of Massachusetts, now a Justice of the Supreme Court of the United States, delivering the opinion of the Massachusetts court in the case of *Rideout v. Knox*, 148 Mass. 372, 19 N. E. 391, 2 L. R.

A. 81, 12 Am. St. Rep. 560, says: "At common law, a man has the right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only. Walker v. Cronin, 107 Mass. 555; Chatfield v. Wilson, 28 Vt. 49; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Frazier v. Brown, 12 Ohio St. 294; Martin, B., in Rawstron v. Taylor, 11 Exch. 369; Benjamin v. Wheeler, 8 Gray, 409." "As has been seen, a property owner has no right to the uninterrupted access of light and air to his premises from and over the adjoining land of another, unless such right has been acquired by grant or prescription. It follows that an obstruction of these elements by the adjoining owner, by building on his own land, is not a legal injury, and is not actionable." 19 Am. & Eng. Enc. L. 122. "According to the received view of the common law, the erection of a fence upon one's own land is not an actionable injury to one's neighbor, although the erection may deprive him of light and air and may be dictated by motives of ill will." 12 Am. & Eng. Enc. L. 1058. "The making of openings or windows, in a house or wall abutting on or overlooking adjoining land, confers no right to the access of light and air over the adjoining land which the owner thereof is bound to respect. The doctrine of the common law is that an adjoining owner may deprive his neighbor of the light coming laterally over his land, by the erection of a wall or other structure thereon, within the period of prescription, though he does so for the purpose of darkening the windows and obstructing the passage of light and air; and, except where this rule has been changed by statute, there is no legal injury by such an obstruction." 1 Cyc. 788. To support that doctrine, cases decided by courts of last resort are there cited from the states of Alabama, California, Delaware, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Mississippi, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Texas, Vermont, and West Virginia, and from England; the case cited from West Virginia being Cunningham v. Dorsey, 3 W. Va. 293. In the same work, at page 789, it is said: "If an erection which deprives the adjoining owner of light and air is lawful, it is not per se a nuisance, and the law will not inquire into the motive with which the erection was made." See, also, 2 Washburn on Real Prop. § 1278. In the case of Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177, it is said: "The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises and conveyed to the premises of another; but in this case nothing is sent, but the light and air are withheld. A man may be compelled

to keep his gas, smoke, odors, and noises at home; but he cannot be compelled to send his light and air abroad."

There are many uses of land by the owner which may invade the rights of others to their injury, and which constitute private nuisances; but the common law does not recognize the case here presented as one of them. It is not claimed that by virtue of any statute, grant, or easement the appellees are entitled to maintain this bill against the obstruction of light and air from the adjoining lot. We do not think that the motive or intent of appellants in building the fence is material in determining what right appellees have in the light and air the obstruction of which they seek to enjoin. The case of Medford v. Levy, 31 W. Va. 650, 8 S. E. 302, 2 L. R. A. 368, 13 Am. St. Rep. 887, is relied upon to support appellees' contention. We think it does not apply. That was not a case for obstructing light or air. It was a bill for the prevention of offensive odors and many other acts, some of which, at least, were considered to be invasions of the complainants' rights in that case. The syllabus of the case must, of course, be read in the light of the opinion. We think that it is clear that the appellees have failed to show, by the allegations of the bill, any right to maintain this suit, under the authorities referred to. The only object of this bill is an injunction against the maintenance and to compel the removal of the said fence.

We must, for the reasons stated, hold the bill insufficient in law, reverse the decree complained of, sustain the demurrer, and dismiss the bill.

Note by BRANNON, J. Counsel for the church claims that the pith of the case on that side, its strength, lies in the fact that Hale erected the fence from malice and spite. As Hale owned the property, she had the legal right to build the fence, even though the intent were that ascribed to her. Authorities given in Transportation Co. v. Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, will go far to sustain this position. Justice Brown in Camfield v. United States, 167 U. S. 523, 17 Sup. Ct. 864, 42 L. Ed. 260, whilst expressing some condemnation of the law, was compelled to say: "It is true that a man may build a fence upon his own land as high as he pleases, even though it obstructs his neighbor's lights, and the weight of authority is that his motives in so doing cannot be inquired into, even though the fence be built expressly to annoy and spite his neighbor, and that in this particular the law takes no account of the selfishness or malevolence of individual proprietors (Mahan v. Brown, 13 Wend. [N. Y.] 261, 28 Am. Dec. 461; Chatfield v. Wilson, 28 Vt. 49; Frazier v. Brown, 12 Ohio St. 294; Pickard v. Collins, 23 Barb. [N. Y.] 444; Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Walker v. Cronin, 107 Mass. 555), although there are many strong

intimations to the contrary." Much authority sustains this. *Metzger v. Hochrein* (Wis.) 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841; *Kusniak v. Kozminski* (Mich.) 65 N. W. 275, 65 Am. St. Rep. 344; *Letts v. Kessler* (Ohio) 42 N. E. 765, 40 L. R. A. 177. If you decide otherwise, you detract from the right of property. "The motives of one who exercises a legal right cannot be inquired into." *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; 3 Am. & Eng. Dec. in Eq. 579.

(60 W. Va. 75)

POLLOCK et al. v. BROOKOVER.

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1906. Rehearing Denied
June 2, 1906.)

1. SPECIFIC PERFORMANCE—OPTION CONTRACT.

Where an option has been given upon land, which has not been converted into a binding contract by acceptance in accordance with its provisions, specific performance thereof cannot be enforced.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 90.]

2. SAME—ACCEPTANCE OF OPTION—EXECUTORY CONTRACT.

An option given for the sale of land, supported by a valuable consideration, is not a sale of real estate, nor an agreement to sell, but is an executed contract, giving the optionee the exclusive privilege of purchasing within the time limited, and which cannot be withdrawn during the time stipulated for; and upon acceptance within that time it becomes an executory contract for the sale of land, which may be specifically enforced in a proper case.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 90, 95.]

3. VENDOR AND PURCHASER — OPTION CONTRACT—CONDITIONS PRECEDENT.

Where the owner gives to another an option to purchase the coal underlying certain land, in which it is provided that, unless the optionee accept the same and pay one-third of the purchase money within a stipulated time, the option shall be null and void, and the parties mutually released therefrom, it is a condition precedent to the consummation of an executory contract of sale between the parties that the option be accepted and the money paid within the time limited.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 23.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County.

Bill by J. B. Pollock and others against Jacob Brookover. Judgment for plaintiffs, and defendant appeals. Reversed.

E. B. Snodgrass and E. L. Robinson, for appellant. Thos. P. Jacobs and A. D. Williams, for appellees.

SANDERS, J. The defendant, Jacob Brookover, being the owner of a tract of 150 acres of land in Wetzel county, on the 15th day of November, 1899, he and his wife gave to the plaintiff, J. B. Pollock, the following optional contract:

"Articles of agreement, made and entered into this fifteenth day of November, A. D. 1899, between Jacob Brookover and Elizabeth Brookover, of Anthem, Wetzel Co., W. Va., of the first part, and J. B. Pollock, of Wayne-

burg, Pa., of the second part, witnesseth, that the said parties of the first part, for the consideration of one dollar, and for the further consideration hereinafter mentioned, do hereby agree to sell and convey unto the said party of the second part, his heirs and assigns, all the coal of the Pittsburgh or river vein in and under all that certain tract of land situate in township of Center, county of Wetzel, state of W. Va., and bounded and described as follows, viz.: North by lands of Samuel Hudson; east by lands of Samuel Thomas and C. Brookover; south by lands of Enoch Roberts; west by lands of C. Brookover and Z. T. Stewart—containing one hundred and fifty (150) acres, together with the free and uninterrupted right of way into, upon, and under said land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, coking, and carrying away said coal, hereby waiving all damages arising therefrom or thereon from the removal of all the said coal, together with the privilege of mining and removing, through said described premises, other coal belonging to said party of the second part, his heirs, or assigns, or which may hereafter be acquired. And the said parties of the second part do hereby covenant and agree that they shall and will, on the payment of the purchase money as hereinafter provided, well and sufficiently, by lawful deed of general warranty, convey the above described coal unto the said party of the second part, his heirs, and assigns, forever. In consideration whereof, the said party of the second part hereby agree to pay, or cause to be paid, unto the said parties of the first part, the sum of seven dollars per acre, one-third of the purchase money to be paid as soon as convenient to have title examined, survey made, deed prepared, etc., after sale is made, so as to take no unnecessary time (the parties of the first part to furnish complete abstract of title), and the remainder to be paid in one and two years thereafter, with interest from date of first payment; deferred payments to be secured by the bond and mortgage of the purchaser, on the coal sold. And it is further agreed by the parties hereto that the party of the second part shall have the option of taking said coal according to the stipulations of the above agreement until the first day of January, A. D. 1901. And on the payment of the purchase money at any time before said first day of January, A. D. 1901, he shall be entitled to a deed as hereinbefore provided. And in case the said party of the second part shall fail to pay the purchase money on or before the said first day of January, A. D. 1901, or elect not to take the same, then this agreement shall be null and void, and the parties hereto shall be mutually released therefrom. The said party of the second part further agrees that if any surface land be used he will pay or cause to be paid unto the said first parties one hundred and fifty dollars per acre for as much as is used. First party reserves the right to drill through

said coal for oil and gas. Parties of first part reserves ten acres of surface around buildings. In witness whereof, we have hereunto set our hands and seals the day and year first above written. Jacob Brookover. [Seal.] Elizabeth Brookover. [Seal.] Attest: Maggie Brookover."

While the option was taken in the name of Pollock, yet it appears that it was for the benefit of him and R. W. Munnell, who were partners doing business under the firm name of Robert W. Munnell & Co. On the 28th day of December, 1900, Robert W. Munnell & Co. notified the defendant, Brookover, that they would elect to take and purchase the coal underlying the land described in the option, subject to the terms and conditions therein contained. After having given said notice of acceptance, and on the 26th day of February, 1901, Robert W. Munnell & Co. and J. B. Pollock assigned their interest in said option to Samuel S. Patterson and Owen R. Brownfield, and some time thereafter the assignees of the option, through their agent, A. D. Williams, demanded a conveyance of the property embraced in the option, which Brookover declined to make; and thereupon the plaintiffs, J. B. Pollock, Robert W. Munnell, Samuel S. Patterson, and Owen R. Brownfield, filed a bill in equity against Jacob Brookover, praying for the specific performance of the contract. The defendant answered, denying the right of the plaintiffs to have specific performance, and upon a final hearing the circuit court granted the relief prayed for in plaintiffs' bill and directed a conveyance of the property to Samuel S. Patterson, one of the plaintiffs; Brownfield having assigned to him his interest during the pendency of the suit. It is from this decree that the defendant has applied for and obtained an appeal and supersedeas.

The relief sought being the specific execution of a contract, it is important to determine the true character of the writing sought to be enforced, as it forms the basis of the plaintiff's suit. A writing of this character, based upon a valid consideration, falls within one of the various classes of a unilateral contract. It is not a contract to sell, nor an agreement to sell, real estate, because there is no mutuality of obligation and remedy; but it is a contract by which the owner agrees with another person that he shall have the right to buy, within a certain time, at a stipulated price. It is a continuing offer to sell, which may, or may not, within the time specified, at the election of the optionee, be accepted. The owner parts with his right to sell to another for such time, and gives to the optionee this exclusive privilege. It is the right of election to purchase, which has been bought and paid for, and which forms the basis of the contract between the parties. Upon the payment of the consideration, and the signing of the option, it becomes an executed contract—not, however, an executed contract selling the land, but the sale of the option, which is irrevocable by the

optionor, and which is capable of being converted into a valid executory contract for the sale of land by the tender of the purchase money, or his performance of its conditions, whatever they may be, within the time to which such offer has been limited. When such option is thus accepted, it becomes an executory contract for the sale of the land, with mutuality of obligation and remedy. *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Ide v. Lelser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Gordon v. Darnell*, 5 Colo. 304; *De Rutte v. Muldrow*, 16 Cal. 505; *Goodpaster v. Porter*, 11 Iowa, 161; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *Perkins v. Hadsell*, 50 Ill. 216; *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485. The offer must have been fully and completely accepted, in all its parts, and its provisions strictly complied with, before it became an executory contract. It is the complete acceptance of the option, by complying with all its provisions in that respect, that concludes the contract between the parties.

The plaintiffs, Robert W. Munnell & Co., on the 28th day of December, 1900, just three days before the expiration of the option, gave notice to Brookover that they would elect to purchase the land, subject to its terms and conditions. But at this time no part of the purchase money was paid, or tendered, nor was the same, or any part thereof, paid or tendered at any time prior to the 1st day of January, 1901. The plaintiffs claim that, upon acceptance of the option, it was converted into an executory contract, and that the delivery of the deed and payment of the purchase money were to be simultaneous acts, after abstract of title was furnished, and a convenient time given within which to examine title and have survey made. To thus construe the option would be to entirely ignore certain express, essential parts thereof, and thereby violate all the fixed rules of construction. Where a contract is uncertain as to its meaning, and does not definitely and clearly express the intention of the parties, it must be construed by taking all of its parts together, and giving to each provision due force. The real intent of the optionor must be gathered from the writing, and in order to do so we cannot be controlled by any particular stipulation or part, but must gather his intention from the entire instrument, and, when this writing is thus construed, we are forced to conclude that the offer to sell was, by the very terms of the contract, limited to the 1st day of January, 1901. At any time before the date specified for its expiration the plaintiffs were entitled to accept the offer; but, in doing so, the acceptance should be strictly in accordance with its express provisions, and unless this was done, and done within the time specified, it never became a concluded contract. It was not only necessary for the plaintiffs to give notice of the acceptance of

the option; but, from its very language, it was also one of its express requirements that one-third of the purchase money should be paid before the time fixed for its conclusion had passed. While it provides that the optionor, upon payment of one-third of the purchase money, would make a deed for the property, and while, also, it is provided that "one-third of the purchase money to be paid as soon as convenient to have title examined, survey made, deed prepared, etc., after sale is made, so as to take no unnecessary time (the parties of the first part to furnish complete abstract of title)," yet these provisions must be construed in the light of the other provisions which follow, one of which is, "Party of the second part shall have the option of taking said coal according to the stipulations of the above agreement until the first day of January, A. D. 1901," and the other, "And in case the said party of the second part should fail to pay the purchase money on or before the first day of January, A. D. 1901, or elect not to take the same, then this agreement shall be null and void, and the parties hereto shall be mutually released therefrom." When these provisions are taken and read together, it would seem that it was the intention of the optionor that the offer should extend only for the period named, and that, unless accepted by proper notice and the payment of one-third of the purchase money, it thereby became terminated.

The provisions giving the optionee until a specified time within which to take the coal, and providing for the payment of the purchase money on or before a certain date, are clear and unmistakable, and are entitled to force. To construe them to mean that the right to accept the coal and pay the purchase money extended beyond the 1st day of January would be to absolutely disregard the express language and true meaning of the writing. It is true the contract provides that the money was to be paid as soon as convenient to have title examined, survey made, and deed prepared, and that the optionor was to furnish a complete abstract of title; but it cannot be gathered from this language, read in connection with the other parts of the contract, that it was ever the intention of the owner to extend the time beyond the 1st day of January, and to so construe it would be to render meaningless other pointed and express provisions thereof. If the writing can be so construed as to give meaning to each part, it should be done. The optionee knew that by an express provision of the option his right to accept it was limited to a certain time, and if he desired an abstract of title and deed, upon paying the cash payment, it became his duty to give notice of his intention to accept a sufficient time before its expiration to enable the optionor to furnish such abstract and deed, and by not doing so he cannot extend the time for the payment of the purchase money, which it was essential should be paid

within a certain time. The optionee, knowing that the offer expired by limitation on a certain day, if not accepted, cannot stand by and wait till the time passes, or within three days of its expiration, and then say that the time should be extended to enable him to examine title, and have abstract and deed prepared, and thereby defeat the very object of the contract. But in doing so he will be regarded as having waived his right to demand abstract and deed upon payment of the purchase money. If notice of acceptance had been given a sufficient time before the expiration of the option to enable the optionor to furnish abstract and deed, then we think he would have been required to do so before being entitled to demand any part of the purchase money. Notice was not given until three days before the date for its expiration, and, when given, no demand was made for abstract, no deed was demanded, and no part of the purchase money tendered; but the optionee contented himself with having the owner to accept the notice, then left, and was not heard of until April or May, 1901, long after the time for the payment of the money had expired, and after the owner had optioned the land for a much higher price—property, in the meantime, having probably more than doubled in value. Brookover lived about 25 miles from the county seat of his county, and the testimony abundantly shows, if we could not presume, that the time between the giving of the notice of acceptance, and the 1st day of January, was altogether inadequate for the purpose of furnishing abstract and deed. It is said that Pollock had every day till the 1st day of January to accept. So he did, but he did not have the right to demand abstract and deed if he waited till the time had so nearly expired that it was impossible for the optionor to furnish them; and if he so delayed without accepting, he must pay without them, or lose his right to accept.

Plaintiffs' counsel contend that this case is controlled by *Gas Co. v. Elder*, 54 W. Va. 535, 46 S. E. 357. Upon examination of that case, it will be found that it is clearly at variance with the case at bar. In that case there was an agreement to sell, and the owner accepted part consideration, and there the agreement did not expressly provide that the purchaser's right to buy expired on a given date, and that, unless it was concluded by acceptance and the payment of the purchase money, it should be void; but, on the other hand, it provided that if the first payment was made within a certain time, or as soon thereafter as the title should be examined and accepted by the purchaser, then the agreement should be considered as rescinded, and neither party bound by it. Here it is true it fixes a time certain for the payment of the purchase money, but it is added that, unless it is paid at that time or as soon thereafter as the title shall have been examined, etc., the contract should be considered as re-

scinded. So at a glance it will be seen that these cases are clearly distinguishable, and bear no relation whatever to each other. The plaintiffs claim that time is not of the essence of the contract, and that the provision of the option for the payment of the purchase money was simply to enforce punctuality, and a failure by default of the vendee alone is usually disregarded in equity, and a subsequent payment, with interest, is treated as a sufficient compensation for delay. While the general rule is that, in contracts for the sale of land, time is not of the essence of the contract, yet it may be made so by the express stipulations of the parties, or it may arise by implication, from the very nature of the transaction. At one time it was the equitable doctrine that the parties could not make time so material as to become of the essence of the contract; but long ago this doctrine was abrogated, and it is now well established that this can be done. The optionor, by the express language of the option, made time of the essence of the contract; if payment not made within a certain time, the option to be void. Here we have only an offer to sell, to stand only for a definite period, and which was never accepted. The offer ceased when not accepted within the stated time. No right of acceptance existed after the 1st day of January. This was a part of, and included in, the proposition to sell. It was nothing but a proposition of sale upon one side, with the privilege of acceptance upon the other; and, from the very nature and terms of the offer, it was essential that it be accepted before the right to do so had expired by lapse of time. Pomeroy's Specific Performance, § 387, says: "Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, when a mere acceptance is contemplated, or payment must be made, when payment was the act of acceptance contemplated, at or before a specified date, then, of course, the act of assent or of payment must be done within the prescribed time, and time is from the very nature of the contract essential. If, therefore, a vendor agree to convey, if payment be made at or before a given date, or if an option is given which is to be accepted by payment within a given time, then the time of the payment is certainly essential; in fact, payment is a condition precedent to the vesting of any right in the vendee." *Brooke v. Garred*, 2 D. & J. 62; *Austin v. Tawney*, L. R. 2 Ch. 143; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Magoffin v. Holt*, 1 Duv. (Ky.) 95; *Harding v. Gibbs*, 125 Ill. 85, 17 N. E. 60, 8 Am. St. Rep. 345.

It is presented that Brookover, by his conduct and acquiescence in the interpretation put upon the option by plaintiffs, showed that he gave it the same construction. There is a conflict in the evidence as to what Brookover said, when approached with ref-

erence to this matter, after the option had expired. He claims that he then asserted that the option had expired, and that he had optioned the property to another person, while, upon the other hand, it is claimed that he said he was not being paid enough for his property; and it is also said that he employed A. D. Williams to assist in curing certain defects in his title, and that he co-operated with him in doing this work. It is certainly unimportant as to what conclusion should be reached with reference to the conflicting evidence; but, conceding the facts to be as claimed by plaintiff, it would not have the effect of bringing into life the option, which had expired by limitation.

For the foregoing reasons, we reverse the decree of the circuit court, and dismiss the bill.

(60 W. Va. 84)

JOHNSON v. GOULD et al.

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1906. Rehearing Denied June 2,
1906.)

1. EASEMENTS—PARTITION.

Upon partition of real estate descended, between heirs, each heir takes his share of land subject to any apparent, permanent, continuous, and reasonably necessary quasi easement which existed thereon, for the benefit of another part of such real estate, at the death of the ancestor, unless the existence of such quasi easement has been discontinued by the heirs before partition, or provision is made by the partition for its discontinuance.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 43, 74.]

2. SAME—INTERCHANGEABLE DEEDS — INTERFERENCE WITH EASEMENT.

Upon partition of a farm descended from an ancestor, between his heirs, by what is termed an interchangeable or partition deed, whereby they in effect provide for the continuance of an apparent, permanent, continuous, and reasonably necessary quasi easement, which existed at the death of the ancestor, upon a part of the farm for the benefit of another part thereof, and convey to one of the heirs the servient part and to other of the heirs the dominant part, the one to whom the servient part is thus conveyed has no right to so change the physical condition thereof as to materially and permanently interfere with or destroy such easement.

3. WATERS AND WATER COURSES—EASEMENTS—OBSTRUCTION.

Where such easement consists of a right to a supply of water naturally issuing or flowing from the servient land, the owner thereof has no right to cut off or materially impair that supply by making excavations, tunnels, walls, or other constructions on the servient land.

4. EASEMENTS—INTERFERENCE WITH—INJUNCTION.

A court of equity has jurisdiction, by injunction, to prevent a continuing material interference with an easement.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 134-137.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by Nannie K. Johnson against Fannie M. Gould and others. Decree for plaintiff, and defendant Gould appeals. Reversed.

V. B. Archer and Wm. Beard, for appellant. Dave D. Johnson and Van Winkle & Ambler, for appellee.

COX, J. This cause is upon the rehearing of an appeal from a final decree of the circuit court of Wood county. We adopt the substance of the statement of the case made by Judge Miller, who delivered the former opinion:

Eppa T. Bartlett was in his lifetime the owner of a certain farm in Wood county, described in the record of this case as the "Home Farm," situate near Parkersburg. This farm was divided by a public road. East of the road, and bounded thereby, was a lot measuring 125 feet on each of its four sides, known as the "spring lot," and other land belonging to said farm. Upon the land west of the road were ice ponds, an ice plant, and some buildings. In 1893, said Eppa T. Bartlett died intestate, survived by Martha Bartlett, his widow, John J., Gertrude O., and Sallie Bartlett, and Fannie M. Gould (née Bartlett), his only children and heirs at law. By a writing dated the 27th day of April, 1893, the said children, and the husbands of Gertrude O. Bartlett and Fannie M. Gould, agreed upon the division of the estate of which Eppa T. Bartlett died seised. It was therein provided that the "part of the home farm lying east of the center of the public road, except the spring lot, shall be conveyed to said Fannie M. Gould"; that the part thereof west of the center of said road, and also the spring lot, "embracing the ice ponds, ice houses, engine and machinery, and two tenement houses, * * * shall be conveyed to Gertrude O. Bartlett and Sallie Bartlett jointly." It was further provided therein that "the free use and access to the spring lot and spring, for stock, farm uses, and all domestic purposes, shall be perpetually reserved to the lands east of the road, but so as not to interfere with the protection of the spring, and its flow to the ice pond." This agreement was consummated by an interchangeable or partition deed, executed on November 22d following, whereby the proper parties conveyed, quit-claimed, and released to the grantees therein the several estates mentioned in the partition agreement. In the grant therein to Gertrude O. and Sallie Bartlett was the clause: "But there is reserved to the lands hereinafter mentioned, and conveyed to Fannie M. Gould, the free use and access to the said spring lot and spring, for stock, farm uses and all domestic purposes, but so as not to interfere with the protection of the said spring, and its flow to the ice ponds on the west side." In the part of the deed conveying to the said Fannie M. Gould the land east of the public road, except the spring lot aforesaid, was the provision: "Also the free use and access to the spring lot and spring, for stock, farm uses and all domestic purposes as aforesaid." The conveyances by this deed were subject to the widow's dower. Sallie Bartlett subsequently died testate. By her will, her undivided interest in the estate owned jointly by her and Gertrude O. Bartlett, being the lands on the west side of the road, and also the spring lot, was devised to her mother, Martha, for

life, and after her death to plaintiff, Nannie K. Johnson. Afterwards, Gertrude O. Bartlett brought a suit against Eppa T. Bartlett's administrator, his widow, Martha, Nannie K. Johnson, Fannie M. Gould, and others, to assign dower in the land of which Eppa T. Bartlett died seised, and to partition the land conveyed by the interchangeable deed to Sallie and Gertrude O. Bartlett jointly. The commissioners appointed in that suit reported that "all the parties to whom allotments and partitions have been made of the home farm shall at all times have the free use and access to the said 'spring lot' and spring aforesaid, to obtain water for stock, farm uses, and all domestic purposes, but so as not to interfere with the protection of the said spring, and its flow to the ice ponds on the west side of the public road." By decree of January 11, 1896, the report of the commissioners was confirmed; the decree containing exactly the same language used by the commissioners with reference to the rights of the several parties to the spring lot and spring. The land west of the road, designated by the commissioners as "lot No. 4," and also the spring lot, were decreed to Martha J. Bartlett for life, and after her death to Nannie K. Johnson; and that part of the land east of the road, designated by the commissioners as "lot No. 6," not including the spring lot, was also decreed to said widow for life, and after her death to Fannie M. Gould. Upon the death of said Martha J. Bartlett, on December 29, 1899, the title to lot No. 4 and to the spring lot became absolute in Nannie K. Johnson, and the title to lot No. 6 became absolute in Fannie M. Gould.

On the 28th day of August, 1899, Fannie M. Gould filed her bill in chancery against Nannie K. Johnson and others, and obtained an injunction inhibiting them from interfering with her right of free access to, and use of, said spring lot and spring in the manner theretofore enjoyed. Certain criminal proceedings against sons of Fannie M. Gould, Cecil R. and Earl Gould, for the removal of a part of said fence, which act was claimed to be a trespass, were enjoined. After the death of Martha J. Bartlett, Nannie K. Johnson filed her cross-bill in said cause against Fannie M. Gould and others, alleging therein the foregoing facts and many other facts, and claiming to be entitled to the rights and privileges under the several contracts and decrees with reference to the said spring lot and spring. She further alleged that, for many years prior to the death of Eppa T. Bartlett, he had resided upon the land east of said road; that upon the land west of said road he had constructed and maintained for many years large ice ponds, and an ice plant, and that for more than 30 years the ice procured therefrom had been of special value on account of its purity, and had produced a large revenue; that said spring was of large volume; that it had been known for more than a century, and had been called the "Bartlett Spring" for 40 years; that in 1884

said Bartlett placed a line of tiling from the spring to a point near the line between lot No. 6 and the spring lot; and that all of the parties to said contract and deed had been familiar from childhood with the situation and condition of the lands partitioned, and that the values were agreed upon with the distinct understanding that the spring should be forever maintained. She further alleged in her cross-bill that, within a short distance (shown by the evidence to be about 22 feet) from the line dividing the spring lot from the land of Fannie M. Gould, the latter and her sons had dug down into her (Mrs. Gould's) lands for a distance of more than 20 feet and to the depth of about 8 feet, and had struck the subterranean stream of water which supplied said spring, cutting off the stream and wholly preventing its flow to the spring; that, in the excavation so made into the hill or bluff and across the channel of said stream, Mrs. Gould and her two sons had built a brick tunnel; that the wall thereof, on the side next to the spring lot, is of solid masonry, cemented so as to be absolutely impervious to water, thereby wholly obstructing said stream; that a large and copious flow of the water, thus hindered, is now carried down to the public road, and conveyed, through tiling, along the western boundary of said spring lot and upon the highway, and thrown to waste in a branch of Pond Run, which is below the level of the said Johnson's ice ponds. Fannie M. Gould filed her demurrer and answer to said cross-bill, denying that she was bound to maintain or protect the supply of water to said spring on the spring lot, and admitting, and claiming the legal right to make, the excavations upon her own land. She also admitted the placing of the tiling drain upon the public road, but averred that it was done under authority of the county court.

Upon final hearing at January term, 1902, the court decreed, among other things, that "Fannie M. Gould has the absolute right to put down the spring on her premises, as she has done, and to take and use the water therefrom for any lawful purpose or use that she may find for said water, and that the supply of water to said spring is from percolating water and not from a subterranean stream, and that she has the right to take all the water that she can procure from said spring, and to dispose of the same as she may see fit, either by selling the same or using the same for her own purposes"; that said Fannie M. Gould be restrained "from maliciously or negligently maintaining any obstruction or construction placed by her on her own premises that interferes with or obstructs the flow of water to the said spring on the said spring lot, and thereby interfering with the flow of said water to the said ice ponds; and she is further enjoined, inhibited, and restrained from maliciously or negligently maintaining any structure, outlet, or other device which so lowers the level of the water on the land of Fannie M. Gould

as to interfere with the supply of water to the said spring on the said spring lot as it existed prior to the opening of the spring on her own premises by the said Fannie M. Gould—provided that on restoring the flow to the spring on the spring lot the said Fannie M. Gould, her heirs and assigns, shall have the right to make full use of the water either at that spring or at the spring upon her own premises, for stock, farm use, and domestic purposes, as hereinbefore mentioned. If the said Fannie M. Gould shall desire to maintain a spring or opening for water on her own land, she is not enjoined from so doing, or from using water therefrom." It was also provided that the defendant Fannie M. Gould should, under the direction of the sheriff of Wood county, by a proper construction, "raise the water in her spring one foot, so as to, if such construction will do so, restore the flow of water to the spring on the spring lot." From this decree Fannie M. Gould appealed, assigning various errors, all of which amount to the assertion that she owns her land in fee without reservation or servitude, express or implied, and that she owns the water in and under her land, and has the right to the free use and unlimited disposition thereof. Mrs. Johnson cross-assigns error, and in effect says that her full legal rights are not secured by said decree. It appears from the record in this case that the old spring, known as the "Bartlett Spring," is located on the northeast corner of the spring lot. It is a basin in the ground, walled with brick. Some of the witnesses have known it for 60 years. The water is led into it by a pipe or tiling, laid several years ago by said Eppa T. Bartlett, from the spring to a point near the line of the land now owned by Mrs. Gould. The bed of this tiling is sand and gravel. This tiling, some parts of which are now visible, extends in a southeasterly direction about 40 or 50 feet towards the new spring on the lands of Mrs. Gould. The two springs are about 135 feet apart. There is evidence that, when said Bartlett put in this tile, he dug down into the sand and gravel, and followed the vein of water which supplied the old spring back toward the bluff or hill. The evidence tends to prove that the tiling was put in for the double purpose of preventing the water, before it reached the spring, from being diverted into the Shattuck ditch and Pond Run, whose water levels are lower than that of the ice pond, and also to lead the water into the spring from which it would flow into the ice pond.

The foregoing is the substance of what we deem to be the material parts of the statement of facts made by Judge Miller. The cross-bill in all respects seems sufficient in law. Eppa T. Bartlett, the ancestor, owning the whole farm upon which this spring, known as the "Bartlett Spring," with its abundant flow of water, was located, maintained ice ponds on part of his farm for the production of ice, which was of value com-

mercially. He connected the spring to the ice ponds by means of pipe or tiling. The spring received its supply from the bluff lands now owned by Mrs. Gould, then a part of the farm. He placed pipe or tiling from the spring to a point near the line of the land now owned by Mrs. Gould, for the purpose of carrying the water to the spring. By these means, he annexed the water supply to the spring, and the water of the spring to the ice ponds. Thus, the ancestor impressed upon the land now owned by Mrs. Gould the quasi servitude of supplying water to the spring by means of the pipe leading to it, and upon the spring the quasi servitude of supplying water to the ice ponds. These quasi servitudes were apparent, permanent, continuous, and reasonably necessary to the enjoyment of the farm. They existed for years prior to and at the time of Eppa T. Bartlett's death. Afterward, by written agreement and by partition deed (called in these proceedings "interchangeable deed"), the farm was partitioned in severalty into two parts. At the time of this partition, the conditions as to the spring and its supply and the ice ponds remained practically as they were at the death of the ancestor. No change in the condition of the land as to water supply is shown to have occurred while the widow held a part of the land as dower. Whether the supply of water issuing from the land of Mrs. Gould was a well-defined stream or percolating water is immaterial for the purpose of our present discussion.

We must presume that the values of the respective parts of the farm in their then condition were taken into consideration by the parties in making the partition. *Burwell v. Hobson*, 12 Grat. (Va.) 322, 65 Am. Dec. 247. Considering the partition deed as simultaneous conveyances or grants of the respective parts to the persons to whom conveyed, we will examine the legal questions involved. Dr. Minor, in his *Institutes* (volume 2, p. 26), says: "Thus it is the established doctrine that where the owner of two heritages, or of one heritage consisting of several parts, has so arranged and adapted them that one derives from the other a benefit or advantage of an obvious, continuous and reasonably necessary character, and he sells one of them, or the heritages any otherwise come to the possession of different owners, without its being expressly provided whether such benefit or advantage shall continue to subsist as between the heritages or parts of the heritage, or not, there is in the silence of the parties an implication, in the nature of an understanding and agreement, that these advantages and burdens, respectively, shall continue as before the separation of the title. But, in order to give this effect, it is required that the servitude or easement should be reasonably necessary, as well as continuous and obvious, or at all events made known to the new acquirer of the property in which it is claimed. Wash. on Easements,

c. 1, § 3, pp. 54-57, 88, 89; *Nichols v. Chamberlain*, 3 Cro. (Jac.) 121; *Lampman v. Mills*, 21 N. Y. 505; *Elliott v. Rhett*, 5 Rich. Law (S. C.) 405, 57 Am. Dec. 750; *Scott v. Beutel*, 23 Grat. (Va.) 6; *Hardy v. McCullough*, Id. 258; *Sanderlin v. Baxter*, 76 Va. 304, 44 Am. Rep. 165. * * * The reason upon which this doctrine rests of an implied grant of apparent, continuous, and necessary easements, on the transfer of one of two tracts or parts of a tract, is said to be found in the maxim that when a thing is granted everything necessary to the enjoyment thereof, which is in the grantor's gift, is also presumed to be granted." In the case of *Elliott v. Rhett*, supra, it was held: "Grant of continuous and apparent easements is implied on severance of heritage, where, though having no legal existence as easements, they have in fact been used by the owner during the unity of the heritage, or where they are necessary to the full enjoyment of the several portions of the heritage. Grant of right of drainage is implied on severance of heritage by a conveyance of part, in favor of the part conveyed, as against the residue, where such right has been continuously exercised by the owner of the entire tract, and there is no natural drainage." "If the owner of an estate, part of which is quasi dominant and part quasi servient, alien the two portions to different persons, the respective alienees will take the portions granted to them burdened or benefited, as the case may be, by those rights in the nature of apparent and continuous easements which the previous owner had the right to attach to them." 10 Am. & Eng. Enc. Law, p. 425. "Upon the principle of construction that, where a man grants a thing, he grants with it everything necessary to its enjoyment, it is held that by a grant of land easements necessary for its enjoyment are created ex necessitate and passed by the grant, although not expressly named." 14 Cyc. 1106. In the case of *Paine v. Chandler* (N. Y.) 32 N. E. 18, 19 L. R. A. 99, it was held: "The necessity required in order to pass an easement by implication is a reasonable, not an absolute, one. Mere convenience is not sufficient to create or convey an easement by implication, but the privilege or right must be of value to the estate granted which the grantee has estimated as an advantage to the estate and paid for in his purchase. Interrupting the flow of water to a spring on one's own land by digging a well and ditches thereon constitutes an unlawful diversion of the water from the spring, where an implied grant of the use of the waters of the spring has been made to the grantee of an adjoining farm." See, also, *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16, 25 Am. Rep. 125.

In the case of *Burwell v. Hobson*, supra, which is binding authority upon this court, it was held as follows: "H., owning lands on both sides of a creek which frequently overflowed its banks, built a dike along the

south side of it, to protect his low grounds on that side of the creek, and this caused the creek to overflow the land on the north side still more. At his death, his lands were divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another, W., the land on the north side; and in their report they made no allusion to the dike. The son receiving the land on the south side of the creek afterwards sold it to B.; and then W., owning the land on the north side, commenced to build a dike on that side to protect his lands, which would have the effect to destroy the dike built by H., and overflow the low grounds on the south side. B. then filed a bill to enjoin the building of the dike on the north side. Held, B. is entitled to have his dike as it was when H. died, and to have his lands protected thereby, and W. has no right to build a dike on his side of the creek which would destroy the dike of B., and overflow his low grounds. Equity will interfere to prevent the building of the dike, and will compel W. to abate so much of his dike already built as would injure the dike and low grounds of B." In the course of the opinion of the court in that case, delivered by Judge Moncure, he says: "If the intestate had conveyed the land with the dike thereon to the appellant, the latter would have been entitled to the benefit of the dike, and the intestate could not have deprived him thereof by erecting his dike on the other side. If the heirs had divided the land among themselves by mutual agreement, and interchanged deeds for the lot of each, the deed conveying the lot with the dike thereon would have entitled the grantee to the benefit of the dike, and he could not have been deprived thereof by the act of any of the other heirs. There is no difference in this respect between a partition by suit and a partition by mutual agreement and interchange of deeds. In each case the heirs are in effect purchasers of the respective lots, and entitled to hold as any other purchaser would be." The doctrine of quasi easements applies with peculiar force in partition. "A right by implication may sometimes arise in case of a partition among heirs when it would not arise in the case of a conveyance of part of a heritage to a stranger." 14 Cyc. 1167. In *Brakely v. Sharp*, 10 N. J. Eq. 206, the intestate owned two farms at his death, with a house on each, and had constructed an aqueduct from a spring upon one of them to both these houses. Upon his death, the farm upon which was the spring was set apart to the widow and one heir, and the other farm to the other heir. The question arose as to the effect of this partition upon the right which the owner of the second farm had to those in connection with his house, in the benefit of this aqueduct. The chancellor held that if the ancestor, while owning both farms, had conveyed to a stranger the one which was set apart to the widow, he would

have lost all benefit of the aqueduct as an easement if he had not expressly reserved it in his deed; but the widow and heirs would not stand in the light of purchasers from the ancestor. All the heirs came in with equal rights, and no preference arose from mere priority of assignment. See *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Kilgour v. Ashcom*, 5 Har. & J. (Md.) 82; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108; *Elliot v. Sallee*, 14 Ohio St. 10; and *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671.

We have in this case not alone the fact that there was a partition by simultaneous grants, but we have for consideration the provisions of the deed. In the part of the deed whereby Gertrude O. and Sallie Bartlett were conveyed their share of land occurs this language: "But there is reserved to the lands hereinafter mentioned, and conveyed to Fannie M. Gould, the free use and access to the said spring lot and spring, for stock, farm uses, and all domestic purposes, but so as not to interfere with the protection of said spring, and its flow to the ice ponds on the west side." In the part of the deed whereby Mrs. Gould was conveyed her share of the land occurs this language: "Also the free use and access to the spring lot and spring, for stock, farm uses, and all domestic purposes, as aforesaid." These provisions, taken together, mean that Mrs. Gould for her land is entitled to the free use and access to the spring lot and spring, for stock, farm uses, and all domestic purposes, but so as not to interfere with the protection of the spring, and its flow to the ice ponds on the land conveyed to Gertrude O. and Sallie Bartlett. What bearing do these provisions have on the question of easement? Certainly they contain nothing which could be construed as working a discontinuance of the quasi easement. Mrs. Gould was granted the free use of and access to the spring lot and spring, but so as not to interfere with the protection of the spring, or its flow to the ice ponds. By the deed, the use in common of the spring was continued in the owners of the two parts of the farm, limited in extent, so far as Mrs. Gould was concerned, to the purposes specified in the deed; but absolute in the owners of the spring lot, subject to access and use by the owner of the Gould land. By the deed, the continued existence, and not the destruction, of the spring was contemplated and intended. Its continued existence was contemplated not only for the purpose of flow to the ice ponds, but also for the use of Mrs. Gould for her land as therein specified. The effect of the provisions of the deed was to continue conditions as to the use of the spring practically as they existed when the deed was made.

In the subsequent partition suit of Gertrude O. Bartlett against Mrs. Gould and others, the commissioners reported that "all the parties, to whom allotments and parti-

tions have been made of the home farm, shall at all times have the free use and access to the 'spring lot' and spring aforesaid, to obtain water for stock, farm uses, and all domestic purposes, but so as not to interfere with the protection of the said spring, and its flow to the ice ponds on the west side of the public road." This report was carried into effect by decree. If this is material at all, it is simply a further provision for a continuance of previous conditions. The owners of all parts of this farm had enjoyed the use of the spring. The spring could not continue to exist without its supply of water. To cut off its supply would be to discontinue the spring. We are clearly of the opinion that Mrs. Johnson for her land has the right to the water naturally issuing or flowing from the land of Mrs. Gould, for the purpose of supplying the spring in the condition in which the land of Mrs. Gould was at the time of the partition, except to the extent that such condition has been changed by natural causes. Such right of Mrs. Johnson constitutes an easement, in favor of her land, upon the land of Mrs. Gould. Mrs. Gould, then, has no right to so change the physical condition of her land as to materially and permanently interfere with or destroy the easement. By the excavations for the new spring on the land of Mrs. Gould, and by the tunnel or ditch and other constructions, she has materially and permanently interfered with and impaired, if not practically cut off, the supply of water to which Mrs. Johnson is entitled for her spring. This interference with the easement is of a continuing, permanent, and material character. In such case, equity has jurisdiction, by injunction, to prevent such interference. *Jones on Easem.* §§ 880, 881; *High on Inj.* 878; *Pence v. Carney* (recently decided by this court, and not yet officially reported) 52 S. E. 702.

It may be contended that the easement cannot exist in favor of Mrs. Johnson, who owns, as devisee of Sallie Bartlett, the land upon which the ice ponds and old spring are located. This position is not tenable. The easement is appurtenant to the land now owned by Mrs. Johnson. She stands in the same situation as would Sallie Bartlett, if living, and is entitled to the same benefit of the easement. *Burwell v. Hobson*, supra; *Linkenhoker v. Graybill*, 80 Va. 885; 14 Cyc. 1166; *Jones on Eas.* § 18. The decree of the lower court in this cause protects the easement to which Mrs. Johnson is entitled to a limited extent only. The decree provides that Mrs. Gould "shall, within 30 days from the rise of this court, by a proper construction such as will raise the flow of water from the spring on her said lot one foot at the point where the water from said spring flows into the public road at or near the building known as 'Springdale Springs,' raise the water in her spring one foot, so as to, if such construction will do so, restore

the flow of water to the spring on the spring lot known as the 'old spring.'" This decree is not the full measure of relief to which Mrs. Johnson is entitled. She is entitled to an injunction against the maintenance by Mrs. Gould of the new spring, the tunnel or ditch, and all other constructions made by her in so far only as the same materially interfere with, impair, or destroy the easement to which Mrs. Johnson is entitled for her land. Mrs. Johnson, under the circumstances of this case, is also entitled to have the land of Mrs. Gould restored to the condition in which it was at the time of the partition, if that can be done (except where such condition has been changed by natural causes), so far as necessary to restore the natural issuance or flow of water therefrom supplying the old spring. *Jones on Eas.* § 890.

For the reasons stated, the decree of the circuit court must be reversed, and this cause remanded, with directions to enter such decree or decrees as shall be necessary to carry into effect the principles announced in this opinion, and to be further proceeded with according to the rules governing courts of equity.

(125 Ga. 4)

LINGERFELT v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. CRIMINAL LAW—NEW TRIAL—REMARKS OF COURT.

One ground of the motion for a new trial assigned error because the court said to a witness in the presence of the jury: "He [meaning the Solicitor General] isn't asking you to be absolutely positive. What is your opinion about it? It is a mere matter of opinion." It does not appear what question the Solicitor General had propounded to which this statement had reference, and the ground is not sufficiently clear to furnish reason for a reversal. If the court referred to the effort to identify a certain piece of cloth, which the witness had seen some time previously and stated he could not be absolutely sure was the same, the question of identity was necessarily one of opinion.

2. SAME—EVIDENCE—FAILURE TO FLEE.

The fact that a person accused of a crime and placed under arrest made no attempt to escape cannot be proved by him in his own behalf. *Kennedy v. State*, 28 S. E. 979, 101 Ga. 559; *Dixon v. State*, 42 S. E. 357, 116 Ga. 186; *Williams v. State*, 51 S. E. 322, 123 Ga. 138; *Com. v. Hersey*, 2 Allen (Mass) 173; *Campbell v. State*, 23 Ala. 46; *People v. Rathbun*, 21 Wend. (N. Y.) 509; *People v. Montgomery*, 53 Cal. 577; *Wharton's Crim. Ev.* § 752; *Abbott's Trial Briefs, Crim. Causes* (2d Ed.) p. 462, § 520, par. 149; 4 *Elliott, Ev.* § 2724. Compare 1 *Wigmore, Ev.* § 293, and note; *Pinkard v. State*, 30 Ga. 757; *Boston v. State*, 20 S. E. 98, 21 S. E. 603, 94 Ga. 590 (explaining evidence for the state).

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 931.]

3. SAME.

What was said in *Jesse v. State*, 20 Ga. 156, to the effect that the fact that a person accused of a crime did not fly is but equivocal evidence of his innocence, was in reference to a charge, and not a ruling on the admissibility of such evidence.

4. SAME—TRIAL—INSTRUCTIONS—VERDICT.

Where the court charged that if the jury should find the defendant guilty generally he would be subject to confinement in the penitentiary for a time not less than two years nor longer than ten years, that they would have the right to reduce the punishment to that appropriate to a misdemeanor, that "if the judge should approve, that he would be punished for a misdemeanor," and that the form of verdict proper for that purpose would be to find the defendant guilty and recommend that he be punished for a misdemeanor, in the absence of any request to charge more specifically on the subject, there was no error in failing to explain to the jury that in the event they should find the defendant guilty, and with the recommendation referred to, the judge could disregard such recommendation and punish him for a felony.

5. SAME—EVIDENCE.

The verdict was supported by the evidence. (Syllabus by the Court.)

Error from Superior Court, Lumpkin County; J. J. Kinsey, Judge.

J. W. Lingerfelt was convicted of crime, and brings error. Affirmed.

O. J. Lilly and R. H. Baker, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except **ATKINSON, J.**, who did not preside.

(125 Ga. 11)

ADAMS v. STATE

(Supreme Court of Georgia. March 22, 1906.)

1. CRIMINAL LAW—INSTRUCTIONS—STATEMENT OF ACCUSED.

The charge of the court, with respect to the prisoner's statement, did not leave the jury free to act arbitrarily in attaching to it such credence and weight as they saw fit.

2. HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—MALICE.

A malicious intent to kill is not, as matter of law, to be presumed whenever one person shoots at another with a gun, unless the shooting be neither in self-defense, nor under circumstances of justification.

(a) In view of the undisputed facts of this particular case, the charge of the court on this subject, while not correct in the abstract, was not harmful to the accused.

(b) Upon a prosecution for assault with intent to murder, proof that the accused shot at and wounded another without legal excuse will raise a presumption of law that the shooting was maliciously done; but a specific intent to kill is never to be presumed where death does not ensue, and must be shown by circumstances authorizing the jury to infer, as matter of fact, that the accused had that intent.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 262, 263.]

3. SAME—INSTRUCTIONS.

It was entirely proper for the court to inform the jury, regardless of the contentions of the accused, that if the shooting was without excuse under the law, then "it would be no defense, nor would it mitigate the crime," if the person shot by the accused fired back at him.

4. CRIMINAL LAW—ALIBI.

The instructions given the jury, with reference to the defense of alibi, were not objectionable because the place at which the shooting occurred was referred to by the court as

"the scene of the crime," instead of being designated "the scene of the offense."

5. SAME—NEW TRIAL—GROUNDS.

A general complaint in a motion for a new trial that the entire charge of the court touching certain vital issues was not clear, accurate, and impartial, but was more favorable to the state than to the accused, does not present any sufficiently specific assignment of error.

(Syllabus by the Court.)

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Newt Adams was convicted of assault with intent to murder, and brings error. Affirmed.

F. W. Copeland, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

EVANS, J. The bill of exceptions sued out in this case presents an assignment of error upon the overruling of a motion for a new trial made by Newt Adams, who was tried and convicted upon an indictment charging him with the offense of assault with intent to murder. The evidence was, as counsel for the accused, very properly conceded, sufficient to warrant the verdict of guilty; and it should be upheld unless, for some reason assigned in the special grounds of the motion, it is made to appear that the accused was denied a fair and impartial trial.

1. Complaint is made of the following charge to the jury concerning the prisoner's statement: "You can give that statement just such credence as you think it ought to have; you may believe it, if you want to do so, in preference to the sworn testimony in the case, or may believe it in part, or reject it in part, or reject it altogether." The criticism made upon this charge is that the court, instead of telling the jury that they might, should they "want to do so," believe the statement in preference to the sworn testimony, ought to have instructed the jury that "defendant's statement should have just such force only as the jury [might] think right to give it." We find, upon an examination of the record, that the court added to the above-quoted excerpt the following express injunction: "Give it just such weight and credence, gentlemen of the jury, as you think it ought to have in determining the truth of this issue." It is not to be assumed, therefore, that the jury understood that they were at liberty to act arbitrarily in the matter, nor was the accused prejudiced by the instructions excepted to, which, if at all misleading, was calculated to impress the jury with the idea that if for any reason they should "want to do so," they could give credence to his statement in preference to the sworn testimony.

2. Exception is also taken to the following charge: "Malice will be presumed in the case of an assault with intent to murder, whenever one person shoots at another with a shotgun." It is insisted that this instruction was erroneous "for the reason that it stands unqualified on the question of justifica-

tion homicide, and the doctrine of self-defense, and tends to express an opinion of the court on the question of malice, independent of defense set up by defendant by his plea of not guilty." The court certainly did not express or intimate any opinion as to any fact at issue, but simply undertook to state under what circumstances the law would presume malice. If the charge was a correct statement of the law, it clearly did not amount to an expression of opinion as to the intent of the accused. *Vann v. State*, 83 Ga. 45, 54, 9 S. E. 945. Even if the charge did not correctly state the law, it did not intimate any opinion as to any question of malice presented by the defense interposed, for the accused relied solely upon the defense of alibi, not upon the doctrine of self-defense or justifiable excuse for the shooting. All of the evidence showed that the shooting was wholly without justification or mitigation, and the sole question presented to the jury for determination was whether or not the accused was the perpetrator of the outrage. A malicious intent is not, as matter of law, to be presumed "whenever one person shoots at another with a shot-gun," unless the shooting be neither in self-defense nor under circumstances of justification. Pen. Code 1895, § 113. But, under the facts of this particular case, the failure of the judge to qualify the instruction by adding that the presumption of a malicious intent only arises where the shooting was without legal excuse does not call for a reversal of the judgment denying a new trial. *Young v. State*, 95 Ga. 456, 20 S. E. 270 (2); *Sharpe v. State*, 103 Ga. 588, 31 S. E. 541; *Holston v. Ry. Co.*, 116 Ga. 661, 43 S. E. 29; *Napper v. State*, 123 Ga. 571, 51 S. E. 592. As this omission to qualify the charge given did not affect any substantial right of the accused, under the undisputed facts concerning the circumstances attending the shooting, the exception taken to the charge can avail him nothing. We are not, however, to be understood as approving a charge, even with such a qualification, when given without explanation on the trial of one indicted for assault with intent to murder. Standing by itself, the jury might be thereby led to believe that the "malice" which the law would presume against the offender was a malicious intent to commit murder, whereas the only legal presumption which could arise would be that the shooting was maliciously done. If one shoot at another with a pistol and hit him, the law presumes, *prima facie*, that he did it with malice (*Collier v. State*, 39 Ga. 31, 99 Am. Dec. 449); and, in a prosecution for assault with intent to murder, if the accused admits stabbing the prosecutor, a like presumption will arise, and the onus of rebutting this presumption is on the accused (*Hogan v. State*, 61 Ga. 43). But where death does not result from the use of a deadly weapon, there may be malice in giving the wound, but utter absence of an intention to kill. *Patterson v. State*, 85 Ga. 133,

11 S. E. 620, 21 Am. St. Rep. 152. As was held in the case last cited: "The law will impute the intention to kill where there is a killing, but not where there is none." While, therefore, a presumption of malice will arise from the use of a deadly weapon, a specific intent to kill will not be presumed where death does not ensue, and the existence of such intent is a question of fact to be passed on by the jury. *Gilbert v. State*, 90 Ga. 691, 16 S. E. 652; *Gallery v. State*, 92 Ga. 463, 17 S. E. 863; *Jackson v. State*, 103 Ga. 417, 30 S. E. 251; *Lanier v. State*, 106 Ga. 368, 32 S. E. 335; *Vann v. State*, 83 Ga. 45, 9 S. E. 945 (8). In the present case, the trial judge recognized this rule of law, and, immediately after giving the charge complained of, instructed the jury that an intent to kill was not to be presumed, but the burden was upon the state to show the intent to kill, and if there was no intent to kill, there could be no conviction of assault with intent to murder, though there might be a conviction of the offense of shooting at another, not in self-defense or in defense of the person. The jury were further told, in this connection, that it was incumbent upon the state to show that the assault was made with a weapon in its nature likely to produce death, and if this fact was not shown, the defendant could not be convicted of assault with intent to murder. In view of these instructions, it is evident that the charge complained of could not have been misunderstood by the jury, especially as the court, before concluding the charge, submitted to them the question whether the accused "fired or shot at the party named in the indictment without any excuse or justification under the law."

3. The jury were instructed, at the request of the solicitor general, that should they decide this question in the affirmative, then, "it would be no defense, nor would it mitigate the crime, if the other party fired back at him." Error is assigned on this instruction for the reasons (1) that the fact that the person alleged to have been assaulted shot at the accused was brought out by the state, and not by him; (2) that this fact was never in any manner relied on by him as any part of his defense, as the jury were led to infer from this instruction; and (3) that it tended to impress the jury with the idea that, in the opinion of the court, the circumstance was material to the prosecution, that the accused was guilty, and that he sought to avail himself of a defense which was wholly without merit. The record discloses that the fact that the person assaulted returned the fire was first brought out by counsel for the accused on cross-examination of the prosecutor. Whether the accused did, or did not, urge this circumstance as a matter of mitigation, it was eminently proper for the court to inform the jury that under the law it could in no way excuse or mitigate the offense. The accused was not en-

titled to any incidental benefit which might accrue to him from the jury being kept in ignorance of what importance the law attached to the conduct of the person assaulted, after he was fired upon.

4. The fourth headnote sufficiently deals with the assignment of error on the charge relating to alibi.

5. In two of the grounds of the motion for a new trial exception is taken to the charge of the court in its entirety, for the reasons that it did not clearly and accurately present the law on the subject of assault, or correctly and impartially state the law bearing upon assault with intent to murder, but was more favorable to the state than to the accused. As has been repeatedly ruled, a general exception of this nature does not properly present any question which can be considered by this court.

Judgment affirmed. All the Justices concur.

(125 Ga. 33)

MORAN v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. ROBBERY—EVIDENCE.

The evidence amply warranted a verdict convicting the accused of robbery by force.

2. CRIMINAL LAW—NEW TRIAL—REVIEW.

No sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; Robt. G. Mitchell, Judge.

Frank Moran was convicted of robbery, and brings error. Affirmed.

Frank Moran was indicted for robbery. The indictment contained two counts, one charging him with wrongfully, fraudulently, and violently taking by force a described pocketbook, and the other charging him with suddenly snatching and taking away the pocketbook. It appeared from the evidence that two men, one of whom was the accused, approached one John King on the platform of a train, and, under pretense of assisting him across from one car to another, caught hold of each arm, forced his hand out of his pocket where he carried his pocketbook, took the pocketbook, and then jumped off the train. King did not know of the theft until after the men had released him. The jury found the accused guilty. His motion for a new trial was overruled, and he excepted.

G. A. Whitaker, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

COBB, P. J. (after stating the foregoing facts). It is contended that the evidence is not sufficient to sustain a verdict for robbery in any form, and at most shows the accused guilty of larceny from the person. In our opinion the verdict is amply sustained, under that count in the indictment

which charged robbery by force. The element of force, which was necessary to constitute a robbery, was present. The hand of the owner of the pocketbook was pulled out of his pocket, where the pocketbook was kept. See *Smith v. State*, 117 Ga. 320, 43 S. E. 736, 97 Am. St. Rep. 105, and citations. It avails the accused nothing if the person robbed makes no resistance, or is even unconscious at the time that a robbery is being perpetrated. The victim of a sand bag may be stripped while unconscious from the blow. It is not necessary to show a suggestion of force or violence on the part of the person robbed. The force which differentiates robbery from larceny from the person is the force employed by the criminal. It is the act which is supposed to evidence a bolder lawbreaker than a sneak thief. Yet the robbery may be fraudulent, and the force employed be covered by an apparently proper and harmless act, as in the present case, where the force was used in rendering the person robbed helpless to protect his property, although he believed at the time that this force was employed only for the purpose of assisting him across the platform. It is force of this character which, used under such circumstances, raises the offense above that of larceny from the person. Cunning, fraud, and deceit, which may be present in cases of larceny from the person, appear in this transaction; but there is also another element, force, which stamps the act as robbery, rather than larceny. The ruling in *Long v. State*, 12 Ga. 320 (9), is that "force implies actual personal violence, a struggle, and a personal outrage." Force implies the elements so enumerated, and they constitute the force necessary to complete the offense of robbery. While, in the present case, there was no struggle, there was personal violence, and a personal outrage, within the meaning of the law. It is true that resistance by the person robbed has been said to be one of the decisive tests distinguishing robbery from larceny from the person. See *Spencer v. State*, 106 Ga. 695, 32 S. E. 849, and citations. But this test seems to have been applied in only those cases where the person was deprived of his property by a snatching.

There was a general verdict of guilty, which will be applied to that count in the indictment which charged robbery by force, and, as there was ample evidence to authorize the verdict on this count, there was no error in overruling the motion for a new trial so far as the general grounds were concerned. The only special ground of the motion complained of the admission of the evidence, and, as the evidence admitted is not set forth anywhere in the motion, this ground will not be considered.

Judgment affirmed. All the Justices concur.

(125 Ga. 35)

COLE v. STATE.**KING v. STATE.**

(Supreme Court of Georgia. March 22, 1906.)

1. CRIMINAL LAW—APPEAL—REVIEW.

These two cases are controlled in principle by the case of *Moran v. State* (decided this day) 53 S. E. 806.

2. SAME—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where the only effect of evidence offered as newly discovered, in support of a motion for a new trial, is to impeach the testimony of a witness, the new trial will not be granted, under the oft-repeated rulings of this court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2331, 2332.]

3. SAME—EVIDENCE.

The evidence in each case amply supported the verdict, and no errors of law were committed by the trial judge.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; Robt. G. Mitchell, Judge.

Ed. Cole and Joseph King were convicted of crime, and bring error. Affirmed.

G. A. Whitaker, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

BECK, J. Judgment affirmed in each case. All the Justices concur.

(125 Ga. 36)

KING v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES.

There was no error in refusing to continue this case on motion of the defendant's counsel until the next day, to give the defendant an opportunity of getting witnesses from Waycross, by whom he claimed that he could show that "he was a guest of the Southern Hotel at Waycross on the night of the 16th of November, and by whom he could show that he left Waycross on the morning of the 17th, on the train upon which he was arrested in Valdosta." Such ground did not show what witnesses it was expected to obtain, or what they would respectively testify, or what effort, if any, had been made to obtain their presence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1353-1360.]

2. SAME—APPEAL—REVIEW.

The evidence was sufficient to support the verdict. See *Moran v. State* (Ga.) 53 S. E. 806.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; Robt. G. Mitchell, Judge.

James King was convicted of crime, and brings error. Affirmed.

G. A. Whitaker, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(125 Ga. 31)

HALL v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

The evidence on which the state relied to convict the accused of unlawfully selling

spirituous liquors showed that he sold either on his own account or as the agent of his father, and that he was in no sense the agent of the purchaser.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Enoch Hall was convicted of an illegal sale of liquor, and brings error. Affirmed.

T. W. Thurman, for plaintiff in error. T. E. Patterson, for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

(125 Ga. 30)

WALKER v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. CRIMINAL LAW—NEW TRIAL—AMENDMENT OF MOTION—REFUSAL.

When an amendment is offered to a motion for a new trial, it is the better practice to allow the amendment and overrule the motion, if no ground in the original or amended motion is meritorious. But a refusal to allow an amendment to a motion for a new trial will not work a reversal of the judgment, when the amendment offered did not contain a meritorious ground.

2. SAME—EVIDENCE.

The evidence authorized the verdict, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Andrew Walker was convicted of crime, and brings error. Affirmed.

T. W. Thurman, for plaintiff in error. T. E. Patterson, for the State.

COBB, P. J. Judgment affirmed. All the Justices concur.

(125 Ga. 29)

BISHOP v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—EVIDENCE—CONTRADICTORY STATEMENTS.

Upon the trial of a criminal case, incriminating statements, not offered for the purpose of impeachment, previously made against, but not in the presence of, the defendant, by a witness who upon such a trial was sworn for the defendant, are not admissible for the prosecution; and this is true, whether such statements relate to matters of fact or matters of opinion. Accordingly it was erroneous upon such a trial to admit in evidence the statements of the witness made in the absence of the defendant, although thereafter sworn in his behalf, to the effect that he had told the solicitor that he knew that the defendant was guilty.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 950-952.]

(Syllabus by the Court.)

Error from City Court of Forsyth County; W. M. Clark, Judge.

J. M. Bishop was convicted of selling liquor without a license, and brings error. Reversed.

Person & Persons, for plaintiff in error.
H. E. Chambliss, for the State.

ATKINSON, J. The defendant was tried under an accusation in a city court and convicted of the offense of selling liquor without a license. In the course of the trial, a witness who was sworn for the defendant testified as follows: "I went to Mr. Chambliss, the solicitor of the city court, who is with Mr. Rutherford, and he told me that the best thing for Bishop to do, as there were two accusations in the court against him, the best thing for him to do was to plead guilty to one of the accusations, and that he would nol. pros. the other. I told him that I would go to see Mr. Bishop and tell him to do that, as I thought that was the best way out of it, as he had been dealing in whisky before Mr. Chambliss said, 'You know he is guilty, and it will be lighter on him to get the case compromised.' Mr. Bishop was not present during this conversation with Mr. Chambliss and myself. * * * I told Mr. Chambliss that I knew Mr. Bishop was guilty." When the above testimony was offered in evidence, it was objected to by the defendant upon the ground that it was "incompetent, hearsay, irrelevant, and opinion," and the admission of the testimony over the objection of the defendant is made one of the grounds of the motion for new trial.

It is obvious, from the mere statement of the proposition, that the court erred in admitting in evidence the conversation between the solicitor and the witness as above stated. It was not admissible for the purpose of impeachment, because the witness had stated no fact with which the statement was in conflict. It can only be classed as irrelevant and hearsay, and could serve no purpose other than to prejudice the case of the defendant before the jury. To permit a witness, in the absence of the accused, to make a confession for him, is violative of the most elementary principles of criminal law.

Judgment reversed. All the Justices concur.

(125 Ga. 41)

**JOHNSON COUNTY SAVINGS BANK v.
ROBERTS & McCURE.**

(Supreme Court of Georgia. March 22, 1906.)
BILLS AND NOTES—ACTION ON NOTE—EVIDENCE—NEW TRIAL.

The verdict being without evidence to support it, the court erred in not granting a new trial.

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Goher, Judge.

Action by the Johnson County Savings Bank against Roberts & McClure. Judgment for defendants, and plaintiff brings error. Reversed.

The Johnson County Savings Bank sued Roberts & McClure on a promissory note

made by the defendants, dated December 3, 1901, due 12 months after date, payable to the order of the Equitable Manufacturing Company, and indorsed by that company to the plaintiff. The defendants pleaded failure of consideration, and that the plaintiff was not an innocent holder of the note, but purchased the same, if purchased by the plaintiff at all, after its maturity. On the trial the defendants admitted the execution of the note and the plaintiff's ownership thereof. Both the defendants testified that the note was given for a lot of jewelry which turned out to be absolutely worthless. The only evidence as to when and how the plaintiff acquired title to the note was the testimony of W. A. Fry, who swore that the plaintiff purchased it outright, before maturity, March 18, 1902, giving full face value for it, less 7 per cent. discount; that "the Johnson County Savings Bank had no knowledge of any failure of consideration, or other defense on this note at the time of the purchase, nor did they know anything relative to the transaction for which the notes were given in payment." He further testified that he was cashier of the plaintiff bank and purchased the note for the bank, and was at that time treasurer and cashier of the Equitable Manufacturing Company. There was a verdict for the defendants. The plaintiff's motion for a new trial being overruled, it excepted.

J. S. Du Pre and Dodd & Dodd, for plaintiff in error. G. I. Leasley and D. W. Blair, for defendants in error.

FISH, C. J. (after stating the facts). A bona fide holder of a negotiable promissory note, receiving the same before due, for value, is protected against a plea of failure of consideration. The holder of a negotiable promissory note is presumed to be such bona fide, and for value; if either fact is negated by proof, the defendants are let in to all their defenses; such presumption is negated by proof of any fraud in the procurement of the note. Civ. Code 1895, § 3696. "Fraud in the procurement of the note" means fraud in its procurement by the holder thereof, and has no reference to fraud in the contract out of which the note arises. Pate v. Allison, 114 Ga. 651, 40 S. E. 715, and citations. The defendants in the present case admitted they executed the note sued on, and that the plaintiff was the owner thereof. Not only was there a presumption that the plaintiff was the bona fide holder, and for value, but there was positive and uncontroverted evidence that the plaintiff purchased the note for value, before maturity, and without notice of the transaction in which the note was given, or of any failure of its consideration, or of any other defense to it. The mere fact that the cashier of the plaintiff bank was, at the time he discounted the note for the benefit of the bank, treasurer and cashier of the

Equitable Manufacturing Company, the payee of the note, was not of itself sufficient to impute notice to the bank of the failure of consideration of the note. Even assuming that such cashier, by reason of the relation he held toward the bank, should have known what its consideration was, there was no evidence that the consideration had failed when he discounted the paper as cashier of the bank, and if there had been, there was no evidence that he had notice of the fact. Nor was there any evidence that the bank had fraudulently procured the note. We are quite clear, therefore, that the verdict was without evidence to support it, and that a new trial should have been granted.

Judgment reversed. All the Justices concur.

(125 Ga. 6)

BROUGHTEN v. STATE.

(Supreme Court of Georgia. March 22, 1906.)
CRIMINAL LAW—APPEAL—REVIEW.

The special assignments of error, in the motion for a new trial, on the admission of evidence and on the instructions of the court, were without merit. The evidence amply warranted the verdict, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

George Broughten was convicted of crime, and brings error. Affirmed.

Zack Childers and R. L. Maynard, for plaintiff in error. F. A. Hooper, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(125 Ga. 7)

TISON v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. ADULTERY—EVIDENCE.

Upon the trial of one charged with the offense of adultery, it is necessary, in order to authorize a conviction, to prove by competent evidence that at the time of the alleged offense both the accused and the other person alleged to have participated in the criminal act were married persons. Kendrick v. State, 28 S. E. 120, 100 Ga. 360.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adultery, §§ 2, 3.]

2. CRIMINAL LAW—ADULTERY—EVIDENCE—HEARSAY—MARRIAGE OF ACCUSED.

The testimony of a witness that the man with whom the accused was alleged to have committed the offense "claims to be a married man" was merely hearsay, and such evidence has no probative value. See Equitable Mortgage Co. v. Watson, 46 S. E. 440, 119 Ga. 283, and citations.

3. ADULTERY—EVIDENCE—SUFFICIENCY.

There being no evidence that the man named in the accusation was a married man at the time of the commission of the alleged offense, the verdict was unauthorized, and the court erred in not setting it aside.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Mollie Tison was convicted of crime, and brings error. Reversed.

Payton & Hay, for plaintiff in error. J. H. Tipton, Sol., for the State.

FISH, C. J. Judgment reversed. All the Justices concur.

(125 Ga. 31)

ELLIOTT v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

ADULTERY—EVIDENCE.

Where one is convicted of the offense of adultery and fornication, and the evidence does not disclose that either the accused or the other party participating in the criminal act is married, the verdict is without evidence to support it, and a new trial should be granted. Kendrick v. State, 28 S. E. 120, 100 Ga. 360; Tison v. State (Ga.) supra.

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peoples, Judge.

John Elliott was convicted of crime, and brings error. Reversed.

Hendricks, Smith & Christian, for plaintiff in error. W. D. Bule and W. G. Harrison, for the State.

BECK, J. Judgment reversed. All the Justices concur.

(125 Ga. 15)

COLLINS v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

VAGRANCY—EVIDENCE.

Where a charge of vagrancy, under the act of 1905, was brought against a minor over 16 and under 21 years of age, and it did not appear that her parents were unable to support her, a verdict of guilty was not warranted by the evidence. Braswell v. State, 45 S. E. 963, 119 Ga. 72.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Vagrancy, §§ 1, 3.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Dacie Collins was convicted of vagrancy and brings error. Reversed.

Guyton Parks and E. W. Maynard, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(125 Ga. 30)

SMOOT v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. CRIMINAL LAW—ASSIGNMENT OF ERROR.

An assignment of error that the court erred in admitting evidence over the objection of the accused is not well made, when it does not appear what the objection to the evidence was.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2953.]

2. SAME—APPEAL—REVIEW.

The evidence warranted the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

E. C. Smoot was convicted of crime, and brings error. Affirmed.

T. W. Thurman and J. J. Flynt, for plaintiff in error. T. E. Patterson, for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(125 Ga. 27)

MITCHELL v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—APPEAL—REVIEW.

There was no merit in any of the assignments of error attacking the court's charge, the evidence warranted the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Jim Mitchell was convicted of crime, and brings error. Affirmed.

Payton & Hay, for plaintiff in error. J. H. Tipton, for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(125 Ga. 24)

LUMPKIN et al. v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—EVIDENCE—REMARKS OF THIRD PERSON.

Before the sayings of a third person, made in the presence of one who is subsequently charged with the commission of a criminal offense, should be admitted in evidence against him, there should be proof affirmatively disclosing that the circumstances were such as to call upon the accused to make some response to what was said in his presence. The circumstances must require an answer or denial, or other conduct, before silence will amount to an implied admission.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 898, 899.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

M. W. Lumpkin and others were convicted of robbery, and bring error. Reversed.

T. J. Ripley, R. R. Shropshire, and W. E. Suttles, for plaintiffs in error. C. D. Hill, Sol. Gen., for the State.

EVANS, J. The plaintiffs in error were jointly indicted for robbery, and upon their conviction moved for a new trial, which was refused. They sued out a bill of exceptions, assigning error upon the overruling of their motion for a new trial, in which they

complained, among other things, of the illegal admission of certain testimony. The prosecutor testified that he was set upon by three negro women, and a sum of money was forcibly taken from his person by one of them. The pressure of the case was upon the identity of the accused. Another witness testified that he was a police officer and received a telephone request to come to the scene of the alleged robbery; that he promptly responded and arrived there within a few minutes, when he was informed by the prosecutor that he had been robbed by three women; that the prosecutor indicated a house in which he said the three women had gone after the robbery, whereupon the witness knocked on the door and entered a room in which he found two of the defendants and a colored man. Over objection of counsel for the accused, this witness was further permitted to testify: "I hadn't mentioned anything about what we were wanting at all, and this negro man spoke up and says, 'How much money did they get off of the old man?' That was before I opened my mouth in the presence of these women. He said it in their presence and before he knew what we wanted at all." The objection to this testimony was that the sayings of a third party could not bind the defendants, even though made in their presence. The court overruled this objection, in so far as concerned the two defendants who were present in the room when this occurred.

Before the sayings of a third person, made in the presence of one who is subsequently charged with the commission of a criminal offense, should be admitted in evidence against him, there should be proof affirmatively disclosing that the circumstances were such as to call upon the accused to make some response to what was said in his presence. The circumstances must require an answer or denial, or other conduct, before silence will amount to an implied admission. Pen. Code 1895, § 1003. The only purpose for which the evidence objected to could be used by the prosecution was to make it the foundation of an inference that the two women found in the room with this negro man had informed him of the robbery, and that they knew they had robbed the prosecutor, and that the officer, accompanied by the prosecutor, was upon their track and had discovered their whereabouts. If, in point of fact, the negro man was told by the women of the robbery, he was a competent witness to so testify, and it was incumbent on the state to prove its case by direct evidence, not by mere hearsay. For aught that appears, this third person may have obtained his knowledge of the robbery from a report made by the person who was robbed, or from persons other than the defendants; and the fact that he made the remark to the officer in the presence of two of the defendants did not demand an explanation from them as to the source from which he had acquired his information con-

cerning the robbery. The remark was addressed to the officer, not to them, and it is purely a matter of inference whether or not the speaker referred to the defendants as the persons who had taken the money of the prosecutor. Unless the accused understood that he meant to charge them with the robbery, certainly they were under no obligation to make any explanation or reply. *Simmons v. State*, 115 Ga. 576, 41 S. E. 983, and citations. As was said by Warner, J., in *Rolfe v. Rolfe*, 10 Ga. 146, nothing "can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction; some assertion made to the party with respect to his right, which, by his silence, he acquiesces in." In the present case it does not appear that the defendants in whose presence the remark was made remained silent, or indicated by their conduct that they understood they were under suspicion, or that the remark made to the officer had any reference to them. Under the circumstances, we think the accused were not called on to speak, and that the court should have rejected the testimony of the officer to which objection was made.

The other assignments of error relate to matters with which it is unnecessary to deal, as we feel constrained to order a new trial for the reasons above indicated, and none of the questions thereby presented can have any practical bearing upon another hearing of the case.

Judgment reversed. All the Justices concur.

(125 Ga. 18)

TIBBS v. CITY OF ATLANTA.

(Supreme Court of Georgia. March 22, 1906.)

1. CERTIORARI—WHEN LIES—BOARD OF POLICE COMMISSIONERS.

A judgment of a board of police commissioners, discharging a policeman, after a trial in the manner prescribed by the law creating the board, is subject to review on certiorari.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 38; vol. 36, Cent. Dig. Municipal Corporations, § 505.]

2. MUNICIPAL CORPORATIONS—POLICE COMMISSIONERS—TRIAL OF POLICEMAN.

Where the charter of a city vests the authority in such a board to select, control, and discipline the police force of the city, and no provision is made for disqualifying a member from acting in a case where he may be biased or prejudiced against the policeman on trial, an objection cannot be properly made to a member of a board participating in the trial on this ground.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 497.]

3. SAME—MEMBERSHIP OF BOARD.

Where the membership of the board is increased by a statute enacted pending a trial, the new member added under the authority of such a statute has no right to participate in the trial; and this is true, although the person who has become a member was present at all

the sittings of the board, and heard all the evidence adduced on the trial.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 497.]

4. SAME—DISMISSAL OF POLICEMAN.

A board of police commissioners may discharge a policeman for conduct prior to his employment, when it subsequently appears that such conduct would disqualify the person from efficient service, or the retention of such person is not calculated to improve the discipline or efficiency of the force. Especially is this true where the conduct consists of acts done during a previous term of service as a policeman.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 492, 503.]

5. CERTIORARI—REVIEW—SCOPE—REMOVAL OF POLICEMAN.

The result of a trial before such a board, as expressed in its findings, like a verdict in an ordinary case, is to have a reasonable intentment, and a reasonable construction, and is not to be set aside except for necessity.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 504-507.]

6. MUNICIPAL CORPORATIONS—REMOVAL OF POLICEMAN—EVIDENCE—SUFFICIENCY.

The finding of the board in the present case was in effect that the policeman was guilty as charged, and as such was authorized by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. L. Pendleton, Judge.

Certiorari by S. T. Tibbs against the city of Atlanta. From an order overruling the certiorari, Tibbs brings error. Affirmed.

Tibbs, a patrolman in the police department of the city of Atlanta, was tried before the board of police commissioners upon certain charges, specification No. 2 being in the following language: "Circulating false reports against an officer, knowing them to be false when so circulated." This was afterwards amplified so as to read as follows: "That Officer Tibbs on March 26, 1903, circulated a report by making an affidavit which is dated March 26, 1903, in which he states that on Monday morning, which was March 23d in which he claims that I made use of the following expressions: 'I heard him talking about Paul Hubbard. I don't give a damn. I have got four commissioners on my side, and I am going to do as I damn please while I am down here,' etc.—the same being untrue when so made." A hearing was had at which Tibbs was present, represented by counsel. Witnesses for both sides were sworn and examined. Tibbs was acquitted of all the charges save specification No. 2, the finding of the board on that charge being as follows: "that he (Tibbs) be found guilty of charge and specification No. 2, in that he made an affidavit that Capt. Moon had used certain language, in speaking about Paul Hubbard and the commissioners, which had not been proven true."

A motion was then adopted "that he (Tibbs) be discharged from the force." Tibbs applied to the superior court of Fulton county for a writ of certiorari, and, in his petition, assigned error upon the finding of the board

of commissioners, for the following reasons: (1) That over the objection of Tibbs a designated member of the board was permitted to participate in the trial, who had used expressions, prior to the hearing, showing bias and prejudice against him. (2) That the board of commissioners refused to permit the chairman of the police committee of the city council of Atlanta to participate in the trial, an amendment to the charter of the city of Atlanta having been passed, pending the trial, making the chairman of that committee, ex officio, a member of the board of police commissioners. (3) That the board of commissioners refused, upon motion made by a member, to reconsider their action. (4) That the verdict was contrary to the evidence. Errors were also assigned upon the form of the judgment. The writ was sanctioned, the board of commissioners answered, and, after a hearing, the certiorari was overruled. To this ruling Tibbs excepted.

Walter McElreath, for plaintiff in error.
J. L. Mayson and W. P. Hill, for defendant in error.

COBB, P. J. (after stating the foregoing facts). The proceeding before the board of police commissioners was quasi-judicial in its nature, and the judgment of the board is subject to review like that of any other tribunal exercising judicial functions. See *Carr v. Augusta*, 124 Ga. 116, 52 S. E. 300; *Gill v. Brunswick*, 118 Ga. 85, 44 S. E. 830, and *cit.*

2. The board, as organized for the purpose of trial, if not technically a court, was certainly about to proceed in the exercise of judicial functions. Its members partook both of the nature of judges and jurors. They were to decide both the law and the facts of the case under consideration. While they had imposed upon them the duties usually required of jurors, they acted more in the nature of judges than jurors; that is, they were judges authorized by law to pass upon questions of fact. They are to be dealt with, therefore, under the rules controlling the powers, duties, and conduct of judges. The accused, at the inception of the trial, objected to one of the members of the board presiding in the case, the ground of objection being that he had, prior to the trial of the case, used expressions indicating bias or prejudice against the accused. The board overruled this objection, and the trial proceeded, with the alleged disqualified member participating so far as the hearing of evidence and argument, and consultation, were concerned. It appears from the record that he did not vote upon the question of guilt or innocence, nor on the question of punishment to be imposed. It is claimed that his presence on the board during the progress of the case vitiated the trial. It is an ancient rule that a man cannot be a judge in his own case. The maxim which lays down this rule is founded upon

common justice and common decency. It was said in one case that even an act of Parliament could not make a man a judge in his own case. *Day v. Savage*, Hob. 87. There are rulings in this country to the effect that it is beyond the scope of legislative authority to confer power upon a person to act as a judge in his own case. 17 Am. & Eng. Ency. Law (2d Ed.) 733. At common law, when the judge had an interest in the case, that is, such an interest as would disqualify a witness under the common-law rule, he was prohibited from presiding in the case. Relationship to a party, or having acted as counsel, or having presided in the case as a judge in an inferior court, did not disqualify a judge at common law. These are disqualifications under the statute in this state, if the degree of relationship is within the fourth degree of consanguinity or affinity. Civ. Code 1895, § 4045. Prejudice or bias on the part of the judge, not based on interest, nor on any other ground not named in the statute, exhibition of partisan feeling, or unnecessary expression of opinion upon the justice or merits of the controversy, are, as a general rule, not assignable as a ground for disqualification. While the use, by one who is to preside in a case, of expressions indicating bias or prejudice against a party are exceedingly indecorous, improper, and reprehensible, and calculated to throw suspicion upon the administration of the law, in the absence of a statute they cannot be made a ground of disqualification. 17 Am. & Eng. Enc. Law (2d Ed.) 733; *Taylor v. Williams*, 26 Tex. 583; *In re Davis' Estate* (Mont.) 27 Pac. 342; *Sjoberg v. Nordin* (Minn.) 5 N. W. 677; *McDowell v. Levy* (Cal.) 8 Pac. 857. The judge who is conscious of prejudice or bias in his own mind might well decline to preside, and even if unconscious of it, if such an objection is made, and the circumstances are such that his presiding would be calculated to bring discredit upon the administration of the law, he might, with propriety, refuse to participate in the trial. But if a judge so situated is a member of a board, and there is no provision of law for filling his place in case he should be disqualified, or decline to preside, and his absence would reduce the board to a number less than a quorum, he should not refuse to participate in the trial, and thus prevent the due course of the administration of the law. There being nothing in the general law of this state which would disqualify the member of the board to whom objection was made, and there being nothing in the act creating the board which would have this effect, the objection of the accused to the member sitting was properly overruled.

3. While the trial was pending, an act of the General Assembly was passed increasing the membership of the board of police commissioners by making the chairman of the police committee of the city council, ex officio, a member. The person who held

this position at the time the trial began, as well as at the time that the act was passed, was present as a spectator during all of the stages of the trial, and, after the passage of the act, asked that he be allowed to take part in the subsequent proceedings of the trial as a member of the board. The board declined to allow him to take any part in the trial as a member of the board. There was no error in this ruling. While he heard the evidence, he was not a member of the board at the time he heard it, and therefore did not hear it under those conditions under which the law contemplates that one acting as a judge should hear it. He did not realize, at the time that he heard the evidence, that he was to pass upon it in a judicial capacity, and it is natural that he would not have paid such attention to what was transpiring before the board as he would have done if he had been conscious of the responsibility resting upon him. In addition to this, the trial should be had before the board as it was constituted by law at the time the trial began; and it is not to be presumed that the General Assembly intended that the new member should participate in a pending trial. In the absence of express terms in the legislative act, a result such as would have been brought about by allowing the new member to preside will not be permitted. It is by no means clear that the General Assembly would have the power to do it by express declaration.

4. It was contended that the board had no right to discharge Tibbs for the reason that the act he was charged with had been committed before his term of service began. It appeared that Tibbs had been serving as a policeman and that his term had expired, and it was during the service of this expired term that he committed the act charged against him. He was afterwards re-elected. The contention is that after a policeman has been elected the board of police commissioners have no right to discharge him for conduct prior to his election, if such conduct was known to the board at the time of his election. We cannot assent to a proposition which will so hamper the board in its control of the officers of the police department. The board may know of the conduct of an individual who is elected, and at the time of the election may not have a just appreciation of the injurious effects upon the efficiency and discipline of the force that the election of such a person would have, and it would be disastrous to the public interests if they were compelled to keep in the employ of the city a policeman whose conduct was, prior to his election, of such a character as to make him a disturbing element in the force. As was said by Judge Jackson, in his concurring opinion in *Queen v. City of Atlanta*, 59 Ga. 322: "The public commission-

ers, in my judgment, have full control of the police force of the city of Atlanta. It is their duty to see to it that this force is fit for duty, and it may take cognizance of the conduct of the police, past or present, which unfits them, or either of them, for duty. * * * The jurisdiction of the commissioners extends over his whole character and conduct. And it ought to be so." Especially would this be true in a case where a policeman had been serving the city, had been re-elected from time to time, and the conduct which was made the basis of the discharge was an act done while a policeman, and of such a nature as inevitably to produce serious injury to the proper discipline of the force.

5. The finding of the board is not couched in that perspicuous language which would be used by an accurate and painstaking lawyer, but being in effect the verdict in the case, it at least should be dealt with in the same way that the law deals with an ordinary verdict. Every reasonable intendment is to be indulged in its favor. A reasonable construction is to be placed upon its language, and it is not to be avoided and set aside unless it is absolutely impossible to determine what was the intent of the commissioners. There can be no doubt but that it was the intent of the commissioners to find the accused guilty of specification No. 2 in the charge. The latter part of the finding does produce some confusion, and one disposed to be hypercritical might see in these words that the police commissioners had placed the burden upon the accused of proving his innocence. But such is not a reasonable construction of the verdict. It simply means this: the accused is guilty of circulating a report which we find to be false, and there is no evidence before us to authorize any other finding. While we have construed this finding under the ordinary rules in reference to verdicts, there is authority that the findings of an inferior judiciary of the class to which this board belongs are to be construed even more liberally than verdicts are construed. *People v. Com'rs*, 93 N. Y. 103.

6. There was evidence to authorize the finding, and the judge of the superior court has approved the same, and we see no reason why his discretion should be controlled. It appears, that at a subsequent meeting of the board a motion was made to reconsider the action in finding Tibbs guilty and dismissing him from the force, and that a majority of the board voted against this motion. Error is assigned, in the certiorari, upon the refusal of the board to reconsider its action. Even if the board had authority to reconsider its action in the matter so far as setting aside their judgment, there is nothing which appears in the record which renders erroneous the refusal in the present case. The board has very broad

powers, and probably has the right to reinstate a policeman upon the force, notwithstanding his conviction and dismissal after a trial; but it is to be doubted whether a right to set aside a judgment of dismissal rests in the board. As it is an inferior adjudicatory such an action would be in effect the granting of a new trial. It might, without regard to the former judgment, re-elect the policeman or reinstate him, but the judgment of dismissal, with all its legal consequences, whatever they might be, would remain unchanged, until that judgment was set aside in the manner prescribed by law. We see no reason for reversing the judgment.

Judgment affirmed. All the Justices concur.

(125 Ga. 1)

DUREN v. CITY OF THOMASVILLE.

(Supreme Court of Georgia. March 22, 1906.)

1. JURY—RIGHT TO JURY TRIAL.

One accused of violating an ordinance of a municipality is not entitled to trial by jury when arraigned in the municipal court.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 152.]

2. CRIMINAL LAW—EVIDENCE UNLAWFULLY PROCURED.

Evidence tending to establish the guilt of one accused of crime, procured by an unlawful search of the premises of the accused before he is charged with the commission of the offense, is admissible against him upon his trial therefor, although he protested against such search and seizure at the time they were made.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 875, 876.]

3. SAME—APPEAL—OBJECTIONS NOT RAISED BELOW.

Neither the superior court nor this court can consider questions raised in a petition for certiorari that were not before the trial judiciary.

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Tom Duren was convicted of violating an ordinance of the city of Thomasville, and brings error. Affirmed.

Theo. Titus, for plaintiff in error. W. C. Snodgrass, for defendant in error.

BECK, J. Duren was convicted in the mayor's court of Thomasville of having on hand for sale certain intoxicating liquors. He applied to the judge of the superior court for a writ of certiorari, alleging that the verdict was contrary to the evidence, that the mayor erred in refusing to allow him a trial by jury and in refusing to exclude certain evidence, and that the verdict was contrary to law, in that the ordinance under which he was convicted was void. The certiorari was denied, and Duren excepted.

1. There is no merit in the contention of the accused that he was entitled to be tried by a jury. *Little v. Mayor*, 123 Ga. 503, 51 S. E. 501.

2. The evidence admitted over the objection of the defendant, complained of in the petition for certiorari, was the following testimony of the city marshal, who had previously sworn that he had been informed the accused was in possession of intoxicants: "I telephoned to Mayor Roddenbery and reported the matter to him. He told me over the phone to take the policemen and search Mr. Duren's [accused's] store, and, if we found any whisky or intoxicants, to seize them and bring them to him. I went with * * * two policemen and searched Mr. Duren's store, over his protest, and found a quantity of intoxicants. It was in packages. We seized and by order of the mayor we destroyed it. I have saved one of the bottles I seized, and have it here [exhibiting bottle]. We had no warrant for Mr. Duren, or any other authority to search his place of business or seize his goods, except the order of the mayor over the phone. We did not arrest him before the search was made." This evidence was objected to on the ground that the marshal's information "was acquired by forcible and unlawful search of petitioner's premises and seizure of his goods under a verbal order issued by the mayor (he being the judge of said police court the day said order was issued), for the express purpose of procuring testimony upon which to found the charge against petitioner, and upon which to subsequently try and convict him, and upon the further ground that the same was inadmissible because in violation of the Constitution and laws of Georgia providing that no man shall be compelled to furnish testimony upon which to convict himself." That this evidence was admissible cannot now be doubted. See the well-considered opinion in *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269, where it was held that evidence is not inadmissible, though it "be the fruits of an illegal and wrongful search and seizure." And, as clearly pointed out in the case of *Dozier v. State*, 107 Ga. 710, 33 S. E. 418, there is a vast difference between searching the premises of one suspected of crime and seizing any evidence of guilt, and compelling the person under suspicion to himself produce the evidence upon which he could be convicted. The criterion is, who furnished or produced the evidence? If the person suspected is made to produce the incriminating evidence, it is inadmissible. *Evans v. State*, 106 Ga. 519, 32 S. E. 659, 71 Am. St. Rep. 269. But if his person or belongings are searched by another, although without a vestige of authority, the evidence thus discovered may be used against him. *Williams v. State*, supra. There is no contention that the defendant in the instant case furnished the evidence; the undisputed testimony being that it was found by the marshal during his unlawful search. Hence we hold that, under the repeated rulings of this court, the evidence was admissible.

3. The ground that the ordinance is void

was not presented to the consideration of the trial court, and therefore will not be considered. *Hood v. Mayor*, 113 Ga. 190, 38 S. E. 409. The evidence warranted the verdict.

Judgment affirmed. All the Justices concur.

(125 Ga. 10)

BENNETT v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—CERTIORARI—FAILURE TO FILE AFFIDAVIT.

For the want of the requisite affidavit, this case comes within the ruling in the case of *King v. State*, 50 S. E. 64, 122 Ga. 153, wherein it was held that "this court will not interfere with the order of the judge of the superior court refusing to sanction a writ of certiorari from a judgment of conviction in a county court, where the record fails to show that the petitioner filed the affidavit required by Pen. Code 1895, § 765."

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

C. Bennett was convicted of crime. From an order denying a writ of certiorari, he brings error. Affirmed.

C. O. Dobbs and Jos. W. Green, for plaintiff in error. S. J. Tribble, Sol. Gen., J. N. Poole, Sol., and D. K. Johnston, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(125 Ga. 6)

CÆSAR v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—REMARKS OF PROSECUTING ATTORNEY.

This case, upon its facts, is controlled by the decision of this court in *Minor v. State*, 43 S. E. 198, 120 Ga. 490, and a new trial is ordered solely because of the improper argument of counsel for the state touching the failure of the accused to avail himself of his privilege of making a statement to the jury in his own behalf.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1672.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Lewis Cæsar was convicted of crime, and brings error. Reversed.

Payton & Hay, for plaintiff in error. J. H. Tipton, Sol., for the State.

ATKINSON, J. Judgment reversed. All the Justices concur.

(125 Ga. 6)

THOMPSON v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

CRIMINAL LAW—APPEAL—REVIEW.

No errors of law are complained of; the evidence, though circumstantial, was sufficient to authorize a conviction; and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Douglas; Levi O'Steen, Judge.

W. A. Thompson was convicted of crime, and brings error. Affirmed.

J. J. Rogers, for plaintiff in error. M. D. Dickerson and W. C. Lankford, for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(125 Ga. 3)

ARMOR v. STATE.

(Supreme Court of Georgia. March 22, 1906.)

1. JURY—IMPANELING—DISQUALIFICATION—SETTING ASIDE.

After a jury has been impaneled, and before the prosecuting counsel submits any of his evidence in the case, if it is discovered that a member of the jury is disqualified, he may be set aside and a new jury impaneled. The fact that the order recites that, upon the disqualification of the juror being ascertained, the solicitor moved that a mistrial be declared, and the defendant's counsel objected; that the motion was withdrawn, and the solicitor offered to proceed to trial before the jury as impaneled, or before the remaining qualified jurors; that the defendant's counsel objected to both of these motions; and that the solicitor renewed his former motion to have a mistrial declared, which was sustained—does not alter the ruling set forth above.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 635.]

2. CRIMINAL LAW—CONTINUANCE.

It appearing that after a mistrial was declared the case was continued to the next term, and there being nothing to show that there were other jurors present, or that there was not sufficient ground for such continuance, error will not be presumed on that account.

3. SAME—FORMER JEOPARDY.

After another jury had been impaneled, a plea of former jeopardy, which set forth the occurrence as stated in the preceding notes, was properly stricken.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 340.]

(Syllabus by the Court.)

Error from Superior Court, Tallahassee County; H. M. Holden, Judge.

Andrew Armor was convicted of crime, and brings error. Affirmed.

The case came on for trial at the March term of the county court. After the jury had been impaneled and sworn, and after arraignment and plea, but before any evidence had been introduced, it was discovered that one of the jurors was a first cousin of the prosecutor. Upon this being made to appear, the solicitor made the motion resulting in the ruling set out in the first headnote. The case was then continued, and at the April term was again called for trial, and the plea of former jeopardy was filed, which was stricken by the court on motion. The defendant was found guilty, and sued out a writ of certiorari to the superior court, and upon the hearing it was overruled, and the verdict and judgment affirmed. The defendant excepted.

J. A. Beazley, for plaintiff in error. David W. Meadow, Sol. Gen., and Hanes Cloud, Sol., for the State.

LUMPKIN, J. (after stating the facts). Our rulings are sufficiently stated in the headnotes. There is no controversy that the juror was disqualified. The right to set aside a juror under such circumstances and to continue the case, if there be ground for it, is settled. See Pen. Code 1895, § 973, par. 4; Jackson v. State, 51 Ga. 402.

Judgment affirmed. All the Justices concur.

(125 Ga. 48)

LEWIS v. STATE.

(Supreme Court of Georgia. March 23, 1906.)

1. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

In the absence of a proper written request, it is not error for the trial court to fail to instruct the jury on the subject of impeachment of witnesses, credibility of witnesses, or the rule as to reconciling conflicting testimony. See Steed v. State, 51 S. E. 627, 123 Ga. 569 (3); Freeman v. Coleman, 14 S. E. 551, 88 Ga. 421 (3); Stevens v. Cen. R. Co., 5 S. E. 253, 80 Ga. 19 (3).

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2007.]

2. HOMICIDE—INSTRUCTIONS.

There being nothing in the evidence to authorize such a charge, it was proper for the court to omit the law of involuntary manslaughter from its instructions to the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1980-1984.]

3. SAME—EVIDENCE.

The evidence warranted the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Hays Lewis was convicted of murder, and brings error. Affirmed.

R. E. Lee and F. F. Calloway, for plaintiff in error. F. A. Hooper, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(125 Ga. 48)

GRAHAM v. STATE.

(Supreme Court of Georgia. March 23, 1906.)

1. HOMICIDE—EVIDENCE—STATEMENT OF ACCUSED.

The evidence disclosing that the accused, a few minutes before the homicide, went to the house of another and procured a gun, the court did not err in refusing to rule out further testimony to the effect that when the accused returned to the house with the gun immediately after firing it, he remarked, referring to the deceased, "I have got the scoundrel." This incriminating statement by the accused was relevant, not only as an admission of the killing, but as showing his feelings towards the deceased. Powell v. State, 29 S. E. 309, 101

Ga. 10, 65 Am. St. Rep. 277 (4); Owens v. State, 48 S. E. 21, 120 Ga. 296, 299.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, §§ 367, 368.]

2. SAME—THREATS.

Evidence of an uncommunicated threat made by the accused against the deceased some three months or more before the homicide was also admissible, as tending to show that the accused was actuated by malice. McDaniel v. State, 27 S. E. 158, 100 Ga. 67.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, §§ 293-295.]

3. CRIMINAL LAW—APPEAL—OBJECTIONS TO INSTRUCTIONS.

When an instruction given by the court to the jury is in general terms excepted to as being erroneous, a complaint, made in the brief of counsel for the plaintiff in error, that the charge, though correct in the abstract, was not adjusted to nor warranted by the facts shown by the evidence, cannot be considered. Stansell v. Merchants' Bank, 51 S. E. 321, 123 Ga. 278.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2025.]

4. HOMICIDE—INSTRUCTIONS—MANSLAUGHTER.

Neither under the evidence nor according to the prisoner's statement was the killing of the deceased voluntary manslaughter, and the court therefore properly declined to charge the jury concerning the law bearing on this grade of homicide.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, §§ 650-653.]

5. CRIMINAL LAW—INSTRUCTIONS.

It is not cause for a new trial that the court failed to instruct the jury "as to the credibility of witnesses"; no request to do so having been made by counsel. Stevens v. Railroad Co., 5 S. E. 253, 80 Ga. 19; Freeman v. Coleman, 14 S. E. 551, 88 Ga. 421; Lewis v. State (this day decided) supra.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1889, 1890, 1896-1899.]

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

John Graham was convicted of murder, and brings error. Affirmed.

R. E. Lee and G. C. Webb, for plaintiff in error. T. A. Hooper, Sol. Gen., Allen Fort, Jr., and Jno. C. Hart, Atty. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

(125 Ga. 53)

RAVEN v. STATE.

(Supreme Court of Georgia. March 23, 1906.)

1. CRIMINAL LAW—MISTRIAL—REMARKS OF COURT.

When a controversy has arisen between counsel for the accused and the solicitor as to whether or not the venue has been proved, it is not error for the court to state that a witness testified that the offense occurred in the county; such being the fact. It follows that a motion to declare a mistrial because of such statement by the court was properly overruled. Wiggins v. State, 5 S. E. 503, 80 Ga. 468; Barnes v. State, 15 S. E. 313, 89 Ga. 316.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1529-1533.]

2. SAME—APPEAL.

The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Fayetteville; W. B. Hollinsworth, Judge.

Joe Raven was convicted of crime, and brings error. Affirmed.

J. W. Wise, for plaintiff in error. J. W. Culpepper, for the State.

COBB, P. J. Judgment affirmed. All the Justices concur.

(125 Ga. 52)

LIPHAM v. STATE.

(Supreme Court of Georgia. March 23, 1906.)

1. INDICTMENT—DESIGNATION OF OFFENSE.

It is not the name, but the description, of the crime, which characterizes the offense charged.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 180.]

2. INCEST—STEPCHILD.

A man who marries the mother of an illegitimate daughter becomes the stepfather of such child, within the meaning of section 380 of the Penal Code of 1895, and of section 2413 of the Civil Code of 1895.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Incest, § 4.]

3. SAME—EVIDENCE.

In the trial of one charged with incest, evidence tending to establish acts of incest at times other than and prior to that relied on for a conviction is admissible as throwing light upon the relations of the parties toward each other.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Incest, § 11.]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

John Lipham was convicted of crime, and brings error. Affirmed.

J. A. Wilkes, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

COBB, P. J. The material portion of the indictment was in the following words: "The grand jurors charge and accuse and present John Lipham, of the county and state aforesaid, with the offense of a felony, for that the said John Lipham, in the county aforesaid, on the first day of July, in the year of our Lord nineteen hundred and four, with force and arms and unlawfully, being then and there a married man, did have sexual intercourse with and carnally know one Della Tipper, who was then and there an unmarried woman, and was then and there the stepdaughter of him the said John Lipham." There was a demurrer to this indictment, which alleged that it charged no offense under the laws of this state; that it charged the accused with a felony, and it does not appear of what the felony consisted; that it does not charge the accused with the com-

mission of incestuous fornication or incestuous adultery, nor does it allege that either of these acts was committed; and it does not charge the offense of incest in any manner whatever. This demurrer was overruled, and this ruling is made the basis of one of the assignments of error. The Penal Code provides that any person guilty of incestuous adultery or incestuous fornication shall be punished by confinement in the penitentiary. Pen. Code 1895, § 380. The Code does not attempt to define the offense of incestuous fornication or incestuous adultery. Adultery or fornication, committed by persons who are prohibited by law from marrying on account of being related within certain degrees of consanguinity or affinity, is incestuous. See *Cook v. State*, 11 Ga. 56, 58 Am. Dec. 410. The Code prohibits the marriage of a man with his stepdaughter, and declares such a marriage to be incestuous. Civ. Code 1895, § 2413. The presentment, therefore, in its descriptive parts, sets out an offense against the laws of this state.

But it is said that the name of the offense is not set out in the presentment; that it should be alleged that the accused was guilty of incestuous adultery, whereas it was simply alleged that he was guilty of a felony. It is immaterial what the offense is called, if the averments of the presentment are such as to describe an offense against the laws of the state. It is not the name given to the offense in the bill which characterizes it, but the description in the averments of the indictment. *Camp v. State*, 3 Ga. 419, Van. Epp's Annotations, Id. 421.

2. Upon the trial the evidence of the state established the fact that the alleged stepdaughter was the illegitimate child of the wife of the accused, born before the marriage of the mother with the accused. The question to be determined is whether such a child becomes a stepdaughter, within the meaning of Civ. Code 1895, § 2413, which declares that a marriage between a man and his stepdaughter is incestuous. Dictionaries and text-books with unanimity define a stepdaughter to be the child of a wife or husband by a former marriage. If this definition is controlling, the illegitimate child of the husband or wife before their marriage would not become the stepchild of the other party to the marriage contract. Section 2413 of the Civil Code of 1895 is founded upon the Roman law. See *Hunter's Roman Law* (3d Ed.) 686. "Only the children begotten in legitimate marriage had juristically a father and paternal relations. On the other hand, as regards the mother and the maternal relations, the law made no difference between their children begotten in wedlock and out of wedlock." *Salkowski's Roman Private Law*, p. 217. This distinction is followed, at least to some extent, in this state. A bastard in the eye of our law has no father, but the relationship between the illegitimate offspring and the mother is recognized, even

to the extent of the capacity of the illegitimate to inherit. It would therefore seem unreasonable to hold that no affinity existed between the husband and the illegitimate child of the woman born before marriage. It is true that this court has held that the statute authorizing a parent to recover damages for the wrongful killing of a minor child gives no right of action to the mother of a bastard. This was a statute in derogation to the common law, and its construction was necessarily strict. The word "child" was therefore held to have been used by the Legislature in its limited sense, and a bastard was not in contemplation. The ruling cited by counsel for plaintiff in error in the case of *Thornburg v. American Strawboard Company*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334, is to the same effect. A statute giving a right of action to a parent for the wrongful killing of a child was held not to apply to a stepchild. It is true that it was there said: "Strictly speaking, therefore, a man who marries the mother of a bastard child does not become the stepfather of such child." But this is obiter; for in the same opinion it is said: "If it were conceded that he was the stepfather of the child named in the complaint, he would not come within the terms of the statute."

A penal statute is subject to careful scrutiny and strict interpretation, but this rule does not impose upon this court a pedantic construction of words and phrases. The framers of statutes are men of affairs, rather than rhetoricians, balancing the various shades of meaning of language employed, and words are to be given their ordinary intendment and effect. As was said by Justice Bleckley, in *Minor v. State*, 63 Ga. 321: "It is something easier for an offender to baffle the dictionary than the Penal Code; for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps in a broad, practical way at the substantial transactions of men." See, also, *Sanders v. State*, 74 Ga. 85; *Jones v. State*, 120 Ga. 188, 47 S. E. 561. It is for the protection of the most important unit of society, the family, that incest is pronounced a crime. If a man marry the mother of an illegitimate daughter, and take the daughter into his care and custody, he becomes charged with a duty towards her. His disregard of morality and decency in having sexual intercourse with her is a crime transcending a mere misdemeanor. The act has the elements which constitute incest. As incest it should be punished. "Thou shalt not uncover the nakedness of a woman and her daughter." *Leviticus xviii, 17*.

3. Complaint was made that evidence was admitted, over the objection of the accused, to the effect that about a year before the date of the alleged offense the accused and his stepdaughter had slept together in a covered wagon on different nights, once in Thomas county and once in Florida. The ac-

cused was on trial for an offense committed in Colquitt county. There was no error in the admission of this evidence. It was relevant for the purpose of throwing light on the relations existing between the parties. *Bass v. State*, 103 Ga. 227, 29 S. E. 966; *Underhill, Crim. Ev. § 92*.

Judgment affirmed. All the Justices concur.

(125 Ga. 46)

TYLER v. STATE

(Supreme Court of Georgia. March 23, 1906.)

CRIMINAL LAW — SENTENCE — ERROR IN MINUTES—CORRECTION.

Following the rule in the case of *Merritt v. State*, 50 S. E. 925, 926, 122 Ga. 752, where sentence upon a misdemeanor convict was orally pronounced in open court imposing a fine, or, alternatively, service upon the chain gang for a given number of months, and in writing out the sentence and placing the same on the minutes of the court the clerk inadvertently omitted stating the number of months specified in the oral sentence which the defendant should serve upon the chain gang, thus leaving the time of service indefinite, such omission could at a subsequent term of court, upon a direct proceeding for the purpose and upon legal proof of the facts, be cured, and the sentence and minutes of the court be amended so as to conform to the truth, and carry into effect the oral pronouncement of sentence.

[Ed. Note.—For cases in point, see vol. 15. Cent. Dig. Criminal Law, §§ 2544-2546.]

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; J. H. Martin, Judge.

John W. Tyler was convicted of crime, and brings error. Affirmed.

J. L. Bankston and E. H. Williams, for plaintiff in error. E. D. Graham, for the State.

ATKINSON, J. In the case of *Merritt v. State*, 122 Ga. 752, 50 S. E. 925, 926, it is ruled, in effect, that oral judgment as pronounced by the court is the real judgment of the court, and if, by clerical omission in writing out the judgment and entering the same upon the minutes of the court, any part of the judgment as orally pronounced is omitted, the records of the court may be afterwards corrected so as to conform to the truth. If done at the same term, the court may make the correction without notice to any one. If at a subsequent term, it must be upon notice to the parties at interest. In the case at bar no question is raised as to the want of notice to the defendant; nor is it contended that the order of the court did not recite the truth of the transaction. In the absence of such contentions, it will be presumed that the defendant was duly notified, and that the amendment was in accordance with the truth.

Under these facts, the case falls within the ruling expressed in the case cited, and the judgment of the court below will be affirmed. All the Justices concur.

(125 Ga. 101)

J. H. KILLOUGH & CO. v. SIMMONS.

(Supreme Court of Georgia. March 23, 1906.)

1. APPEAL—REVIEW.

Where a suit was brought against two persons alleged to be partners, but only one of them was served, and he pleaded that he was not indebted to the plaintiffs, that there was no partnership, and that the claim was barred by the statute of limitations, and where the case was by agreement submitted to the judge without a jury, and he found in favor of the defendant, without stating on which plea his finding was based, such judgment will not be set aside by this court, as contrary to law and without evidence to support it, if the evidence authorized the finding for the defendant on any of the pleas.

2. SAME.

In the present case the evidence was sufficient to sustain a finding on the plea of no partnership, whether or not the accounts between the parties were mutual, so as to prevent the statute of limitations from beginning to run, except from the date of the last item.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by William H. Simmons against J. H. Killough & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

R. L. Maynard, for plaintiffs in error. El. A. Hawkins, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(73 S. C. 542)

ABRAHAM'S v. COLUMBIA, N. & L. R. R.
(Supreme Court of South Carolina. April 2, 1906.)**1. APPEAL—REVIEW—REFUSAL OF NONSUIT.**

A judgment of the circuit court, affirming a judgment of a magistrate refusing a nonsuit for insufficiency of the evidence, will not be reviewed, unless entire failure of evidence is shown.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4322-4352.]

2. SAME—INSTRUCTIONS—RECORD.

Where the charge of a magistrate is not in the record, an exception alleging that he charged as to matter of fact cannot be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2930.]

3. CARRIERS—INJURY TO FREIGHT—PENALTIES.

24 St. at Large, p. 1, providing for a penalty against a carrier for damage to freight, on refusal to pay claim therefor and recovery of the amount claimed, does not require the claimant to demand interest; and where he sues for the actual amount of damage, without interest, and recovers the amount claimed, he is entitled to the penalty.

4. SAME—RECOVERY.

Where a shipper sued a carrier for the amount of damage to freight and for penalty for failure to pay the claim, but made no demand for interest, and the verdict was for the amount claimed, the magistrate could enter up judgment for interest and penalty in addition to the verdict.

Appeal from Common Pleas Circuit Court of Laurens County; Klugh, Judge.

Action by J. W. Abrahams against the Columbia, Newberry & Laurens Railroad. From an order affirming the judgment of the magistrate, defendant appeals. Reversed.

W. H. Lyles and Dial & Todd, for appellants. W. C. Irby, Jr., for respondent.

WOODS, J. This action was brought in a magistrate's court to recover \$50, the value of a bundle of household goods alleged to have been shipped from Whitmires, S. C., a station on the Seaboard Air Line Railway, to the plaintiff, the owner, at Laurens, S. C., a terminus of the defendant's railroad. Demand was made also for the statutory penalty of \$50 against the defendant for failure to adjust and pay the claim within 40 days after it was filed. The jury found a verdict for \$50, whereupon the magistrate entered judgment, not only for the amount of the verdict, but also for \$50 as the penalty, and the interest on the claim from date of filing, which he adjudged the plaintiff entitled to recover, in addition to the verdict. The appeal is from a judgment of the circuit court affirming the judgment of the magistrate.

1. The exception alleging error by the magistrate in not granting a nonsuit on the ground that there was no testimony proving or tending to prove that the articles described in the complaint were ever delivered to the defendant, or that it ever became liable as a connecting carrier, cannot be sustained. On this issue of fact the jury in the magistrate's court and the circuit judge found against the defendant, and this court cannot reverse the finding unless appellant can show an entire failure of testimony to support it. The bill of lading was in evidence, but its terms are not disclosed by the record, and we cannot assume it furnished no evidence of defendant's liability as a connecting carrier under the terms of the statute of 1903 (24 St. at Large, p. 1).

2. As the charge of the magistrate does not appear in the record, there is no basis for the exception alleging that he charged the jury as to matters of fact.

3. The statute providing for the penalty demanded in this case makes the carrier liable for interest on the claim, but it does not require the claimant to demand it; and where, as in this case, he chooses to waive interest, both in filing and suing his claim, the failure to recover interest does not prevent the recovery of the penalty. The verdict for \$50, therefore, does not, as defendant contends, necessarily imply that the jury fixed the value of the goods at less than \$50, the amount claimed, and allowed interest on the reduced amount in order to reach a verdict of \$50. The statute under which the penalty was claimed has been declared constitutional in *Seegers v. S. A. L. Ry. Co.*, 73 S. C. 71, 52 S. E. 797, and the exception on that point must fail.

4. The magistrate erred in adding interest and the penalty of \$50 to the amount of ver-

dict and entering judgment for the aggregate amount. The act provides: "Failure to adjudge and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid." The defendant, therefore, was as much entitled to be heard in a regular trial on the issue of its liability for the penalty as for the amount of the claim itself. The full amount of the claim might well be allowed by the jury, and yet they might have the best of reasons for refusing to find a verdict for the penalty, as for instance that the claim had not been filed with the agent of the carrier at the point of destination or had not been so filed for the prescribed time before the commencement of the action. All the material allegations of the complaint were denied, and all the issues were submitted to a jury, whose verdict was for \$50. The magistrate had the power to grant a new trial on the ground that he considered the jury had no just ground for failing to include interest and the penalty in their finding, but he could not himself add interest and the penalty to the verdict. The judgment must be limited to the verdict found.

The judgment of this court is that the judgment of the magistrate be set aside, with leave to the plaintiff to enter judgment for the sum of \$50.

(141 N. C. 823)

STATE v. WHITLEY.

(Supreme Court of North Carolina. April 17, 1906.)

1. SEDUCTION — INDICTMENT — SUFFICIENCY — PROMISE OF MARRIAGE.

Under Revisal 1905, § 3354, providing that "if any man shall seduce an innocent and virtuous woman under promise of marriage" he shall be punished, etc., an indictment alleging that the defendant "did seduce one F., an innocent and virtuous woman under promise of marriage to the said F. made by him the said defendant" is not defective on the ground that the words used in the indictment in addition to those used in the statute negative the idea of a contract of marriage.

2. SAME—EVIDENCE.

In a prosecution for seduction under promise of marriage, it is competent for the prosecutrix to testify under what inducements and circumstances she yielded to defendant.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, §§ 72, 73.]

3. SAME—STATEMENTS OF PROSECUTRIX.

In a prosecution for seduction under promise of marriage, it was proper to admit evidence by the mother of prosecutrix that the daughter had told her of the seduction and the promise.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, §§ 83-85.]

4. SAME—CHARACTER OF PROSECUTRIX.

In a prosecution for seduction under promise of marriage, it was proper to refuse to allow a witness who had not testified to the general character of prosecutrix to testify on cross-examination as to whether there was not a report in the neighborhood derogatory to her character.

5. SAME—CHASTITY OF PROSECUTRIX.

In a prosecution for seduction under promise of marriage, evidence that prosecutrix had before the alleged seduction permitted certain persons to take liberties with her person did not show actual incontinence, but was merely evidence to be considered in determining whether she was virtuous.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 81.]

6. SAME.

A virtuous woman, within the meaning of Revisal 1905, § 3354, punishing seduction under promise of marriage, is a woman who has never had illicit sexual intercourse.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 55.]

7. SAME—INSTRUCTIONS.

In a prosecution under Revisal 1905, § 3354, punishing the seduction under promise of marriage of any innocent and virtuous woman, an instruction that a virtuous woman is one who had never had illicit intercourse, and that "an innocent woman means that, although there may have been a marriage contract, yet if prosecutrix yielded on account of lust or from any other motive than promise of marriage she would not be innocent," within the statute, was harmless to defendant, even conceding that the words "virtuous" and "innocent" were interchanged.

Appeal from Superior Court, Stanly County; Council, Judge.

C. D. Whitley was convicted of seduction under promise of marriage, and appeals. Affirmed.

The indictment alleged that on a designated day defendant did with force and arms at and in a certain county unlawfully, willfully, and feloniously seduce one Flora C. Eudy, an innocent and virtuous woman, under promise of marriage to the said Flora C. Eudy, made by him, the said Devotion Whitley, against the form of the statute, and the peace and dignity of the state. Defendant moved in arrest of judgment on the ground that the indictment did not allege a marriage contract because the allegation following the statement that the seduction was under a promise of marriage reduced the effect of the allegation as to promise to a mere proposition on the part of one of the parties. On trial the mother of prosecutrix was allowed to testify that after she discovered her daughter to be pregnant the daughter had told her that defendant had promised to marry her and that she loved him. On cross-examination of one of the witnesses for the state the defendant's counsel asked the witness if he had not heard a report in the community that prosecutrix would permit young men to take indecent liberties with her. The question was excluded, and defendant excepted.

R. L. Smith, Adams, Jerome & Armfield, and J. R. Price, for appellant. The Attorney General, for the State.

CLARK, C. J. The indictment follows the exact words of the statute. Revisal 1905, § 3354. The added words are mere surplusage and do not affect the bill. Revisal 1905, § 3254, forbids the arrest of judgment "by reason of any informality or refinement." In *State v. Ferguson*, 107 N. C. 850, 12 S. E. 574, the court says: "The crime does not consist in the sexual intercourse nor in the seduction, nor in the innocence and virtue of the woman, but in committing the act under promise of marriage, without which no crime is created by the statute, and which alone makes the seduction criminal." It was clearly competent for the prosecutrix to testify under what inducement and circumstances she yielded to the defendant, the truth of her statement being a matter for the jury.

The statements made by the prosecutrix to her mother were competent to corroborate her testimony on the trial. As to the fourth and fifth exceptions, the witness had not testified as to the general character of the prosecutrix, and it was not competent to ask him (unless perhaps on cross-examination, if he had been such character witness) whether there was not a report in the neighborhood derogatory to her character. If she were not a virtuous and innocent woman, that fact could not be shown by hearsay, by a mere report that she had permitted, on a certain occasion, familiarities to be taken with her person, not amounting to sexual intercourse.

The first special instruction asked by the defendant was properly refused. If the prosecutrix had permitted the familiarity recited in the prayer, it did not amount to incontinence in fact, and the court could not tell the jury that it amounted to such as a matter of law, but correctly told the jury that evidence of such conduct, if believed, was a matter to be considered by them in passing upon the question whether she was a virtuous woman within the meaning of the statute. This indeed was in accord with the second prayer of the defendant, which was substantially given.

The seventh exception cannot be sustained. In *State v. Crowell*, 116 N. C. 1058, 21 S. E. 503, the court said: "The law looks at conduct and motive only as shown by conduct, and not at thoughts undisclosed and natural impulses not acted on. The precedents sustain the definition given by the court, that an innocent and virtuous woman is one who never had illicit intercourse with any man, and who is chaste and pure. (*State v. Ferguson*, 107 N. C. 841, 12 S. E. 574) and properly refused to go farther and charge that the prosecutrix must have had 'a mind free from lustful and lascivious desires.'" A woman may not resent language and

familiarities in some stations in life, which conduct in other circumstances and surroundings would lead a jury to infer that she was not virtuous and innocent. Such testimony does not amount in law to her being not a virtuous and innocent woman, and the court could go no further than to leave the evidence to the jury. Any inference that could be drawn from it is an inference of fact, and could be drawn only by the jury, not by the court. A woman may use vulgar language and submit to familiarities, if such is the custom of her society, and yet be of impregnable virtue. "Bundling," where it is the custom, is no proof of immorality, though it would be strong evidence where such custom is unknown.

The court refused a prayer "that in order to find from the evidence that the prosecutrix is not a virtuous woman, it is not necessary for the jury to find that she had ever had actual sexual intercourse with any other person than the defendant," and correctly charged that "a virtuous woman is one who had never had illicit intercourse with any man," and that "an innocent woman means that, although there may have been a marriage contract, yet if the prosecutrix yielded on account of lust or from any other motive than of the promise of marriage, she would not be innocent within the meaning of the statute." Whether or not his honor did not interchange the words "virtuous" and "innocent," the defendant cannot complain of a harmless error. The gravamen of this offense is the seduction of an innocent and virtuous woman under promise of marriage. His honor charged that the prosecutrix must be found by the jury to be both virtuous and innocent, and that she did not yield her person to the embraces of the defendant, from lust, or any motive or inducement other than the promise of marriage.

No error.

(141 N. C. 113)

ALLEY et al. v. HOWELL.

(Supreme Court of North Carolina. April 17, 1906.)

1. EJECTMENT — ISSUES — EVIDENCE — ADMISSIBILITY.

Where, in ejectment by the heirs of a decedent against the grantees of decedent, the complaint alleged plaintiff's legal title, without alleging undue influence, inadequate consideration, or fraud, evidence of the mental capacity of the decedent to execute the deed, and of fraud in the factum, was admissible on the issue whether legal title passed to defendant, but evidence of fraud not in the factum and of undue influence, or of want of consideration, was inadmissible.

2. TRIAL — EXCEPTIONS — NECESSITY OF TAKING EXCEPTIONS TO RULINGS WHEN MADE.

Under Revisal 1905, § 554, subsec. 2, providing that where an exception is taken at the trial it must be reduced to writing at the time, exceptions to the evidence or to the remarks of the judge or other matters occurring during the trial must be taken at the time, and it is too late to make them after the trial,

notwithstanding subsection 3 and section 591, which permit exceptions to a charge to be made for the first time in making out the case on appeal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 254.]

Appeal from Superior Court, Iredell County; Peebles, Judge.

Ejectment by Mary E. Alley and others against T. J. Howell. From a judgment for defendant, plaintiffs appeal. **Affirmed.**

Furches & Coble and Geo. B. Nicholson, for appellants. L. C. Caldwell and J. B. Connelly, for appellee.

CLARK, C. J. This was an action of ejectment; the plaintiffs claiming as heirs at law of Susan Ervin, and the defendant as her grantee. In the complaint the plaintiffs alleged and relied upon their legal title only, and, there being no averment of undue influence, inadequate consideration, or fraud in the treaty, the court properly excluded evidence offered to prove such, and also refused prayers based upon the assumption that evidence to that effect had been admitted. There must be allegata as well as probata. The judge properly admitted evidence upon the question of the mental capacity of Susan Ervin to execute the deed, as that went to the issue whether legal title had passed to the defendant, and evidence (if offered) of fraud in the factum would also have been competent. *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142; *Jones v. Cohen*, 82 N. C. 80; *Young v. Greenlee, Id.*, 346. Fraud (not in the factum), undue influence, or want of consideration are matters foreign to an allegation of legal title, and cannot be put in evidence unless the defendant has notice by appropriate allegations in the complaint, that he may come to trial prepared to defend an attack on those grounds. This has been the settled practice and rests upon the principle of fair play, that those matters only should be contested at the trial which come within the scope of the allegations. It is true, the averments here omitted were matters of equitable jurisdiction under the former system of pleading, but it is not on that ground that they are required to be pleaded, but because when the plaintiffs merely allege, as here, that they are "owners and entitled to the possession," the defendant has notice only that his legal title is assailed.

For exactly the same reason an equitable defense cannot be proven unless set up in the answer. *Talbert v. Becton*, 111 N. C. 543, 16 S. E. 322; *Hinton v. Pritchard*, 102 N. C. 94, 8 S. E. 887. See, also, *McLaurin v. Cronly*, 90 N. C. 50, in which the matter is so clearly stated (citing *McKee v. Lineberger*, 69 N. C. 217; *Shelton v. Davis, Id.*, 324; *Rand v. Bank*, 77 N. C. 152, and *Carpenter v. Huffstetter*, 87 N. C. 273) that further discussion by us is unnecessary. The counsel for plaintiffs are correct in asserting that the distinction between law and equity is

abolished—that is, that they are no longer administered in separate forms, but the proposition before us is simply the maintenance of the just and reasonable doctrine that there must be allegation as well as proof. The plaintiffs could readily have cured the defect by asking to amend (*Joyner v. Early*, 139 N. C. 49, 51 S. E. 778), and if that were refused in the discretion of the court, the plaintiffs could have taken a nonsuit and have brought a new action, with a complaint making the necessary allegations. *Wright v. Ins. Co.*, 138 N. C. 483, 51 S. E. 55, passed upon the question of immaterial defects in the pleadings, and also held that the court would give any relief justified by the complaint and proof, whether it was the specific relief demanded or not. It in no wise controverts what is said above. *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566, and *Fulps v. Mock*, 108 N. C. 601, 13 S. E. 92, merely hold that in an action to recover upon a contract, if proof is made upon which a recovery can be had upon a quantum meruit, this is not a fatal variance. Citing *Jones v. Mial*, 82 N. C. 252. In *Shelton v. Davis*, 69 N. C. 324, *Pearson, C. J.*, says that one may "sue for a horse and recover a cow [which Blackstone thought an absurdity], but he must obtain leave to amend by striking out 'horse,' and inserting 'cow.'" That was a case of variance, but here the defect is greater—the failure to state the true cause of action. In *Rand v. Bank*, 77 N. C. 154, *Pearson, C. J.*, again says that "it cannot be tolerated that plaintiffs should file a skeleton of a complaint and eke out a cause of action" by proof of matters not alleged, and thus convict the defendant of fraud and undue influence, without notice in the complaint of such charges.

There are several other exceptions, but upon examination we find that they do not require discussion, and, indeed, they are not presented in the appellants' brief. *Jones v. Ballou*, 139 N. C. 527, 52 S. E. 254; *Peoples v. Railroad*, 187 N. C. 98, 49 S. E. 87; *Currie v. Railroad*, 135 N. C. 587, 47 S. E. 654; *State v. Register*, 133 N. C. 751, 46 S. E. 21. We take note, however, that some of these exceptions are to the evidence or remarks of the judge or other matter occurring during the trial, and that these exceptions thereto were not taken at the time, as required by the statute. *Revisal 1905*, § 554, subsec. 2; *State v. Pierce*, 123 N. C. 745, 31 S. E. 847. It is too late to make such exceptions after the trial, which the statute permits only as to exceptions to the charge, which alone may be made by appellant for the first time in making out his case on appeal. *Revisal 1905*, § 554, subsec. 3; section 591. The statutory requirements as to exceptions are summarized. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266, and *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383, which have been repeatedly cited since; *Hicks v. Kenan*, 139 N. C. 338, 51 S. E. 941.

No error.

(141 N. C. 827)

STATE v. WILLIAMS.

(Supreme Court of North Carolina. April 17, 1906.)

1. HOMICIDE — MANSLAUGHTER — TIME FOR COOLING.

Where deceased went to defendant's house and was drinking and noisy, and, after defendant asked him to go away, threatened to shoot any one who put his foot out of the door, and shot at defendant when the latter came out, whereupon defendant re-entered the house, the lapse of 15 minutes thereafter was sufficient cooling time.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 63.]

2. SAME — SELF-DEFENSE — SUFFICIENCY OF EVIDENCE—QUESTIONS FOR JURY.

Where deceased and another came to defendant's house, and were drinking and noisy, and, after being asked to go away, deceased threatened to shoot any one who put his foot out of the door, and on defendant's coming out, shot at the latter from a distance of about 50 yards, but did not injure him, and defendant testified that after waiting about 15 minutes in the house he went out with his rifle to see if deceased and his companion were gone; that after going a short distance he was shot at by deceased, and shot back because he was afraid deceased would shoot him again before he re-entered the house, he was entitled to go to the jury on the question of self-defense.

Appeal from Superior Court, Davie County; Peebles, Judge.

Robert Williams was convicted of homicide, and appeals. Error.

T. B. Bailey, E. L. Galther, and A. T. Grant, for appellant. The Attorney General, for the State.

CLARK, C. J. The deceased and one Tucker went to the house of prisoner's sister, and were drinking and noisy. The prisoner came while they were there, and asked them to go away as his sister was sick. The deceased threatened to shoot any one that put his foot out of the door. The prisoner testified: "I went out at the front door, and as I got about two feet from the door deceased shot at me with his gun; I think he was about 50 yards off; heard shot strike some lumber behind me; I had no gun at this time. Went back and stayed about 15 minutes, and then went out at the back door with a rifle. I went out to see if they were gone. I went about 20 steps until I had passed Fisher Phelps' house. As I passed deceased saw me; he was squatted down, and he shot at me. As he shot I shot towards him. I shot because I was afraid he would shoot me again before I got in the house; he was about 65 or 70 yards away. I did not know whether I had hit him or not." In fact, the deceased was killed.

The court refused to submit a prayer presenting the defendant's theory of self-defense, and charged in lieu thereof "that if the jury were satisfied beyond a reasonable doubt that the prisoner fired the fatal shot then the only thing for them to consider was whether the prisoner was guilty of murder in the second degree or manslaughter. In any view of

the testimony he would be guilty of either one or the other, and it was for the jury to determine which." This was error.

The prisoner's testimony was that he went out of the house, by the other door, after the lapse of 15 minutes, "to see if they were gone," that he was shot at and that he shot back "because I was afraid he would shoot me again before I got in the house." The lapse of 15 minutes was sufficient cooling time as his honor held, and if the prisoner went out for the purpose of renewing the fight, as his honor seems to have assumed, the charge was even more favorable to the prisoner than he was entitled to. But though his carrying the gun looks suspicious, it was not conclusive of his motive, as he may have carried it for precaution and in self-defense. His testimony presented the phase of self-defense, if believed, and he was entitled to have the jury pass upon it.

Error.

(141 N. C. 173)

HILTON LUMBER CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. April 17, 1906.)

1. CARRIERS—DISCRIMINATION AGAINST SHIPPERS—ACTION BY SHIPPER—COMPLAINT.

Revisal 1905, § 3749, provides that if any carrier shall collect from any person a greater compensation for transportation of property than it receives from any other for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances, it shall be liable to a fine of a specified sum in an action by a shipper to recover a sum alleged to have been paid defendant railroad on account of discriminating overcharges, it was proper to refuse to dismiss the action, on the ground that the complaint did not set forth the exact date of the shipments by plaintiff and did not state the dates and times that defendant had received a lower rate for the same kind of shipments from other persons, as defendant might have asked for a bill of particulars under Revisal 1905, § 404, providing that it shall not be necessary for a party to set forth in a pleading the items of an account, but that he shall deliver a copy thereof after demand.

2. SAME—EVIDENCE—COMPETENCY.

In an action by a shipper against a carrier to recover sums paid on account of discriminating overcharges, in violation of Revisal 1905, § 3749, testimony of a witness in regard to shipments from a point without the state to a point within the state, was not inadmissible on the ground that such shipments were interstate and not within the control of the state courts.

3. SAME.

It was competent to show the rates charged to others for shipments over other branches of the road, it appearing that the conditions were substantially similar.

4. SAME—QUESTION FOR JURY.

In an action by a shipper against a carrier to recover sums paid on account of discriminating overcharges for shipments in violation of Revisal 1905, § 3749, evidence considered and held, that it was a question for the jury whether the railroad had practiced the alleged discrimination.

5. SAME—STATUTORY REGULATIONS.

Revisal 1905, § 3749, provides that if any carrier shall collect from any person a greater

compensation for transportation of property than it receives from any other for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances, it shall be liable to a fine of a specified sum. *Held*, that the word "contemporaneous" means a period of time through which shipments of freight are made by one shipper at one rate, and by other shippers at another rate.

6. SAME—BURDEN OF PROOF.

In an action by a shipper against a carrier to recover on account of discriminating overcharges, in violation of Revisal 1905, § 8749, the burden is on plaintiff to show such discrimination by the greater weight of the evidence.

7. SAME—WHAT CONSTITUTES DISCRIMINATION.

A carrier may not give one customer a lower rate for the shipment of logs, than another, merely because the former ships the manufactured product over the carrier's line.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 12.]

Appeal from Superior Court, New Hanover County; Council, Judge.

Action by the Hilton Lumber Company against the Atlantic Coast Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff sued for the recovery of \$3,865.26, alleged to have been unlawfully demanded and paid defendant company on account of discriminating overcharges for shipment of logs over defendant's road from the 15th day of November, 1898 to the 30th day of April, 1901. Plaintiff alleged that, between said dates, the defendant company, a common carrier, unlawfully charged and demanded of plaintiff an unreasonable and discriminating rate of \$2.50 per thousand feet for hauling its logs from Musteen's Crossing to the city of Wilmington, a distance of 39 miles, whereas during the said time, defendant charged other persons and corporations for shipment of logs for a like distance to said city, only \$2.10 per thousand. That, after protest against such discrimination, plaintiff applied to the corporation commission of the state, whereupon said commission ordered defendant to reduce its rate to \$2.10 per thousand feet. That between said dates plaintiff shipped logs from said crossing to Wilmington, aggregating 9,663,160 feet for which it paid at the rate of \$2.50 per thousand feet, the sum of \$24,157.90. That the amount which should have been paid at \$2.10 per thousand feet would have been \$20,292.64, the difference between said amounts being \$3,865.26. The plaintiff demanded payment of said amount, etc. Defendant admitted the plaintiff had paid the sum named for hauling logs between said points, but denies that same was either unreasonable or discriminating. Defendant denied that the rate of \$2.10 per thousand feet was a reasonable or proper rate for carrying plaintiff's logs and says there was a substantial difference, both in conditions and circumstances, between logs shipped over its road at \$2.10 per thousand

feet and those shipped by plaintiff at \$2.50 per thousand feet. That the \$2.10 rate applied only to mills to which logs were shipped and from which it was afterwards reshipped in the form of lumber or its manufactured products. The other material allegations were denied. After the pleadings were read, the defendant moved *ore tenus* to dismiss the action upon the ground that it did not state a cause of action upon which plaintiff was entitled to recover, in that it did not set forth the exact dates of the shipments of the logs, which it claimed to have shipped over defendant's road and did not state that at the same dates and times the defendant was charging, collecting, and receiving from other persons a lower rate of freight for the same kind of shipments. Motion overruled, and defendant excepted. Defendant admitted its liability to plaintiff for the sum of \$91.98, being the excess of \$2.10 per thousand feet collected from plaintiff on shipment of logs from March 20, 1901, to April 30, 1901, the commission having fixed the rate at \$2.10 on March 20, 1901, and defendant not having observed or adopted it in shipment of plaintiff's logs until April 30, 1901. At the conclusion of the plaintiff's evidence defendant demurred and renewed its motion to nonsuit the plaintiff. Motion denied, and defendant excepted. The court upon the trial submitted the following issues to the jury: "(1) Did the defendant unjustly and illegally discriminate against the plaintiff in the matter of freight rates or transportation of logs, as alleged? (2) Did defendant unlawfully collect of plaintiff freight from November 15, 1898, to April 30, 1901? (3) If so, what sum, if any, is plaintiff entitled to recover?" At the conclusion of the entire evidence defendant renewed its motion for judgment as of nonsuit, which was denied and defendant excepted. Verdict was rendered upon the issues, and there was judgment for plaintiff. Defendant excepted, and appealed.

Junius Davis, for appellant. Rountree & Carr, for appellee.

CONNOR, J. (after stating the facts). In the complaint some reference is made to an agreement entered into by the Wilmington & Weldon Railroad Company, to whose rights and contracts the defendant succeeded, and the predecessor of plaintiff in regard to hauling logs. The cause was heard and determined, as appears from the record, upon the sole question whether during the periods named in the complaint defendant company demanded and received payment from plaintiff a rate of freight in excess of that charged other persons or corporations for the same service under substantially similar conditions. The learned counsel in his brief says: "The action is not in tort, but *ex contractu*. Plaintiff charges that the defendant required it to pay \$2.50 per thousand feet for hauling logs in car load lots a distance of 40 miles

when defendant had a regular, established, and published rate for other portions of its line * * * of \$2.10 for the same service and the same rates applied at Wilmington for all who would agree to give the defendant the output of their mills." The defendant denied the allegations upon which plaintiff's alleged cause of action is founded. It says further, that assuming the law to be as contended by the plaintiff it has not shown by any competent testimony that, at the date of shipments made over its road, defendant was charging and receiving from other persons a less rate of freight than that charged plaintiff for a like service in the transportation of like traffic contemporaneous in point of time and under substantially similar circumstances. The record contains exceptions to the ruling of his honor, presenting every phase of these controverted questions. It will be observed that the foundation of plaintiff's claim is not, that the rate charged plaintiff was, except in so far as it was related to the lower rate charged, unreasonable. The gravamen of the complaint is that the rate was discriminating and by reason thereof, unlawful. Plaintiff claims that it has a right to demand of defendant (1) that it haul the logs at a reasonable rate; (2) that it haul them at the same rate charged other persons for hauling logs over the same distance, at the same time, and under substantially similar circumstances. This right, it charges, defendant has infringed and thereby demanded and received for hauling its logs, between the dates named, the amount sued for, in excess of the amount which it was entitled to receive; and in good conscience, defendant should repay this amount and it sues as for money had and received to its use. The agreement referred to in the complaint is eliminated by plaintiff's averment that it is suing to enforce its right at common law, of which section 3749 of the Revisal of 1905 is but declaratory, to have equality in rates, etc. It will be observed, as said by Clark, C. J., in *Lumber Co. v. Railroad Co.*, 136 N. C. 479, 487, 48 S. E. 813, 816, that this statute is substantially like that portion of the English "Traffic Act," known as the "Equality Clause" and the "Interstate Commerce Act." These and similar statutes are said by many of the courts to be but declaratory of the common law, which required all public carriers to serve all persons at reasonable rates and upon equal terms under similar circumstances. However that may be, the fundamental purpose underlying all of this legislation both in England and this country, is, as said by Mr. Justice White, in *Railroad Co. v. Interstate Commission*, 26 Sup. Ct. 272, 50 L. Ed. —, that: "Whilst seeking to prevent unjust and unreasonable rates to secure equality of rates as to all and destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and for-

bidding rebates, preferences, and all other forms of unjust discrimination. to this extent and for these purposes, the statute is remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

Referring to provisions in charters of railway companies having for their purpose the guaranty that all persons should have equality of right in the use of facilities afforded by common carriers, Tindall, C. J., in *Parker v. Great Western R. R. Co.*, 49 E. C. L. 252, 287, says: "Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public." Blackburn, J., in *Great Western R. Co. v. Sutton*, L. J. 1869 N. S. 38, 177, after reviewing the several acts of Parliament on the subject, says: "I think the construction of the proviso for equality is equally clear and is that the company may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they do, during the same time, charge to others under the same circumstances." The evil intended to be remedied is the prevention of unjust discrimination, or, to put the proposition affirmatively, to secure to every person constituting a part of the public, an equal and impartial participation in the use of the facilities which the carrier is capable of affording and which it is its duty to afford. It is an elementary rule that statutes shall be so construed as to repress the evil and advance the remedy. We held in this case—*Railroad Discrimination Case*, 136 N. C. 479, 48 S. E. 813—that upon the facts set out in the complaint and substantially the same testimony, that the discrimination was unlawful. In other words, that defendant could not rightfully charge the plaintiff \$2.50 per thousand feet for hauling its logs, if it, at the same time, for the same service, under substantially similar circumstances, carried logs for other persons at \$2.10 per thousand feet in consideration of the shipment of the manufactured products over its road. This proposition, the learned counsel does not ask us to reconsider. He contends that the plaintiff has neither alleged nor proven such a state of facts. We have discussed the law only in so far as the general principles governing the right of plaintiff and duty of defendant enable us to approach the decision of the several exceptions of defendant to specific rulings of his honor.

The first exception is to the refusal to dismiss the action because the complaint did not set forth the exact dates of the shipments of logs by plaintiff over defendant's road, and does not state the same dates and times that defendant had charged and received a lower rate for shipment of logs from other

persons. The argument upon this exception made by defendant's counsel in his brief takes a rather wider range than the causes of demurrer assigned in the record. He says that it is not charged in the complaint that any service of a like kind was rendered contemporaneously by defendant for any other person at a lower rate than was charged plaintiff. The complaint appears to have been drawn with a "double aspect"; that is, eliminating the reference to the agreement, it charges that the rate charged plaintiff was unreasonable. It also avers that a reasonable and proper rate "having reference to the charges to other shippers and under like conditions and circumstances would not have been more than \$2.10 per thousand feet. That the charge to the plaintiff of \$2.50 per thousand feet when others are charged only the rate of \$2.10 per thousand for the shipment of logs for a like distance to the city of Wilmington * * * is discriminating and unreasonable. While the charge in respect to the facts relied upon is not so explicit as it may have been, it is evident that defendant was not misled. In paragraph 6 of its answer the defendant "denies that the rate of \$2.10 per thousand feet would have been or was a reasonable and proper rate of freight under the circumstances, and alleges that there is a substantial difference both in conditions and circumstances between the timber shipped by plaintiff over the defendant's road at the rate of freight of which the plaintiff complains in its complaint and the rate of \$2.10 per thousand feet, and the defendant avers that the conditions and circumstances under which the rate of \$2.10 per thousand feet was charged by it were substantially different, for this rate applied only to mills to which the timber was shipped, and from which it was afterwards re-shipped over defendant's lines in the form of lumber or its manufactured products." If desired it may have demanded a more specific statement. In regard to the exception to the complaint for indefiniteness as to dates, etc., defendant might, if it so desired, have asked for a bill of particulars. Revisal 1905, § 494. The ruling of his honor was correct.

We proceed to consider the other exceptions in the order presented in the brief of appellant, omitting any reference to such exceptions as are not argued, except the forty-fourth. Counsel stated that, with that exception, they were abandoned. The fourth to seventh, inclusive, are pointed to the admission of testimony of Mr. Parsley for that his statements were general and did not fix dates of shipment, etc. The plaintiff was, by this testimony laying the foundation upon which he was seeking to show the character of its business, the number of lines or branch roads of defendant, their terminal points, the number, etc., of mills on such lines, its own dealings with defendant. For those purposes we see no valid objection to the testimony. The

16th exception is for that the witness was permitted to testify as to logs shipped from a point in South Carolina to Wilmington, N. C., which was interstate and not within the control of the state courts. We do not perceive how the testimony involved interstate commerce. It was relevant to the issue and tended to show the manner of dealing by defendant company with persons shipping logs over its lines coming into Wilmington.

Exceptions 21 to 30 present the question whether for the purpose of showing the discrimination alleged it was competent to show the rates charged other persons for shipment of logs in car load lots over branches of defendant's road not coming into Wilmington; for instance, Mr. Hines, who operated a mill at Kinston to which logs were hauled from other points on defendant's road, was permitted to testify in regard to the rates paid for shipping car load lots. Mr. O'Berry, at Goldsboro, was also permitted to testify to the same effect. The question at issue was whether defendant, while charging plaintiff \$2.50 per thousand for hauling logs 39 miles from Masteen's Crossing to Wilmington, was charging other persons \$2.10 for the same service under substantially similar circumstances. To give any beneficial or remedial effect to the law, either common law or statute, it must be given a reasonable construction. Certainly to show that in a few cases and within a short period lower rates were given other persons would not establish unlawful discrimination. It is therefore essential to plaintiff's right to recover for it to show that a regular systematic discriminating rate was given. Nor do we conceive that it is necessary for plaintiff to show that the lower rate was confined to persons shipping logs into Wilmington. If it is made to appear that during the period named the defendant was giving to mill owners at Kinston, Goldsboro, or other points on its line, a lower rate than that given to persons living in Wilmington, the conditions being substantially similar, such discrimination would be unlawful. To so construe the law as to permit a railroad to charge a person shipping logs in car load lots to Wilmington, a distance of 39 miles, \$2.50 per thousand and to charge a person shipping in the same way over the same distance to other points \$2.10 in the absence of any circumstances or conditions justifying the discrimination, would practically nullify the underlying principle upon which it is based. The real and pivotal question is whether the difference in charges are contemporaneous in point of time and under substantially the same circumstances. The purpose of the testimony was to establish this proposition. The principle involved is announced by Blackburn, J., in *Great Western Railway v. Sutton*, supra: "When it is sought to show that the charge is extortionate as being contrary to the statutory obligations to charge equally, it is immaterial whether the charge is reasonable or

not, it is enough to show that the company carried for some other persons or class of persons at a lower charge during the period throughout which the party complaining was charged more under like circumstances. One single act charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, week, or month, whatever the period might be. I think it would be necessary to show that there was a practice of carrying for some persons or class of persons at the lower rate. But a single instance would be evidence to prove this practice. * * * It would be of the very essence of the case to prove that the goods were of the same description and came under the same circumstances." We think that the testimony was relevant and that it was sufficiently definite to go to the jury. The witnesses were asked in regard to rates charged them for longer and shorter distances than that over which plaintiff's logs were shipped. If this was error, we do not perceive how defendant was prejudiced by it.

Exceptions 31 to 34 are to allowing Mr. Parsley to testify that he had seen logs moving on the defendant's branch lines, the objection being that he could not name the dates accurately. The testimony was, in the light of his honor's charge confining the inquiry of the jury to the dates fixed in the issue, entirely harmless.

Exceptions 36 and 37 are disposed of by what is said in regard to exception 16. This disposes of the exception directed to the admission of evidence.

At the close of plaintiff's evidence defendant demurred and demanded judgment of nonsuit, which was denied. Defendant waived its exception to this ruling by introducing evidence. Assuming that plaintiff had introduced testimony which, for the purpose of disposing of the motion for judgment of nonsuit was fit to go to the jury we are brought to a consideration of defendant's motion to nonsuit at the close of the entire evidence. This motion involves the assumption that plaintiff's evidence was insufficient, and that nothing has been shown by defendant to aid the defective condition of plaintiff's case. Assuming that plaintiff has introduced evidence fit to be submitted to the jury to show that between the dates named it paid defendant \$2.50 per thousand feet for hauling logs from Musteen's crossing to Wilmington in car load lots and that during the same period defendant gave to other persons a \$2.10 rate for hauling logs in car load lots the same distance, and that such lower charge was general—that is, a practice was made of doing so—does defendant's evidence aid the plaintiff in showing either that the conditions were substantially similar, or if not, whether the conditions justified the difference in the rates. Mr. Emerson, who was defendant's traffic manager, testified that

he made the rates on logs hauled over defendant's road. He was shown and identified a number of printed tariffs showing rates at a number of points on the road and branches. He testified that there was at no time a rate of \$2.10 per thousand feet for logs shipped to Wilmington, a distance of 39 or 40 miles. The only portion of his testimony which could in any aspect aid the plaintiff, is the statement in reply to a question by plaintiff's counsel. "You asked, as I understand it, why it was that we applied a higher rate on logs to Wilmington, N. C., than we applied to other towns over our lines; I will answer that by saying that the revenue received on the product of the logs from the points in Eastern Carolina named in the testimony, and for which tariffs have been filed, enabled us to haul the logs to the mill at a lower figure than we felt that we could afford to handle the logs to a mill without getting any of the product. We were prepared to make the same arrangement effective—I will change it. We offered that if the product of the logs were shipped out we were prepared to make the same rates effective to the Wilmington mill on the logs on which we received the product as were applied to any other mill on the line of our road." Mr. Emerson, in reply to another question, testified: "The Hilton Lumber Company paid no more for logs they desired to move than would be paid by the Cape Fear or Angola Lumber Company. * * * We have in effect, between certain points on the Wilmington & Weldon Railroad where logs are moving to mills and where we receive for shipment the lumber cut from said logs, rates as per the following table: '40 miles and over 30, \$2.10.' You will note that these rates are somewhat lower than the rates we were charging on logs moving to Wilmington and other points where we do not receive a second movement in the way of lumber cut from the logs moved." The date fixed by witness is November 12, 1900. He does not state when this rate went into effect: "That they did not apply over the entire Atlantic Coast Line." We omit any reference to the charge of \$2.10, which witness said was made by mistake. Assuming that there is sufficient evidence in regard to shipments of plaintiff and of witnesses testifying in regard to shipments from other points to go to the jury, we have, with Mr. Emerson's testimony, this case, presented on defendant's demurrer. Defendant operating several lines or branches of railroad in Eastern North Carolina, upon which are located several saw mills deriving their supply of logs over such lines as are convenient to them, maintains a tariff by which it charges mills in Wilmington \$2.50 per thousand feet for car load lots a distance of 39 miles and mills at other points \$2.10 for the same service, the difference being that it handles the manufactured products of the logs thus shipped at points other than Wi-

mington and was willing to make the same rates effective to the Wilmington mill on the logs of which it handled the product.

Thus stated, assuming the other conditions to be substantially similar, is the discrimination unlawful? The question is answered by this court in the defendant's appeal at the fall term, 1904, *supra*. Clark, C. J., says: "The proposition is that a common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity the same distance, under the same conditions, provided the shipper give the company a consideration (shipping the manufactured lumber subsequently over its line), which its managers think will make good to it the abatement of rate given to such parties. But if this is equality as to the treasury of the company, it is none the less a discrimination against the plaintiff." The authorities are reviewed in the opinion, and we have no disposition to disturb the reasoning or conclusion reached on that appeal.

Since the rendition of that decision, the Supreme Court of the United States has, in an able opinion, discussed the principles involved in this case and applied them to a correction of the evil of unjust discrimination which goes to the root of the matter; saying that the statute was remedial and to be given a construction which reasonably accomplishes the great public purpose which it was enacted to subserve. "Nor, in view of the positive command of the second section of the act that no departure from the published rate shall be made 'directly or indirectly' how can it in reason be held that a carrier may take itself out from the statute in every case by simply electing to be a dealer and transport a commodity in that character. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rate shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about." In an exceedingly strong opinion by Mr. Justice Doe in *McDuffee v. Railroad*, 52 N. H. 430, 13 Am. Rep. 72, it is said: "A common carrier is a public carrier. He engages in a public employment and takes upon himself a public duty and exercises a sort of public office. * * * His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right." After an interesting discussion and review of English cases the learned justice says: "In charters of common carriers what is called the equality clause was inserted, requiring the carriers to furnish transportation on equal terms. The fashion of legislation, once set, was studiously followed with a degree of reverence for precedent that does not prevail in this country. General statutes were passed enacting the common-law doctrine of reasonable equality, and new methods of enforcing

it were introduced. And the practice of the English courts on charters and general acts of this kind, has been so long continued that the fact seems now to be overlooked that the general principle of equality is the principle of the common law. * * * It seems to have been a result of the anxiety of Parliament that instead of merely providing such new remedies and modes of judicial procedure as they deemed necessary for the enforcement of the common law, they repeatedly re-enacted the common law until it came to be supposed that in such an important matter as the public service of transportation by common carriers the public were indebted for the doctrine of equal right to the modern vigilance of Parliament instead of the system of legal reason which had been the birthright of Englishmen for many years. A mistake of this kind is of some magnitude. It unjustly weakens the confidence of the community in the wisdom and justice of the ancient system and impairs its vigor." After pointing out the tendency sometimes seen to give a narrow construction to such statutes upon the theory that they are changes in the common law, he says: "But the common law of equal right and reasonableness is the ground on which we stand." The action in *Parsons v. Ch. & N. W. Ry.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231, was brought for a violation of the interstate commerce act, and the decision is based upon the language of the statute. It is true that Mr. Justice Brewer says: "So, but for the provisions of the interstate commerce act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor no matter though it appeared through any mistake or partiality on the part of the railway officials' shippers in Nebraska had been given a less rate." The action was brought to recover a penalty and of course it was necessary to show that the provisions of the statute had been violated. In commenting upon this interesting subject, we note the following language in an editorial notice in the *Harvard L. R.*, vol. 19, No. 6, p. 453, of the recent decisions of the Supreme Court of the United States in *N. Y.*, etc., *R. R. v. Int. State Com.*, *supra*: "It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. So dependent are all commercial activities upon adequate service by the great companies which conduct these public employments, that the general situation demands the stern code that all who apply shall be served with adequate facilities for reasonable compensation, and without

discrimination. Enforcement of all branches of this law is necessary at all times; but the commercial community is most interested to-day in the prevention of personal discrimination. It is established now, past all qualification, that it is the duty of the common carrier to serve all alike who ask the same service, so that all shippers from a given point may compete with each other in distant markets upon equal terms. For it is now recognized that the slightest differences in the rate may result in the long run in building up one concern and in ruining its rival." Judge Noyes, in his work on American Railroad Rates (page 103), after stating the general doctrine in a note, says: "While the rule of the common law is undoubtedly correctly stated in the text, it has not been followed by several American courts of high standing. In fact, at the present time, it is probable that the weight of American authority is in favor of equal charges to all persons for similar services, even in the absence of statutory provision."

We think that the strict construction heretofore given the act by the federal courts must be modified to conform to and promote the purpose of the legislation—to enforce by appropriate remedies the great common-law doctrine of equality of service by public agencies of all kinds. The decision referred to points strongly in that direction. However the courts construe statutes making penal or criminal a violation of the equality of right, when we come to deal with the question, in the enforcement of the civil right of the citizen, we must construe the law so that the right is secured and the remedy for its infringement given. This is the key note of the decisions both in England and this country. In *Directors, etc., v. Evershed*, 3 App. Cas. 1029, Lord Hatherly says: "According to the strict meaning of the acts of Parliament, as interpreted by the decisions from the very moment that the company charges A. a given sum when B., another person, comes to the company to have the same service rendered under the same circumstances, he cannot be charged one farthing more than has been charged A."

He can only be charged precisely what the act authorized the company to charge, namely, that which has been charged others and the moment the directors take on themselves to charge less to another person, they must charge less to him, too." *Hays v. Penn. R. Rd.* (C. C.) 12 Fed. 309; *L. E. & St. L. R. R. v. Wilson*, 18 L. R. A. 105, note. Defendant says there was no evidence tending to show that at the time it was shipping logs and paying \$2.50 rate any other person was shipping under similar circumstances at the \$2.10 rate. Mr. Parsley swore to the payment of the \$2.50 rate by defendant. It appears that mills were being operated, receiving logs over defendant's line at different points during the time named. Mr. Emerson says that defendant was operating these lines, had a tariff for

logs giving the basis of it, he says that he was traffic manager. Mr. Hines and others say that they were operating mills shipping logs over defendant's line, etc. It is true that no one says that on any given day logs were shipped and the \$2.10 rate paid, but in view of the well known fact that men do not keep saw mills standing idle or railroads keep cars idle when it can be avoided, nor ship freight without payment therefor, the jury may well have found that they were shipping logs over defendant's lines at the rates fixed by the tariffs. Mr. Hines says: "We own some timber which came over the Coast Line * * * sawed probably two or three million feet. Other witnesses testified to the same effect. It would be impossible for any one to recover for discrimination in freights unless testimony of this character could be received and submitted to the jury. Whether the testimony was true and what reasonable inferences were to be drawn from it was for the jury. *Interstate Comm. v. Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414. We do not think that his honor was in error in denying motion for nonsuit."

His honor charged the jury: "That the word contemporaneous in the statute did not mean the exact day, hour, or necessarily month, but that it meant a period of time through which the shipment of goods or freights were made by plaintiff at one rate, and by other shippers at another rate." To this defendant excepted. His honor, in the same connection, told the jury that the burden was on the plaintiff to satisfy them by the greater weight of the evidence, that during the period of time named in the complaint the discriminating rate was charged. We find no error in this instruction. His honor, after defining the duty of the defendant to give equal rates, said: "If, therefore, you find from the evidence in this case that the defendant company extended to shippers of logs who did agree with defendant that after the shipment of logs over its line of road, that the logs when manufactured into lumber at the saw mill of the shipper would be reshipped over defendant's line of road, even though this was open to all saw mill owners or shippers doing business at any point along the line of the road, and you find that other saw mill owners or shippers who were shipping logs and manufactured lumber over defendant road under like conditions, but who did not accept or agree to the terms so held out or extended were not given this lower rate, then the court charges you that those accepting the lower rate, if you find from the evidence that any such did, would fix the rate at which other shippers who did not accept the rate would in law be required to pay, and any sum demanded or collected of any shipper not conforming to such agreement in excess of the lower rate would be in violation of the law. If, therefore, you find from the evidence in this case that a schedule of

shipping rates during the period of time from the 15th of November, 1898, to March 20, 1901, was maintained and promulgated by the defendant company, by the terms of which they extended to shippers a rate of \$2.10 per thousand in car load lots of lumber shipped over its line within the distance of from 30 to 40 miles, such rate extending only to those who might ship the manufactured product again over defendant's line, and you further find from the evidence that on other portions of the defendant's road that it charged other shippers—or charged the plaintiff—\$2.50 a thousand feet, the shipments made for a like distance and under substantially the same circumstances and conditions and contemporaneously, then the plaintiff would be entitled to have the first issue answered 'Yes.' Defendant excepted (exception 43). Whatever cause for criticism to be found in this language is removed by reading it in connection with that immediately following: "It will not be alone sufficient for the plaintiff to satisfy you from the evidence in the case that two rates of freight were maintained by the defendant company, or rather, that a rate was extended to one class of shippers who might return the manufactured product over their road, and another rate to those who did not elect to accept this rate and do so, but the plaintiff must go further and satisfy you from the evidence that at the time such rates were maintained (if you find from the evidence they were so maintained), that it was during this period shipping lumber over defendant's road a like distance, under substantially the same conditions, and paying a higher rate of freight to the defendant company than the first-mentioned class." Thus read, we see no error in the instruction given. We find it difficult to discuss the exceptions separately, because, in some instances, they are interjected between sentences which are connected and can only be understood when so read. Many of the exceptions are pointed to the statement of the contention of the parties. The charge is very full, covering several pages in the record. We have given to it a careful examination and are of the opinion that it accords with the decision of this court. In dealing with the testimony in regard to the charge made the Angola Company alleged by defendant to have been the result of a mistake, his honor instructed the jury that if they so found they should dismiss it from further consideration. He further instructed them that having admitted the fact it was incumbent upon defendant to show that the lower rate, which unexplained, was discriminating, was charged by mistake. There really seems to be no evidence to the contrary, and it would seem that the particular item had but little effect upon the case. No special instructions were asked by either side. A careful examination of the charge shows that his honor correctly instructed the jury that if they found the facts in regard to the several rates as alleged by

the plaintiff they must further find, before answering the issue in the affirmative, that the shipments for the lower rate were for a like distance and under substantially the same circumstances, and this we understand to be the test which distinguishes a lawful from an unlawful discrimination. It is not denied that all the shipments of the logs were in car load lots, nor is it claimed that the cost of handling the freight coming into Wilmington was greater than that going to other points.

The real controversy made upon the first appeal, and again presented upon this record, is whether, assuming the facts to be as plaintiff claims, the defendant could give a lower rate to such of its customers as shipped the manufactured product of the logs over its line and, as we have seen, that question has been decided adversely to the defendant's contention. The only case to which our attention has been directed which would tend to sustain the contention is the *L. & N. & R. Co. v. Comn.*, 57 S. W. 508, decided by the Supreme Court of Kentucky. We have examined that case with care, and think that the dissenting opinion of Paynter, J., in which two of the other judges concurred and which fully sustains the view taken by this court, and we think supported by authority and reason, is the sound view of the question. The defendant does not controvert the plaintiff's right to recover for money had and received, provided the facts are as alleged. In *Western Railroad v. Sutton*, supra, the action was for money had and received for a discriminating freight rate charged and paid. It was held in that case that where a higher charge was paid than that charged other shippers, the payment was not to be considered voluntary and the excess might be recovered back upon account for money had and received. The authorities are uniform upon this question. It is not necessary that at the time of payment there should have been any protest. As said by the Supreme Court of Alabama in *Mobile M. R. Co. v. Steiner*, 61 Ala. 559, in an action like this: "The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges for transportation and if the shipper pays the rates established in violation of the law to the carrier rather than forego his services, such payment is not voluntary in the legal sense and the shipper may maintain his action for money had and received to recover back the illegal charge." There seems to be no conflict of authorities upon this question. His honor gave judgment for the amount sued for and interest, to which defendant excepted. We think his honor was correct. The theory upon which the plaintiff recovers is that the defendant has received the money wrongfully, and the law implies a promise to repay it. The action was originally equitable in its character and founded upon the theory that in good conscience the defendant should re-

pay the money wrongfully received, and from this duty the law implied a promise so to do. We see no reason why the amount should not draw interest. Revisal 1905, § 1954; Barlow v. Norfleet, 72 N. C. 535; Farmer v. Willard, 75 N. C. 401. The cases cited by defendant were actions in tort, wherein the jury may or may not allow interest, as they see proper. In this lies the distinction.

Upon a careful review of the entire record, we find no reversible error. The judgment must be affirmed.

BROWN, J., did not sit.

(141 N. C. 184)

WRIGHT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 17, 1908.)

1. GARNISHMENT—ACTIONS—FOREIGN JUDGMENT—JURISDICTION—PRESUMPTIONS.

In the absence of countervailing evidence, it will be presumed that a garnishment action proceeded regularly and according to the course and practice of the court of the state wherein it was pending, and that all proper steps were taken to charge the garnishee, where it appears that the court had jurisdiction of the subject-matter and the parties.

2. SAME—NOTICE TO DEFENDANT—NECESSITY.

Where defendant was personally served with summons in the principal action brought in another state, and the court had jurisdiction of his person and of the subject-matter of the action, the failure to notify him of garnishment proceedings in the action did not render invalid payments made by the garnishee under such proceedings.

3. SAME—JUDGMENT AGAINST GARNISHEE—PAYMENT—EFFECT—CONSTITUTIONAL LAW.

Under Const. U. S. art. 4, § 1, requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, payment by a garnishee of a judgment rendered against it in an action wherein process was personally served on defendant, and the court had jurisdiction of the parties and the subject-matter of the action, must be recognized as payment of the original debt by the courts of any other state, where it is properly pleaded by the garnishee in an action against him by defendant to whom he originally owed the debt.

Appeal from Superior Court, Guilford County; Ward, Judge.

Action by J. L. Wright against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. New trial.

The plaintiff brought the action before a justice of the peace to recover \$133.27 alleged to be due by the defendant as wages for services rendered. The defendant pleaded what is called the "general issue," that is, it denied the indebtedness. The justice gave judgment against the defendant, and it appealed. In the superior court it further pleaded payment, set-off, and counterclaim. The defendant did not, at the trial, deny that it was at one time indebted to the plaintiff in the said amount, but relied, in support of its general denial and the added pleas, upon judgments in two suits, one in a justice's court of Knox county, Tenn.,

entitled "Brewing Co. v. Luther Wright & Co.," of which firm plaintiff was a member and proved that plaintiff in this action, who was a defendant in that one, was personally served with process, the court having jurisdiction of the action, and that judgment was therein rendered against him for \$85.10, and thereupon a writ of garnishment was sued out, and served on the defendant in this case, Southern Railway Company, after a return of nulla bona to the execution which had been issued on the judgment. Defendant appeared in obedience to the process issued against it and answered by admitting an indebtedness to the plaintiff of \$136.29 and alleged that of this sum \$52.93 was subject to a prior garnishment issued in another suit against it. Judgment was duly entered against defendant, under the garnishment, for \$83.99, which it afterwards paid. The other suit was brought by the plaintiff against the Knoxville Livery & Stock Company in the court of chancery of the same county, in which the defendant filed a cross-bill and upon the said cross-bill obtained judgment against the plaintiff for \$37. Upon a return of nulla bona to the execution issued upon that judgment process of garnishment was sued out against the defendant in this case, Southern Railway Company, and judgment, after appearance and answer, was duly entered against it for \$48.25. The defendant railway company, as garnishee, paid on this judgment \$5,190, which was \$3.65 more than should have been collected on the principal judgment or the garnishment. This excess was paid by the clerk of the court to the plaintiff, J. L. Wright, who was substantially the defendant in the judgment. So far as appeared in the court below, the proceedings in both suits were conducted regularly. The judge held that the payments thus made by the defendant did not constitute a good and valid defense or support the pleas of payment, set-off, or counterclaim except as to the sum of \$3.65 received by the plaintiff from the clerk of the chancery court and so instructed the jury and directed them to answer the issue accordingly. There was a verdict in favor of the plaintiff for \$133.27, being the amount claimed by him, and judgment thereon. Defendant excepted and appealed.

King & Kimball, for appellant. Taylor & Scales, for appellee.

WALKER, J. (after stating the case). The plaintiff contends that the payments made by the defendant under the garnishment proceedings cannot be set up to defeat his recovery in this action because he was not notified of the process of garnishment. It does not affirmatively appear whether he was or not, but for the sake of the argument we will assume that he was not so notified. He was personally served with the summons in the principal action and (nothing else ap-

pearing), we think that was quite sufficient to bind him by the judgment in the garnishment, not that he is precluded by it from showing that the defendant did not owe him more than was adjudged to be due in that proceeding, but the latter is protected by the payment from answering again to the plaintiff for the same debt. It is not pretended that the statute of Tennessee requires that he should be notified. In the absence of any countervailing evidence, we must presume that the case proceeded regularly and according to the course and practice of the court of the state in which it was pending and that consequently all proper steps were taken to charge the garnishee. This is the well-settled rule, where it appears that the court had jurisdiction of the subject-matter and the parties. *Rood on Garnishment*, § 214; *Grier v. Rhyne*, 67 N. C. 338; *McLane v. Moore*, 51 N. C. 520. No question is made in this case as to the jurisdiction of either of the courts which rendered the two judgments, and there is no irregularity or other defect in the proceedings alleged except the failure to notify the defendant in them, who is plaintiff in this action, of the garnishment. This objection is not tenable. One reason for requiring such a notice is to enable the defendant to make his defense, if he has any, to the original action and thereby prevent his being called upon to pay the debt twice. This, we think, is a most just and reasonable rule but in all cases where it has been applied, the defendant, not the garnishee, had been brought in by publication, by constructive and not by personal service, and the reason for the rule would perhaps confine it to such cases, unless there is some special defense to the garnishment or some right that could be asserted thereunder. The defendant's counsel rely on *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, and that is the only decision cited to us to sustain the point. The court does say in that case: "But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff) we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder." But it is further said: "This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit."

We see, therefore, that the principle, as there restricted by the reason given for it, does not apply when the original defendant has had legal notice of the suit by the personal service of process and a full opportunity to defend as he undoubtedly had in the present case. Indeed, the garnishment was not issued until after the time for pleading or answering had expired, and a judgment had actually been entered, thereby cutting off all defenses and fixing the defendant conclusively with liability for the debt. What good then would notice have done? He could not have defended if he had been notified, as by his own laches or his failure at the proper time to appear and defend the suit he had lost his day in court. The defendant does not now deny his liability, and he is in no danger whatever of being twice vexed for the same debt, or in any jeopardy of having to make a double payment upon it. The two judgments have been fully satisfied of record, and the plaintiff has received the amount paid in excess of what was due on the last of the two judgments. His creditor has received all that is justly due to him and no court in any jurisdiction would permit him to proceed against the plaintiff again. In a case like this, where the defendant has been personally served with process in the principal suit, it would be next to impossible to charge him twice on the same liability, as the judgment must first be taken against him before a garnishment issues, and then the money that is collected under the garnishment is applied to the satisfaction of that judgment. Under the statute of Tennessee, a garnishment upon a judgment after a return of nulla bona to the execution issued thereon is closely analogous to our supplementary proceeding under the provision of sections 490-493 of the Code (Revisal of 1905, §§ 675, 678). These sections of the Code and the Revisal do not require notice to the defendant, though the court may, in its discretion, order notice to be given. *Wilmington v. Sprunt*, 114 N. C. 310, 19 S. E. 348. It is said in *Rood on Garnishment*, § 280: "If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that the rights of no person can be concluded by any proceeding till he has had his day in court. But, in all cases in which he has been personally served with process, or has appeared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such notice is required by some provision of the statute under which the garnishment

suit is conducted." However this may be, and we express no opinion in regard to it as being a general rule and applicable to all cases, there is nothing in this record to show that the plaintiff has been prejudiced by the failure of the defendant, as garnishee in the other cases, to notify him of the garnishments, if it had appeared that such notice had not been given. He has not been deprived of any defense nor of any right, so far as we are informed, which he could have saved if he had received the notice. The case, therefore, is resolved into the simple fact that the debt due by the defendant to the plaintiff has been applied to the payment of a just obligation against him in the state of Tennessee, in suits to which he was made a party by the personal service of process. It would be requiring an innocent party to pay a debt twice if we should now hold the payment to be unavailing, especially in the absence of any sound legal reason for it and of any evidence showing that the plaintiff had a meritorious defense to the garnishment. It would, too, be unjust so to hold.

As to the other question. It has been recently held by the Supreme Court of the United States, reversing *Balk v. Harris*, 130 N. C. 381, 41 S. E. 940, that attachment is the creation of local law and if there be a law of the state providing for the attachment of the debt due to the defendant in the principal suit, then if the garnishee be found in that state, and process be personally served upon him therein, the court thereby acquires jurisdiction over him and can garnish the debt due from him to the defendant as debtor of the plaintiff and condemn it; provided the garnishee could himself be sued in that state. Power over the person of the garnishee confers jurisdiction on the court of the state where the writ issues against him, without regard to the "situation of the debt," as the obligation to pay his debt clings to and accompanies him wherever he goes. The court then concludes that a judgment rendered against a garnishee under such circumstances, which is afterwards paid by the garnishee, must, by virtue of the clause in the federal Constitution requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, (article 4, § 1), be recognized as a payment of the original debt by the courts of any other state, where it is properly pleaded by the garnishee in an action against him by the defendant to whom he originally owed the debt. *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023. *Railroad v. Deer* (decided at the present term of the same court and following *Harris v. Balk*) 26 Sup. Ct. 207, 50 L. Ed. —, is like our case except in one particular. In that case there was no personal service on the defendant in the principal suit, but only constructive service by publication, while here he was personally served. Those decisions having been made by the court

having jurisdiction to finally construe and apply the clause of the federal Constitution to which reference has been made and to review the decisions of this court, in respect thereto, we must abide by what is there decided and at least to the extent that the cases are binding upon us as authorities. See, also, *Railroad v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; *Goodwin v. Claytor*, 187 N. C. 224, 49 S. E. 173, 67 L. R. A. 209; *Insurance Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663; *Cahoon v. Morgan*, 38 Vt. 234. This disposes of the only two questions presented in the case as shown by the briefs of counsel, the one as to the right to garnish the debt due by defendant to the plaintiff in Tennessee, and the other as to plaintiff's right to notice of the garnishment.

There was error in the ruling of the court, for which a new trial is ordered.

New trial.

(141 N. C. 117)

BLACKWELL v. MUTUAL RESERVE FUND LIFE ASS'N.

(Supreme Court of North Carolina. April 17, 1906.)

INSURANCE—ACTION BY POLICY HOLDER— FOREIGN COMPANY—APPOINTMENT OF RE- CEIVER.

A policy holder in a foreign mutual insurance company, cannot, in an action against the company, have a receiver appointed for the purpose of taking charge of assessments to become due the company, though the company has no assets in the state and is in danger of becoming insolvent.

Appeal from Superior Court, Durham County; Ferguson, Judge.

Action by James W. Blackwell against the Mutual Reserve Fund Life Association. From a judgment denying the appointment of a receiver, plaintiff appeals. Affirmed.

Plaintiff sued to recover amount of premiums paid defendant company, \$2,314, on account of assessments upon a policy of \$25,000, which he alleges was wrongfully and in violation of terms of the contract canceled by defendant. He remitted the excess over \$2,000. After setting forth the facts upon which his alleged cause of action is based, he alleges that defendant, having, in compliance with the laws of this state, appointed an agent upon whom service of process could be served, fraudulently and for the purpose of preventing suits being brought in the courts of the state, attempted to cancel its power of attorney; that plaintiff's policy was issued while said power of attorney was in force and while defendant was engaged in soliciting business and issuing policies in this state; that defendant has now in force a large number of policies issued to citizens and residents of this state, and that it is collecting assessments or premiums on said policies; that for the purpose and with intent to defraud its North

Carolina policy holders, defendant is taking from the state and the jurisdiction of the courts its assets and property; that the insurance commissioner of this state has prepared and published a statement showing that the affairs of defendant company are badly managed; that judgments against it for large amounts are unpaid and outstanding; that from said publication and other sources set out in his affidavits plaintiff believes that defendant company is insolvent or in imminent danger of insolvency. For the reasons and upon the grounds thus set forth plaintiff asks that a receiver be appointed by the court to take in to his possession a sufficient amount of the property and assets of defendant in this state to satisfy and discharge his claim, etc. An order was duly issued directing defendant to show cause before the judge presiding in the Ninth judicial district why a receiver should not be appointed as prayed, etc. The defendant company, on the return of said order, filed an answer, and affidavits in support thereof, denying the material allegations contained in plaintiff's complaint and affidavits. Defendant also denied that it owned any property or assets in this state, and averred that no person residing in this state was indebted to it; that the payment of the assessments made upon policy holders was voluntary, and that by the express terms of the policy, a copy of which is set out, the holder assumes no personal liability for the payment of said assessments; that by the terms of said policy failure to pay the assessment works a forfeiture thereof, but imposes no other liability upon or against the holder; that said assessments are due and payable at the home office of defendant company in New York. It denies that it is insolvent, or in imminent danger of becoming so, setting forth a statement of its assets and liabilities. It avers that it canceled the power of attorney to its agent without any other purpose than to cease doing business in the state, and without any intent or purpose to defraud its creditors or policy holders. His honor, upon hearing the answer and affidavits, declined to appoint a receiver. Plaintiff appealed.

Guthrie & Guthrie, for appellant. Winston & Bryant and Hinsdale & Son, for appellee.

CONNOR, J. (after stating the case). In view of the admitted facts in regard to the property rights, or rather absence of such rights, within the jurisdiction of the courts of this state, we are relieved from the necessity of discussing the affidavits in regard to the management and solvency of the defendant company. Assuming that, upon the facts stated in the complaint, in the light of the decisions of this court in which the same defendant was a party, plaintiff has a valid cause of action; and, assuming that de-

fendant is in danger of becoming insolvent, we find ourselves confronted with the difficulty in granting the motion for a receiver by the fact that the company has no assets within this state which could be taken into possession of such receiver. The only rights suggested by plaintiff in this connection are assessments to become due hereafter from policy holders residing in this state. These assessments will not be, when due, debts or choses in action which the defendant could enforce. "The levying of an assessment does not make a member a debtor to the association, authorizing it to bring suit in the event of his neglect or refusal to pay. "The only effect of the default is to relieve the association of its obligation to the member." Cooley, Ins. Briefs, 1013; Insurance Co. v. Stathan, 93 U. S. 24, 23 L. Ed. 789; 2 May on Ins. (3d Ed.) 341. The law, supported by authority, is thus stated in Bacon on Benefit Soc. § 357: "In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums or assessments, and consequently no personal liability therefor. The payment of the premium or assessment is only a condition precedent of the liability of the company. The insured does not promise to pay the premiums, and the company only promises to pay if it has received the agreed consideration. Therefore the insured may pay or not as he pleases. He has the perfect right to do either, and need give no excuse for his choice. If he does not pay, the contract is ended." While the court would be prompt to protect by any process within its power the rights of a citizen against a foreign corporation and hold any property within its jurisdiction to meet the demand when established by judgment, it will not do a vain thing and send its officer to chase unsubstantial possibilities. The only effect of the appointment of a receiver in this case would be to embarrass and probably injure other policy holders, without any resultant benefit to plaintiff. If the receiver demanded payment of an assessment, and it was refused, he could not enforce its payment; he having no other right against the policy holder than the defendant company has. If he should seek to enjoin payment to the company, he would be met with the obstacle that, if the courts of this state enjoined such payment, the policy would be avoided for nonpayment of assessment. If so declared avoided by the company, this court would have no power to protect the policy holder by mandamus or otherwise. Without pursuing the discussion further, it is manifest that no possible benefit could accrue to the plaintiff, and much annoyance and injury to innocent persons. "The liability of the members of the mutual insurance companies upon their premium notes is not increased by reason of the insolvency of the corporation and the appointment of a receiver, since the receiver is merely substituted in place of the direct-

ors of the company and vested with their rights and powers and nothing more." Ald. on Rec. § 372. The power of a receiver to enforce assessments made upon unpaid stock is based upon the fact that the delinquent stock holder owes a debt to the company for which it could maintain an action; whereas for an assessment upon an insurance policy, as we have seen, no action could be maintained by the company.

Again; it seems to be established by the authorities cited in the well-considered brief of defendant's counsel that such assessments as are levied under the provisions of the policies issued by defendant company are, when paid, impressed with a trust for the benefit of the other policy holders. The contract of insurance expressly provides that a certain percentage of the assessments shall be set apart for the purposes set forth therein. We could not, through a receiver, compel the payment of an assessment to be appropriated to plaintiff's claim in violation of the terms of the contract and the rights of other policy holders. The plaintiff has no lien or specific claim to any portion of the assets of the company. This plaintiff, together with thousands of others, has entered into a contract of insurance with a corporation having no capital or assets within reach of the courts of his state, and with but little, if any, substantial guaranties of compliance with its contract. By a very remarkable provision, which, if read, should have put plaintiff upon notice, the contract declares that "this contract shall be governed by, subject to, and construed only according to the laws of the state of New York; the place of this contract being expressly agreed to be the home office of said association in the city of New York." This provision is void so far as the courts of this state are concerned. Revisal 1905, § 4806. It seems from his account of the dealings between the company and himself that he has expended a considerable amount of good money with a poor prospect of realizing any very substantial returns. The courts of this state in the trial of his cause will adjudge his rights; but it seems that, as others have been compelled to do, he must pursue his remedy to reach assets of the defendant in the courts of New York. We do not entertain any doubt of the power of the courts of this state, either by attachment or, in proper cases, the appointment of a receiver, to seize and retain any property of a foreign corporation in this state and apply it to the payment of debts due our citizens. The exercise of this power does not involve winding up the affairs of the corporation. It is only for the purpose of securing the fruits of the recovery. The question is fully discussed by Mr. Justice Walker in *Holshouser v. Copper Co.*, 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183. We have examined the case of *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47

L. Ed. 987, cited by plaintiff. The only question decided upon that appeal related to service of process and procedure. It is true that the court of Kentucky appointed a receiver after judgment in an action against this defendant. Whether there was property other than assessments to become due does not appear.

For the reasons set out his honor's judgment must be affirmed.

(141 N. C. 409)

BRENIZER v. SUPREME COUNCIL, ROYAL ARCANUM.

(Supreme Court of North Carolina. May 16, 1906.)

1. GARNISHMENT—DISCLOSURE—ISSUES.

Revisal 1905, § 781, declares that when any garnishee denies that he owes to or has in his possession any property of the defendant, and plaintiff shall on oath suggest the contrary or when the garnishee shall make any statement of the facts that the court cannot proceed to give judgment upon, then the court shall order an issue to be made up which shall be tried by a jury and render judgment on the verdict. *Held*, that where plaintiff in garnishment suggests a desire to traverse the return of a garnishee, plaintiff is entitled to have the issue tried as directed without filing any formal or verified statement.

2. INSURANCE—FOREIGN COMPANIES—PROCESS—SERVICE.

In an action against a foreign fraternal insurance order doing business within the state, service of summons on the insurance commissioner conferred jurisdiction of the society.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 33.]

3. ATTACHMENT—DISMISSAL—PROPERTY SUBJECT—OBJECTION—RIGHT TO RAISE.

Where, in an action against a foreign assessment insurance society, funds in the hands of a collector were attached and the society claimed that such funds were trust funds held by it for the benefit of the widows, etc., of deceased members, and were therefore not subject to attachment, the society in its capacity as trustee was entitled to raise such question by motion to dismiss the attachment.

4. SAME—BENEFIT FUND—ATTACHMENT.

The constitution of defendant assessment insurance society provided that one of its objects was to establish a widows' and orphans' benefit fund, from which a sum not to exceed \$3,000 should be paid to the wife, etc., of deceased members, that the funds from which such payment should be made should be derived from assessments collected from members, and that the expense of the society should be defrayed from a per capita tax, dues, and expense assessments. Provision was also made for creating from assessments an emergency fund to pay any excess of current death losses. *Held*, that assessments payable into the benefit fund, in the hands of a collector of the society which he was bound to pay over to the society's treasurer were trust funds for the benefit of the beneficiaries of deceased members, and were not subject to attachment by a creditor of the society.

5. COURTS—JURISDICTION OF THE PERSON—FOREIGN SOCIETIES—MANDAMUS—INJUNCTION.

The courts of a state have no power to control the supreme council of a foreign assessment insurance society by mandamus or injunction.

6. INSURANCE—BENEFICIAL ASSOCIATIONS—ACTION—JUDGMENT—ENFORCEMENT.

A judgment recovered against a foreign assessment insurance society could be enforced only by final process against the funds of the society within the jurisdiction or by a suit on the judgment in the state of the society's domicile.

Clark, C. J., dissenting.

Appeal from Superior Court, Mecklenburg County; Webb, Judge.

Action by A. G. Brenizer against the Supreme Council of the Royal Arcanum. From an order denying a motion to dissolve an attachment levied on certain funds of the society, it appeals. Reversed.

This was a motion to dissolve an attachment levied upon certain moneys in the hands of D. T. Johnson, collector of Raleigh Council of the Royal Arcanum. The facts appearing upon the record are as follows: Plaintiff, A. G. Brenizer, on the 31st day of October, 1905, instituted an action in the superior court of Mecklenburg county for the purpose of recovering the sum of \$1,400, alleged to be due him by the Supreme Council of the Royal Arcanum. Summons was duly served on the insurance commissioner of North Carolina. The warrant of attachment was issued by the clerk of the superior court of said county, directed to the sheriff of Wake county commanding him to attach all the property of the defendant in said county. The said clerk issued an order to the sheriff of Wake county commanding him to summon D. T. Johnson to appear and answer on oath concerning such moneys or property as he had in hand belonging to the defendant, etc. Upon service of the notice, said Johnson, upon oath, made return saying: That he is a collector of Raleigh Council No. 551 of the Royal Arcanum which is a subordinate council under the jurisdiction of the Supreme Council. That as such collector under the charter, constitution, and laws of the Royal Arcanum, as shown in the constitution thereof, it is his duty to receive and collect all moneys due by the members of his council for the widows' and orphans' benefit fund, and to pay the same over to the treasurer of the subordinate council. It is the duty of the treasurer to keep a separate account of the widows' and orphans' benefit fund, and not allow this fund to be used for any other purpose, and to transmit the money to the Supreme Council. As such collector, he had in his possession on November 1, 1905, the day the notice of attachment was served upon him, the sum of \$861.34 which is to his credit as collector, in bank. That this money was collected and received from the individual members of the said council, as assessment No. 350, for the widows' and orphans' benefit fund, and when collected should have been paid over to the treasurer of the said council, whose duty it is to transmit the same to the proper officer of the Supreme Council. That he had no other money or property of the Supreme

Council; that all the money in his possession or on deposit made by him, was collected for the purpose of paying assessment No. 350 belonging to the general fund of Raleigh Council, not the property of or in any way controlled by, the Supreme Council. This money is a part of the fund which, under the charter, constitution, and laws of the defendant, the Supreme Council, and under the laws of Massachusetts, of which state defendant is a citizen, was raised for, and is held as a trust fund to be paid out solely for death benefits, and neither affiant nor defendant nor any one else can divert the same to any other purposes. That he is advised that such sum is not liable to attachment at the hands of any one who has a supposed claim against the Supreme Council, not arising out of the death benefit. He refers to the provisions of the charter, constitution, and rules of the Royal Arcanum; wherefore he asks that the attachment against him be vacated, etc.

Henry J. Young, treasurer of Raleigh Council, filed an affidavit stating that it was his duty to receive from the collector all the money paid to him for the council and to keep an account of the sum. That it is his duty to keep a separate account of the widows' and orphans' benefit fund and not to permit it to be used for any other purpose. That at the time the notice of attachment was served upon him, he had in his possession \$333 which belonged to the subordinate council and that he had no funds belonging to the Supreme Council. E. A. Skinner of the state of New York filed an affidavit stating that he was supreme treasurer of the Supreme Council of the Royal Arcanum; that he is the custodian of the funds of said corporation, etc.; that according to the articles of incorporation of defendant, the laws of Massachusetts, and the constitution and laws of the defendant, the said defendant has created and established a widows' and orphans' benefit fund out of which shall be paid to the wife, children, and relatives of persons entitled thereto, under the amounts of certificates issued to them by said council. The said widows' and orphans' benefit fund is collected and remitted to him as custodian thereof, and payments therefrom made in accordance with the constitution and laws of said order. That none of the moneys contributed and paid to the widows' and orphans' benefit fund by the members of the various subordinate council has ever been used for any other purpose than for the payment of death benefits and to establish what is known as the "Emergency Fund," and that said moneys have been held sacred as a trust created by the articles of incorporation, the laws of Massachusetts and the constitution of the Royal Arcanum; that the funds which have been attached by process in this action were contributed to and paid by certain members to the collectors for the sole purpose of being transmitted before

November 15, 1905, to this deponent as custodian of said fund, and to be used only in the payment of death benefits as heretofore stated and that none of such funds under the articles of incorporation, the laws of Massachusetts, etc., is liable for the payment of any other debt or debts of the Supreme Council, but is a trust fund as herein provided. There is a separate fund of the Supreme Council from which all expenses of whatever kind are paid. W. O. Robson, of the state of Massachusetts, filed an affidavit stating that he was supreme secretary of the defendant; that he knows of the constitution and laws thereof and of the laws of Massachusetts, under which the defendant is organized. That said defendant was authorized to and has established a widows' and orphans' benefit fund by requiring all the members of the various councils of the defendant corporation, wherever situated, to pay to the collectors of their respective subordinate councils, certain sums of money, prescribed in said laws, which after a certain period of time, therein prescribed, become the property of the defendant corporation, and that after the same comes into the possession of the supreme treasurer, it then becomes a part of the widows' and orphans' benefit fund, above referred to, and by the articles of incorporation, the laws of the state of Massachusetts and the constitution and laws aforesaid, are a trust fund to be used only as provided in said laws found in exhibit attached. That according to the laws of Massachusetts and the constitution, etc., the said widows' and orphans' benefit fund is a trust fund created and established solely for the purpose of paying therefrom, "on the satisfactory evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding \$3,000 to the wife, children, relatives, etc., as he may direct." That said trust funds have not been, nor does he believe they could be used for any other purpose whatsoever. That the funds which were attached in this action were paid by the members of the subordinate councils to the officers of said councils, as assessments due from such members to the widows' and orphans' benefit fund to be transmitted to the supreme treasurer, etc. A copy of the certificate issued to the plaintiff was attached to the record by which it appears that the Supreme Council of the Royal Arcanum promises to pay out of its widows' and orphans' benefit fund to the person named therein the sum of \$3,000, etc. Certain portions of the constitution and laws of the said Supreme Council were in evidence in which the objects of the order are stated, among others, to issue a widows' and orphans' benefit fund, from which the sum not exceeding \$3,000 shall be paid to the wife, children, etc., of each member upon the conditions therein set out. It is also provided that upon application made and accepted by any

person a certificate shall issue entitling the person named therein upon the death of the applicant to be paid from the widows' and orphans' fund the sum named not exceeding \$3,000. A schedule of assessments is attached to the record, also certain portions of the statute in force in Massachusetts regulating the management of benefit societies.

The motion was based upon two grounds, the second being that the warrants of attachment and attempted service and levy thereof be adjudged void and vacated, on the ground that the funds attempted to be garnished and attached are not subject to attachment or garnishment for the claim of the plaintiff. The motion being denied, the defendant excepted and appealed.

Tillett & Guthrie and F. H. Busbee & Son, for appellant. E. T. Cansler and Chas. Brenizer, for appellee.

CONNOR, J. (after stating the case). Plaintiff's counsel in their well-prepared brief and able argument in this court, raise a question of practice, insisting that under the provisions of the statute (Revisal 1905, § 781): "When any garnishee makes such a statement of facts that the court cannot proceed to give judgment thereon, then the court shall order an issue to be made up which shall be tried by a jury and, on their verdict, judgment shall be rendered." It is clear that plaintiff, upon the suggestion that he wished to traverse the return, was entitled without any formal or verified statement to have the issue tried as directed by the statute. It seems, however, that defendant made its motion upon the return and plaintiff thereupon made an issue of law, as upon a demurrer, admitting, for the purpose of the motion, the truth thereof. The appeal comes to us in that form, and has been argued upon the merits. We concur with the plaintiff that his honor correctly refused to vacate the warrant of attachment. It is in all respects regular, and if so advised, the plaintiff may, upon his affidavit, have other warrants against any property which the defendant may have in this state. The service of summons on the commissioner of insurance brings the defendant corporation into court, and all such further proceedings may be had in the cause in ascertaining and declaring plaintiff's rights, as may be in accordance with the law upon the facts as found by the court or jury. Plaintiff suggests that the defendant corporation cannot raise the question whether, upon the return to the notice, the money in the hands of Mr. Johnson is liable to garnishment or attachment; that only the garnishee or collector can raise the question at this time, or until after judgment it is sought to have the funds applied to its discharge. We think that, in view of the contention of the defendant corporation that it is entitled, and that it is its duty to receive and hold this money upon

an express trust, that it may at this stage of the litigation make such motions and pursue such course as may be proper to protect the fund. It is always the duty of a trustee to protect the trust property, and for that purpose institute actions, intervene in actions pending, and, in any other way, in accordance with orderly procedure, protect such property. Having disposed of these preliminary questions of practice, we are confronted with the real question in debate. Taking the return to be true, together with the affidavits filed in support thereof, is the money in the hands of Mr. Johnson, collector, subject to attachment for the claim of the plaintiff? The solution of this question depends upon the answer to the further question, whether the money collected by him is impressed with an express trust. The process with which we are dealing is rather an attachment than a garnishment. The money held by Johnson is the property of defendant, and not a debt due by Johnson, which is usually the subject of garnishment. It is not material to discuss or attempt to distinguish the two kinds of process. Johnson says that he is the treasurer of Raleigh Council, the members of which are assessed by the Supreme Council, monthly, for the amount fixed, and that he collects such assessments for the widows' and orphans' benefit fund created by the council and held by it in special trust to pay to the wife, children, relatives of, or persons dependent upon members holding certificates at their death; that the amount in his hands, at the time of notice of attachment was collected and received from the individual members of the said local council, as assessment No. 350 for the widows' and orphans' benefit fund, and should have been turned over to the treasurer of said council, whose duty it is to send the same to the treasurer of the Supreme Council, for the purpose of holding same. He says that he had no other money which is, or can be called, the property of the Supreme Council; that this fund is, under the charter, constitution, and laws of the Supreme Council, and the laws of Massachusetts, raised for, and is held as, a trust fund to be paid out solely for death benefits. The other affidavits and exhibits all tend to sustain the truth of the return. The portion of the constitution, etc., in evidence declaring the objects of the order are consistent with the return. In paragraph 5 it is expressly stated that one of the objects of the order is "to establish a widows' and orphans' benefit fund from which on satisfactory evidence of the death of a member of the order, * * * a sum not exceeding \$3,000 shall be paid to the wife, etc." The funds from which the payment of such benefits shall be made shall be derived only from assessments collected from the members, except as provided in sections 8, 9, and 10. The fund from which the expenses shall be

defrayed may be derived from a per capita tax, dues, and expense assessments.

Provision is made for creating, from the assessments, in excess of the current death losses, an emergency fund, from which, if assessments are insufficient to meet death losses, they may be paid. The emergency fund shall be used only for death or disability benefits. We think it apparent from the portions of the charter, laws, and statutes quoted, and others in the record, that the assessments received by Mr. Johnson, collector, are made and paid for the purpose set out in his return. It is his duty to pay them over to the treasurer of Raleigh Council to be sent the supreme treasurer. Mr. Robson says that he is the supreme secretary, and knows the method by which the assessments are made, collected, and remitted; that after receipt by the grand treasurer, the assessments become a part of the widows' and orphans' benefit fund, all of which, he says, is regulated by the charter, laws, etc., of the corporation and the laws of Massachusetts. The question is of first impression in this state; but we find that in other courts, the status of funds held by orders or societies of the class to which defendant belongs has been considered. "Whether a fund formed by the contributions of members of a society has been impressed with a trust and so accepted is a question of fact always open to judicial inquiry, and whether the alleged trustee be an individual, incorporated or otherwise, no act, declaration, or decision of such trustee will prevent such inquiry. If the terms of the alleged trust are contained in an instrument of gift, that instrument will be examined, and the intentions of the donor carried into execution. If expressed in the articles of a voluntary society, these articles will be carried into specific execution for the purpose of enforcing the trust and if in the fundamental law, or in the ordinances and by-laws of a society, on the faith of which contributions have been made, the court will adopt the construction of the members and apply relief according to their own views of the law. An ordinance of a society, which provides for the creation of a fund for the benefit of the widows, orphans, heirs or designated beneficiaries, of the members and commits the administration of such fund to the officers of the society, impresses any money paid into such fund with the qualities of a trust for the special purposes expressed therein; and the fund thus formed can properly be applied only in that particular manner pointed out in such ordinance, which is in this regard to be treated as an express declaration of trust." Niblack, Benefit Soc. 247.

Our statute (Revisal 1905, §§ 4790-4796), recognizes the distinction between "assessment companies," "fraternal orders," and insurance companies. By section 4791 assess-

ment companies are prohibited from issuing policies or transacting business not authorized by its charter. By section 4796 fraternal orders are defined bringing the defendant corporation within such definition and providing "that such order, society, or association paying death benefits may also create, maintain, apply, or disburse among its membership a reserve or emergency fund as may be provided in its constitution or by-laws; but no profit or gain shall be added to the payments made by a member." Section 4796 provides that funds for such orders must be derived from assessments and dues. "Such societies or associations shall be governed by the laws of the state governing fraternal orders, and shall be exempt from the provisions of all general insurance laws of this state and no law hereafter passed shall apply to such societies unless fraternal orders be designated therein." This general statement of the law is sustained by a number of decided cases—we find none to the contrary. In *Nat. Park Bank v. Clark* (Sup.) 77 N. Y. Supp. 1089, the relative rights of members and creditors of an order of this character were involved and passed upon. An order or association, in some respects similar to the defendant, chartered in Indiana, became insolvent and a receiver was appointed by the court in that state. The order had subordinate councils in New York and they, in turn, established a grand council in that state. The Supreme Council maintained a general fund for the purpose of defraying its ordinary expenses, etc., and a relief fund for the benefit of members disabled, etc. The funds were derived from assessments of an amount fixed according to age, etc., paid by members of the subordinate councils and transmitted by them to the Supreme Council, 90 per cent. of which went into the relief fund and 10 per cent. into the general fund. Certificates were issued to the members very similar in form and substance to that issued to plaintiff. No assessments were made for any particular claim. For the convenience of claimants, depositories of the relief fund were appointed; one of them being the National Park Bank. Several creditors attached the funds deposited therein. A receiver was appointed by the New York courts to protect the funds in that state for the benefit of claimants residing there. The question as to the rights of attaching creditors and the receiver came up before the Supreme Court. Wright, J., said: "So we have a fund devoted by the law providing for its existence, and also by the subsequent agreement of every member of the order, to a certain definite purpose. It was paid by the members to the Supreme Council for that purpose, and it was hedged about by rigid provisions for its protection against diversion from that object by the Supreme Council or any other authority. The body of beneficiaries, entitled to this fund, was determined by the claims that were, from time to time,

passed upon and allowed. * * * From the foregoing, it clearly appears that said fund was impressed with a trust for the purpose aforesaid." After discussing the rights of all claimants to an equitable distribution of the fund, it is said: "The counsel for the attaching creditors cite several cases for the purpose of endeavoring to substantiate their claims to a preference by virtue of their liens of attachment; but those cases do not apply to a case like this, when the fund attached is a trust fund." The court directed the receiver appointed by the New York court, after paying the expenses of the receivership, to pay over the fund to the Indiana receiver to be administered in accordance with the terms of the trust.

In *Knight Templars v. Vall* (Ill.) 68 N. E. 1103, in discussing the status of the funds derived from assessments and set apart for a specific purpose, a distinction is drawn between such funds and those of the ordinary life insurance company, *Ricks, J.*, saying: "It may be observed that appellant is not an ordinary insurance company, which pays tribute to the state upon the theory that it reaps, from the business, pecuniary profit; but, on the contrary, its existence is only authorized upon the theory as the title of the act authorizing it provides that it was organized 'for the purpose of furnishing life indemnity or pecuniary benefits to widows, orphans, etc., to the members thereof.' In the eye of the law, the members and those bearing certain relations to them, are the beneficiaries of all the funds realized by such corporation, and not the corporation itself. The corporation stands but as a trustee handling the funds paid by the members and to be issued to them, and the beneficiaries authorized by the act, according to the plain restrictions provided by the act." The same view is taken in *Com. v. Eq. Ben. Ass'n* (Pa.) 18 Atl. 1112, wherein, after discussing the theory upon which insurance companies is based, it is said: "What is known as a 'Beneficial Association,' however, has a wholly different object and purpose in view. The great underlying purpose of the organization is not to indemnify or secure against loss. Its design is to accumulate a fund from the contribution of its members for beneficial or protective purposes to be used in their own aid or relief in the misfortune of sickness, injury or death."

In *Allen v. Thompson* (Ky.) 56 S. W. 823, the question under consideration is sharply presented. Plaintiff borrowed from the Granger's Mutual Benefit Society a sum of money, and secured its payment by a mortgage. The society, of which he was a member, becoming insolvent, he sought to use, as a counterclaim, the amount paid by way of assessments or the cash value of his certificate. The assessments were made for and paid into the mortuary fund held by the society to pay death claims of the members. The court

said: "These monthly dues were a sum certain, payable every month, and not contingent in any way upon the death of members, as under the old policy. Still the company had no assessments and no means of meeting this obligation, except from the mortuary fund above referred to. Every member who took a policy was compelled to know that his only reliance for the payment of his policy in case of his death was the collection of the dues of the members. It was, therefore, strictly a mutual company, and for this reason the funds of the two classes were required to be kept separate, so that no part of the funds of one class should be required to pay the losses of the other. Besides, the mortuary fund by the express terms of the charter could be used only in the payment of death claims or in resisting claims on the fund. It was thus a guaranty fund for the payment of death losses, and cannot be appropriated to any other obligation so as to leave them unpaid." He was not permitted to set up his counterclaim.

In *Sherman v. Harbin* (Iowa) 100 N. W. 623, the court, in this connection, used the following language: "Such an association acts as trustee in the collection of funds and their distribution to the beneficiaries entitled to receive them." The question, as it arose in that case, is discussed at length, and the conclusion reached in harmony with what we have quoted from other courts. *Ins. Com. v. Provident Aid Soc. (Me.)* 36 Atl. 627.

In *Wilber v. Torgerson*, 24 Ill. App. 119, it appeared that the directors for the purpose of paying a death loss, advanced the money from their personal funds. Thereafter they repaid themselves out of the reserve fund set apart to pay death losses, the amount so advanced. The association became insolvent. Plaintiff was entitled to be paid the amount due on a certificate issued to his wife. He insisted that the directors had no right to repay themselves out of the reserve fund, the amount so advanced. Upon appeal from a judgment against the directors, *Moran, P. J.*, said: "We think this action of the court was correct. It was the duty of the directors to make an assessment upon the members to pay the death claim, and, if instead of doing so, they saw fit to advance their own money to discharge said claim, they did not thereby gain a right to appropriate the reserve fund in payment to themselves of such advance as long as there was any certificate holder who had the right to have such reserve fund paid out to him as a mortuary benefit * * * under the terms of the certificates which the association issued; such reserve fund was a trust fund to be used only for mortuary benefits, without assessments, or applied otherwise for the promotion of the objects, for which, by the by-laws, it was set apart. The advance of the directors made them only ordinary creditors, and the trust fund could

not be used to pay such debt if there were trust purposes to which it could be applied." The relation which the members or holders of certificates issued by the Royal Arcanum hold to the order came under discussion in *Saunders v. Robinson*, 144 Mass. 306, 10 N. H. 815, in which it was held that the sum due the beneficiary named in the certificate was not subject to attachment or garnishment. *Devens, J.*, said: "An example of the whole system shows that the association was established, among other things for the purpose of affording mutual aid to its members, and also for the purpose of establishing what is termed a widows' and orphans' benefit fund for the payment of specified sums to the widows, orphans, and other dependents of deceased members. It transacts its business mainly through the agency of grand councils composed from the subordinate councils in each state, and through the agency of these subordinate councils, both of which councils operate under charters granted by the Supreme Councils and in obedience with the rules prescribed in such charters." While not strictly analogous, we find in *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392, an interesting discussion of the principle as involved in the charter, etc., of a lodge of Free Masons.

This court held in *Lord v. Hardie*, 82 N. C. 241, 33 Am. Rep. 682, that the communion service owned by the trustees of a church could not be sold under execution. *Smith, C. J.*, said: "It is thus apparent that the trustees hold the property vested in them by law, in their corporate capacity, for the exclusive use of the congregation and under its direction and control." They are depositaries of the naked, legal title. "An attaching creditor can acquire no greater interest in attached property than the defendant had at the time of the attachment." *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930. Whether we treat the funds collected by *Mr. Johnson*, collector, as the property of the corporation immediately upon its receipt by him or as the property of the members of *Raleigh Council* until transmitted is immaterial. If the first, it is impressed with an impressed trust; if the second, it cannot be attached for a debt of the Supreme Council of the Royal Arcanum. The results which would follow if a creditor of the Supreme Council could attach the assessments paid by members for the widows' and orphans' benefit fund would be disastrous to thousands of innocent people. To what extent the failure of the subordinate councils to forward the assessments, by reason of attachments served on them, would operate to cancel the certificates of its members, we need not inquire. If, however, we permitted the assessments to be diverted from the purposes for which they are paid, we would be powerless to protect the sufferers. We have no power to control by mandamus or injunction the

Supreme Council. If the plaintiff shall establish his claim against the corporation, he will have final process against any property it may have within this state. To such other property, he will be compelled to resort to the courts of Massachusetts. *Blackwell v. Mutual Reserve* (at this term) 53 S. E. 833.

After a careful examination of the authorities, we are of the opinion that the levy of the attachment on the funds in the hands of the officers of Raleigh Council should have been vacated and set aside. Let this be certified to the superior court of Mecklenburg county.

Error.

CLARK, C. J. (dissenting). The assessments are not for any particular loss, but to raise a fund to pay losses as they may occur. If a policy holder should die and payment be refused, surely his personal representative could attach this or any other property of the defendant which he might find in this state. He should not be driven to a distant forum to battle with the company in the courts of the state of its origin. This fund has not been segregated and applied to any one loss. The assessments are held in trust, it is true, to pay losses which may accrue, just as premiums are so held by "old line" companies. But in both cases, the money is the property of the company (*Bragaw v. Supreme Lodge*, 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602), its general assets, and may be attached here and held to abide the judgment of our courts in payment of a death loss, whose payments out of the fund has been refused, or to pay a claim like the plaintiffs which is in lieu of a death loss, being to recover back assessments paid into the fund by him by reason of the wrongful cancellation of his policy, or breach of contract under which he paid in said premiums. It is a trust fund for the payment of losses; it is necessarily a trust fund for the repayment of anything which has been paid into the fund by the plaintiff under an agreement which has been wrongfully repudiated by the defendant.

(141 N. C. 220)

ISLEY v. VIRGINIA BRIDGE & IRON CO.
(Supreme Court of North Carolina. April 24, 1906.)

1. NEGLIGENCE—RES IPSA LOQUITUR.

No presumption of negligence arises simply because an accident has occurred, but the fact of an accident in some cases is permitted to go to the jury as some evidence to be considered, and given whatever effect is warranted thereby in the opinion of the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 218.]

2. TRIAL—INSTRUCTIONS—NECESSITY OF REQUEST.

Where the doctrine of "res ipsa loquitur" applies, the party entitled to the benefit thereof can avail himself of it only by requesting an

appropriate instruction at the proper time, presenting such doctrine to the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 627-641.]

3. NEGLIGENCE — QUESTION FOR COURT OR JURY.

Where, in an action for personal injuries, the facts are undisputed, and only one inference can be drawn from them, whether they constitute negligence is a question of law for the court.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 290.]

4. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—INSTRUCTIONS.

Where plaintiff's injury was directly caused by the breaking of a chain, defendant's failure to exercise ordinary care in having the chain properly annealed at proper times to preserve its fibre and toughness, constituted negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 178, 199.]

Appeal from Superior Court, Alamance County; Ward, Judge.

Action by Warren W. Isley, by his next friend, against the Virginia Bridge & Iron Company. From a judgment for defendant, plaintiff appeals. Reversed.

The court submitted the following issues: "(1) Was the plaintiff injured by the negligence of the defendant as alleged? (2) What damage has the plaintiff sustained thereby?" From the judgment rendered, plaintiff appealed.

W. H. Carroll and J. T. Morehead, for appellant. Brooks & Thompson, for appellee.

BROWN, J. The uncontradicted evidence shows that the plaintiff was injured while working in the defendant's mills assisting the foreman in moving a heavy piece of iron weighing about 1200 pounds. The piece of iron was suspended by chains from an overhead trolley by which it could be moved. One of the chains broke, and a piece of it fell on the plaintiff's leg and broke it. The chain broke in the middle suddenly, and gave way all at once.

1. Counsel for the plaintiff, in beginning his address to the jury, insisted that the doctrine of *res ipsa loquitur* applies. His honor ruled that it did not. This rule is sometimes applied in cases where the circumstances are such that "the thing speaks for itself." No inference of negligence is to be drawn from the fact of an accident and there is no presumption of negligence arising simply because an accident has occurred. In some cases the fact of an accident is permitted to go to the jury as some evidence to be weighed and considered by them, and given whatever effect in their opinion is warranted. We have held that this is simply a matter of evidence in cases where the rule applies, and in order that a party might avail himself of it he must, in due time, hand up an appropriate prayer for instruction. *Lyles v. Carbonating Co.*, 140 N. C. —, 52 S. E. 283. This was not done in this case, and therefore the plaintiff's exception is of no avail.

2. His honor instructed the jury as follows: "It is the law in this state that where, on the facts admitted or established, the question of the exercise or absence of actionable negligence is clear so that there can be no two opinions among fair-minded men in regard to it, then the court must say whether or not negligence exists. But where two men of minds could come to different conclusions on the question, then the law directs that the jury shall find the facts, and determine on the facts and circumstances when so found whether or not there has been negligence on the part of the defendant; so then if you find that defendant had used the chain in question for two years or thereabouts and ought to have had knowledge of the properties of iron, and the effect of strains and pulls on chains when used in places of like kind as that in question, and that when so used chains are liable to become defective and that it would be necessary to toughen or repair a chain or replace it with another when it has been used a considerable length of time, then the court leaves it to you to say whether or not it would be negligence to go on using the chain without repairs or replacing the same." The court here explained negligence to the jury. To this charge plaintiff excepted. The court further charged: "If you find by the greater weight of evidence that the plaintiff was injured by the falling of the cord or crossbar by reason of the chain breaking, and you further find that the chain which was broken had been used by the defendant for a considerable length of time, say two years, and had been used in carrying heavy weights from one end of the building to the other and that said chain was defective and unsafe, and that by long use and strain and pulls by heavy weights it had lost its toughness and elasticity, and you further find that the defendant knew or ought to or could have known it by the exercise of reasonable care and prudence that it was defective and that it was liable by long use to lose its durability and toughness and to become impaired and defective and you find that it could have been annealed and thereby reinstated and that the defendant continued to use it without its being repaired and that in so doing the defendant was negligent in that it failed to exercise that reasonable care and prudence that would ordinarily be used by prudent persons under like circumstances and conditions and you find further that such negligence was the proximate cause of the injury complained of, then the court charges you to answer the issue 'Yes.'" To this charge plaintiff excepted. It is the settled law in this state that where the facts are undisputed and only one inference can be drawn from them negligence is a question of law to be determined by the court. In his charge to the jury his honor recited a given statement of facts from which no other inference can be drawn than that, if they are true, the plaintiff's in-

jury was caused by the negligence of the defendant. This statement of facts which his honor put to the jury is supported by evidence, and, if the jury find these facts to be true, his honor should have instructed the jury to answer the first issue "Yes." His honor erred in leaving the question to be decided by the jury as to whether there was negligence or not, even if they should find that state of facts to be true. There is no evidence or issue as to contributory negligence, and the whole evidence in any possible view of it shows that the injury to the plaintiff was directly caused by the breaking of the chain, and, if the defendant company failed to exercise ordinary care and diligence in having the chain properly annealed at proper times for the purpose of preserving its fibre and toughness, then in law that is negligence, and there being no evidence of contributory negligence the company would be liable for the injury sustained by the plaintiff by reason of the breaking of the chain.

New trial.

(141 N. C. 200)

JONES v. RAGSDALE.

(Supreme Court of North Carolina. April 24, 1906.)

DEEDS—ESTATES CREATED—FEE SIMPLE.

Revisal 1905, § 1578, provides that every person seized of an estate in tail shall be deemed seized in fee simple, and section 1583 provides that any limitation in a deed to the heirs of a living person shall be construed to be to the children of such person, unless a contrary intention appears. A deed conveyed land to a married woman and her heirs by her then husband. *Held*, that what would have otherwise been a fee tail special, was converted into a fee simple, and section 1583 applies only when there is no precedent estate conveyed to a living person, and the woman took a fee simple.

Appeal from Superior Court, Guilford County; Ferguson, Judge.

Action by Carl M. Jones against W. G. Ragdale. From a judgment in favor of defendant, plaintiff appeals. *Affirmed*.

L. M. Scott and G. S. Bradshaw, for appellant. W. P. Bynum and King & Kimball, for appellee.

HOKE, J. The facts agreed upon and pertinent to the controversy are as follows: On the 19th of December, 1882, Alexander W. Robbins conveyed to "Zilphia S. Jones and her heirs by her present husband, Levy Jones, the land in controversy, * * * to have and to hold the said land and appurtenances thereunto belonging, to the said Zilphia Jones, and her heirs by her present husband, and assigns, to her only use and behoof." That, at the date of the execution of this deed, Zilphia Jones was the wife of Levy Jones and they had one living child, Levy Edgar Jones; and thereafter, to wit, on November 14, 1883, the plaintiff was born to

said Zilphia and Levy Jones. That in May, 1898, Levy Edgar Jones died, leaving him surviving his mother and the plaintiff, the father having died in August, 1897. That after the death of her husband, Zilphia Jones conveyed the entire property in fee simple, and by mesne conveyances the defendant has become the owner of all the right, title, and interest of Zilphia Jones, under the said deed from Alex W. Robbins. Plaintiff contends that this deed conveyed the property to Zilphia Jones and her then living child, Levy Edgar Jones, as tenants in common, and on the death of Levy Edgar Jones, plaintiff became entitled to his share of the property as his heir at law. Defendant contends that the deed from Alexander W. Robbins conveyed to Zilphia Jones the entire interest in the property, and that, under her deed and mesne conveyances, he is now the absolute owner.

The deed from Alexander W. Robbins, under the old law, would have passed to Zilphia Jones a fee-tail special, which by our statute is converted into a fee simple. Revisal 1905, § 1578. As stated in *Marsh v. Griffin*, 136 N. C. 334, 48 S. E. 735, "Code, § 1329 (now Revisal 1905, § 1583), providing that a limitation to the heirs of a living person shall be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person."

The opinion in that case is decisive of the one before us, and the judgment below is affirmed.

(141 N. C. 829)

STATE v. BECK.

(Supreme Court of North Carolina. April 24, 1906.)

LARCENY — ELEMENTS OF OFFENSE — NATURE OF PROPERTY — STATUTORY PROVISIONS.

A brass railing attached partly to the freehold and partly to an engine in an ice plant, the engine being attached to the freehold, is within Revisal 1905, § 3511, providing that if any person shall enter on the lands of another and carry off any "wood or other kind of property whatsoever, growing or being thereon," with felonious intent, he shall be guilty of larceny.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 14.]

Appeal from Superior Court, Forsyth County; Peebles, Judge.

Lee Beck was convicted of larceny, and appeals. Affirmed.

J. S. Grogan, for appellant. The Attorney General, for the State.

CLARK, C. J. The defendant is indicted for the larceny of 80 pounds of brass railing attached partly to the freehold and partly to an engine in an ice plant, the engine being attached to the freehold. Revisal 1905, § 3511, provides: "If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon

the lands of another and carry off, or be engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, * * * if the act is done with felonious intent, shall be guilty of larceny; * * * if not done with such intent he shall be guilty of a misdemeanor." Had the act provided "carrying off any wood or other kind of property, growing or being thereon," the rules of construction would restrict "other kind of property" to property of like kind with wood. But the addition of the word "whatsoever" shows a clear intent of the Legislature to take this case out of such rule of construction. In the language of *State v. Vosburg*, 111 N. C. 720, 16 S. E. 392, "the obvious intent of the act was to prevent the willful and unlawful entry upon land of another, and the taking and carrying away of such articles as were not, at common law, or by previous statute, the subject of larceny." It is added that money would not come under the words of the statute, for the articles taken must be "of like character with that mentioned by name, the character being that of chattels real, connected in some way with the land, or which once had been so connected and were now severed therefrom." Besides money had been made "by previous statute, the subject of larceny." The article here taken comes within the very scope and purport of the act which was to cure a defect in the law of larceny, which had before applied only to personal property, by making it applicable to the felonious taking and carrying away of chattels real.

In *State v. Burt*, 64 N. C. 619, the court held that the defendant who found a nugget upon a loose pile of rock and carried it away was not guilty of larceny, evidently, from the language used, resting the opinion upon the absence of felonious intent, saying, "In public estimation, it has never been regarded as larceny for the fortunate finder of a nugget of gold, or a precious stone, to appropriate it to his own use, although found upon the land of another." Though we disapprove of that decision since the felonious intent had been properly left to the jury, still it is different from this case where the defendant did not merely find some brass lying on the ground, but he wrenched off the brass railing around a stationary engine, without the knowledge of the owner, and without claim of right, and carried it off and sold it. This comes within the purport of the statute, and the failure of the former law of larceny to cover such cases is the very evil the statute was intended to cure. The statute had been very recently enacted when *State v. Burt* was decided and was probably not called to the attention of the court. It is not mentioned in the opinion. *State v. Graves*, 74 N. C. 396, was an indictment for forcible trespass to personal property in taking rails from a division fence of which the defendant also claimed ownership. The case went off on the ground that prosecutrix was not

"present and forbidding," till after the rails had been removed from the fence and hence were no longer in her possession. It is true that obliterate the court says (and correctly enough), citing *State v. Burt*, supra, that at common law it would be neither larceny nor trespass to personally to remove rails from a fence and carry them off by one continuous act. But there was no reference to the statute under which this indictment is had, and no occasion for such reference. This technical distinction, resting upon "one continuous act" is exactly what was repealed by the statute before us, and was its sole purpose. *State v. Liles*, 78 N. C. 498, also relied upon by the defendant, was an indictment for larceny of growing figs, under an entirely different statute, Revisal 1905, § 3503, "Larceny of Growing Crops," and the judgment was arrested because of the omission in the indictment of material words required by the statute, "cultivated for food or market."

No error.

(141 N. C. 193)

In re BAILEY'S WILL.

Appeal of SAPP.

(Supreme Court of North Carolina. April 24, 1906.)

EXECUTORS AND ADMINISTRATORS — RIGHT TO ADMINISTER.

Under Revisal 1905, § 3, providing that letters of administration shall be granted to the persons entitled thereto and applying for the same, in the order named, and section 20 providing that the public administrator shall apply for and obtain letters of administration when six months have elapsed from the death of decedent, and no letters have been applied for, and issued to any person, the next of kin having applied for such letters before appointment of the public administrator, though not till after expiration of the six months, is entitled thereto.

Appeal from Superior Court, Forsyth County; Peebles, Judge.

In the matter of the will of Octavia Bailey, deceased. From an order appointing an administrator, the public administrator appeals. Affirmed.

The testatrix, Octavia Bailey, died 2d November, 1904, and on 9th November her will was probated, and the executor therein named, W. O. Cox, qualified. On 19th November, a caveat to said will was filed and issues made up for trial, but pending the trial the executor died 4th September, 1905. Prior to filing the will for probate, a brother of the testatrix had applied for administration. On 12th March, 1906, H. O. Sapp, the public administrator of the county, applied verbally for administration c. t. a.; on 13th March, G. M. Bailey, a brother of the testatrix gave notice in open court that at noon recess he would apply for letters of administration c. t. a., and such application was made in writing on that day, but before it was made, and after above oral announce-

ment, H. O. Sapp, the public administrator made application in writing. On the same day one Walls, with whom the infant child of the testatrix was residing, made written application that letters of administration c. t. a. be issued to the public administrator. The clerk appointed the brother of the testatrix, and the public administrator appealed to the judge who affirmed the ruling of the clerk. Appeal.

Jacob Stewart, F. T. Baldwin, and Lindsay Patterson, for appellant. Watson, Buxton & Watson, for appellee.

CLARK, C. J. The court concurs with the ruling of his honor that "the brother of the testatrix had the right to qualify in preference to the public administrator at any time before the latter had been allowed to qualify." Revisal 1905, § 20, provides that the public administrator shall apply when those entitled to take out letters of administration have delayed to do so for six months. The object is to prevent a defect in the administration of estates. But because the public administrator cannot take out letters till after the lapse of six months, it does not follow that he alone can qualify thereafter. Section 20 must be read in connection with section 3, which prescribes the order in which the right to administer devolves. If after the lapse of six months, those entitled do not apply, it is the duty of the public administrator to make application, but none the less if any one entitled in prior right, as provided in section 3 shall make application at any time prior to the appointment of the public administrator, such person having priority should be appointed, unless he is disqualified under section 5. His delay in making application is not per se a "renunciation of the right to qualify." It is a waiver only if he fail to claim it until six months have elapsed and after the appointment of the public administrator to act. The object of section 20 is not to disqualify those entitled under section 3, but merely to provide an administrator if they fail to apply. If those, in prior right, do apply, notwithstanding the lapse of six months, their priority is not lost, unless the public administrator has been appointed. If the lapse of six months was ipso facto a forfeiture absolute of the right of the next of kin to qualify, and not merely a waiver provided another is already appointed before the next of kin applies, by the same rule the public administrator in this case had lost his right by not applying at the end of the six months as required by the statute. *Hill v. Alsbaugh*, 72 N. C. 402. His preference, as well as that of the next kin, is lost (*Garrison v. Cox*, 95 N. C. 353; *Withrow v. De Priest*, 119 N. C. 541, 26 S. E. 110) and it was open to the clerk to appoint the next of kin or any other suitable person.

So, quaecunque via, there was no error.

(141 N. C. 232)

DUNN v. MARKS.

(Supreme Court of North Carolina. April 24, 1906.)

1. COSTS—BOND—EXTENDING TIME FOR FILING.

Revisal 1905, § 512, providing that the judge may, in his discretion, allow an answer or reply to be made, "or other thing to be done," after the time limited, applies to filing the defense bond required by section 453.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 418.]

2. APPEAL—DISCRETIONARY ORDER.

An order extending time to file a defense bond being, under Revisal 1905, § 512, in the discretion of the judge, appeal will not lie therefrom.

Appeal from Superior Court, Lenoir County.

Action by Charles F. Dunn against A. Marks. From an order, plaintiff appeals. Dismissed.

Y. T. Ormond, for appellee.

CLARK, C. J. This is an action of ejectment. At November term, 1905, the first term after service of summons, the defendant filed his answer, but failed to file his defense bond as required by Revisal 1905, § 453. No action was had at that term. At December term the plaintiff moved for judgment for want of a defense bond. The court in its discretion granted 60 days' leave to file such bond. From this order, and the refusal of judgment by default, the plaintiff appealed. This is a motion to dismiss the appeal on the ground that this was a matter of discretion from which no appeal lay.

The plaintiff having made no objection to the failure to file bond, at the term at which the answer was filed, it is questionable if the judge ought to have given judgment at a subsequent term without giving the defendant some opportunity to file bond. *McMillan v. Baker*, 92 N. C. 110. Whether or not time should have been given to file bond was a matter in the discretion of the judge. Revisal 1905, § 512, provides: "The judge may likewise in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order enlarge such time." This applies to filing the defense bond required by section 453. *Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530. Extension of time to file a defense bond being a matter in the discretion of the judge, no appeal lay, and the motion to dismiss must be allowed. It is true that in *Kruger v. Bank*, 123 N. C. 16, 31 S. E. 270, the court held that an appeal lay from the refusal of a judgment by default for want of an answer, to which the plaintiff was entitled; but it added that, if the court below had granted time to file answer, it would have been unreviewable, and no appeal would lay.

When an appeal is taken in a matter

wherein no appeal lies, the court below need not stay proceedings, but may disregard the attempted appeal as was done properly by the court below in *State v. Dewey*, 139 N. C. 560, 51 S. E. 937. The judge below, in such cases, may proceed to try the action, while the attempted appeal on the interlocutory matter is in this court. *Green v. Griffin*, 95 N. C. 50. If this were not so, a case could be interminably protracted by taking premature appeals and appeals in matters resting in the discretion of the judge, thus delaying trial, till each successive improvident appeal is dismissed. For the same reason, when the appellant does not docket his transcript on appeal in this court, the judge below may adjudge the appeal abandoned, and proceed as if no appeal had been taken. *Avery v. Pritchard*, 98 N. C. 266; *Cline v. Mfg. Co.*, 116 N. C. 837, 21 S. E. 791. When, however, it is doubtful whether an appeal lies, it is best that the court below should await the action of this court.

Though this cause was docketed too late to be heard on the call of the district to which it belongs, we have entertained this motion to dismiss, after due notice to appellant, that the trial of the cause below may not be delayed by an invalid appeal.

Appeal dismissed.

(141 N. C. 205)

HAIRSTON v. BESCHERER.

(Supreme Court of North Carolina. April 24, 1906.)

SPECIFIC PERFORMANCE—SALE OF REAL ESTATE—PURCHASER'S DELAY.

Where a contract for the sale of land called for payments on certain dates, and the purchaser failed to make the payments as required, but subsequently tendered the entire amount due under the contract, which the seller refused to accept and make a deed, but the purchaser remained in possession and neither party took any action until nine years after the making of the contract, the purchaser was entitled to specific performance, notwithstanding that the value of the land had greatly increased since the time when he tendered the entire amount due.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 305-307.]

Appeal from Superior Court, Rowan County; Long, Judge.

Action by Isham Hairston against M. W. Bescherer. From a decree in favor of complainant, defendant appeals. Affirmed.

Plaintiff sues for specific performance of a contract for sale of real property. The facts as set forth in the pleadings and found by the jury are: Defendant entered into possession of the locus in quo during the year 1891, under a contract to purchase, and paid thereon \$20. On April 13, 1895, upon a settlement had, it was found that he owed a balance of \$92. The parties thereupon entered into and executed a written agreement, plaintiff promising to pay \$2 per month for

one year and thereafter \$7.50 per quarter until the full amount, with interest, was paid when defendant agreed to convey the land, being about 2½ acres, to plaintiff. The contract contained the following provision: "It is covenanted and agreed that if I fail to pay three consecutive monthly payments for the said first 12 months from date, that the amounts theretofore paid shall be forfeited, and if, after having made all the payments for said first 12 months I shall fail to pay two consecutive quarterly payments, then the amount theretofore paid shall be forfeited." The plaintiff continued in possession of the land and was at the time of bringing this action in possession thereof. Plaintiff did not offer to make the monthly and quarterly payments under the contract to the defendant or to his agent in accordance with the terms thereof. The failure to make said payments was not caused by any act of the defendant or his agent. During the year 1896 plaintiff offered to pay the total amount due under said contract, and demanded that defendant execute a deed for said land; defendant declined to accept said amount and make the deed. The offer was repeated during the year 1897, and he again demanded the deed, which defendant again refused. The value of the land in 1896 was \$100, and in 1897, \$500. On the date of the summons herein, July 23, 1904, the value of the land was \$1,000. There was evidence tending to show that defendant was out of the state a portion of the time and that there was some misunderstanding in regard to the authority of his attorney to receive payments. Upon the admissions in the appeal and the verdict of the jury embodying the foregoing facts the defendant moved for judgment that plaintiff was not entitled to specific performance, etc. Motion refused, and defendant excepted. Thereupon his honor rendered judgment that the defendant, upon payment by the plaintiff of the sum of \$92, with interest thereon from the date of the contract, execute and deliver to the plaintiff a deed in fee for the lands mentioned in the complaint in accordance with the terms of the contract. The defendant excepted and appealed.

Overman & Gregory and E. E. Raper, for appellant. John S. Henderson, for appellee.

CONNOR, J. (after stating the facts). It is well settled by numerous decisions of this court that when contracts of the character set out in the record are entered into the relation established between the parties it is in many respects similar to that of mortgagor and mortgagee. The vendor is treated as holding the legal title as security for the payment of the purchase money, and upon failure to pay may proceed to have the land subjected by sale for that purpose. *Derr v. Dellinger*, 75 N. C. 300; *Barnes v. McCullers*, 108 N. C. 46, 12 S. E. 994. When the vendee remains in possession, and the ven-

dor takes no action to enforce payment of the purchase money, there is no presumption of abandonment of the right to pay the money and call for a deed. In this case the plaintiff, unless a forfeiture was wrought by the language of the contract and his failure to comply strictly therewith, was to pay for one year \$2 per month and thereafter \$7.50 at the end of each quarter, thus giving him several years to complete his payments. Before the time expired in 1896 he offered to pay the entire amount, and this offer he repeated in 1897. It is manifest that he did not intend to rescind the contract or surrender his rights. He continued to hold possession without any interference on the part of the defendant. Assuming that he was notified by the conduct of the defendant that he would not accept the money and convey, and was thereby put to his action in the nature of a bill for redemption or specific performance, it would seem that he was entitled to the same time allowed mortgagees to redeem, which is 10 years. But as he remained in possession the statute was not put into operation. Both parties treated the contract as subsisting. No issue was submitted nor was his honor asked to find that there was an abandonment by plaintiff of his rights under the contract. We do not find any evidence of such abandonment. *Bynum, J., in Faw v. Whittington*, 72 N. C. 321, says: "Assuming the law to be that a vendee can abandon by matter in pais his contract of purchase, it is clear that the acts and conduct constituting such abandonment must be positive, unequivocal, and inconsistent with the contract. The mere lapse of time or other delay in asserting his claim, unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment." *Falls v. Carpenter*, 21 N. C. 237, 28 Am. Dec. 592. If plaintiff had surrendered possession upon the refusal of the defendant to accept the purchase money and make a deed, quite another question would have been presented. *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924. Defendant says that plaintiff, by reason of his long delay in asserting his equity and the largely increased value of the land, should not have a decree of specific performance, but be left to his action for damages for breach of the contract in refusing to accept the money when offered to him in 1896 and 1897. While it is well settled that specific performance is not an absolute right, and rests in the sound discretion of the court, it is equally true that in equity, time is not of the essence of the contract. When the contract, as in this case, is bilateral, giving the vendor an action at law for the purchase money or a right in equity to subject the land to the payment of the debt and both parties acquiesce in the delay, the vendor permitting the vendee to remain in possession of the land after the day for payment fixed by the contract has passed and the vendee making

no demand for a conveyance, the court will treat their conduct as estopping either from taking advantage of the delay. The language of Pearson, J., in *Scarlett v. Hunter*, 56 N. C. 84, would seem to be decisive of the question. "The right to have specific performance is mutual and when the vendee is let into possession and continues in possession, as in our case, it is taken for granted that the parties are content to allow matters to remain in statu quo, until a movement is made by one side or the other." In *Holden v. Purefoy*, 108 N. C. 163, 12 S. E. 848, where the authorities are reviewed by Mr. Justice Shepherd, he says: "But there is here more than mere delay, for Purefoy, having control of the land, actually leaves the same with the purpose of having nothing more to do with it. We have, then, not simple delay only, but a most significant act, as well as an admitted intention of abandoning the property." The last provision in the agreement at most only gave the vendor a right to put an end to the contract by entering. Certainly in equity, whose peculiar province it is to relieve against forfeitures, it cannot be successfully used to prevent plaintiff having relief. This court has frequently held that similar provisions in contracts of sale both of real and personal property do not bar equitable relief. The enhanced value is no good reason for refusing the relief. When plaintiff made his first offer in 1896, the land was worth only \$100. *Falls v. Carpenter*, supra; *White v. Butcher*, 59 N. C. 231.

There is no error.

(141 N. C. 186)

HAYES v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 24, 1906.)

1. RAILROADS—INJURIES TO TRESPASSERS—TRIAL—PRESENTATION OF ISSUES.

In an action against a railroad for injuries received by plaintiff, a trespasser on defendant's train, through being ejected therefrom, it was not reversible error to submit all three issues: First, was plaintiff injured by the negligence of defendant? Second, was plaintiff injured by defendant negligently, wantonly, and forcibly ejecting him from its moving train as alleged in the complaint? Third, what damages is plaintiff entitled to recover, if any? although the case could have been presented under the first and third issues.

2. SAME—EJECTION FROM TRAIN.

A trespasser on a railroad train attempting to perpetrate a fraud on the road by beating his way with the connivance of the railroad's brakeman at the start, may recover damages of the road for the violence of the brakeman in forcing him from the train, whereby he is injured.

3. SAME—LIABILITY FOR ACTS OF BRAKEMAN.

It being within the scope of the agency of a brakeman on a freight train to eject trespassers therefrom, the railroad is responsible for his conduct in ejecting a trespasser in an unlawful and violent manner, thereby endangering life or limb.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 887, 906.]

4. SAME—PROXIMATE CAUSE.

Where plaintiff, a trespasser on defendant's train, was forcibly ejected therefrom by defendant's brakeman, while the train was moving rapidly, and in falling, struck a clearance post by the side of the track, and was thereby thrown under the car wheels and injured, the wrongful act of the brakeman was the proximate cause of the injury.

5. NEGLIGENCE—PROXIMATE CAUSE—WHAT CONSTITUTES.

The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence would foresee might naturally or probably produce injury, and the second requisite is that it did produce it.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 69.]

6. RAILROADS—EJECTION OF TRESPASSERS ON TRAIN—PUNITIVE DAMAGES.

Where defendant railroad's brakeman wantonly and violently ejected plaintiff, a trespasser on its train, therefrom, while the train was rapidly moving, whereby plaintiff was injured, the jury were authorized to award punitive damages.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 916.]

7. DAMAGES—PUNITIVE DAMAGES.

The jury cannot allow punitive damages unless they conclude from the evidence that the wrongful act resulting in the injuries occasioned plaintiff, was accompanied by fraud, malice, recklessness, oppression or other willful and wrongful aggravations on defendant's part.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 188-205.]

8. RAILROADS—TRESPASSERS EJECTED FROM TRAIN—PUNITIVE DAMAGES.

Where, in ejecting a trespasser from a train, a brakeman acting for the railroad, and within the scope of his agency, the general principles of law relating to punitive damages apply to him as well as to the train conductor.

9. DAMAGES—INSTRUCTIONS.

In an action against a railroad for injuries to a minor, an instruction that the jury might allow for damages and loss occasioned plaintiff by reason of his total disability to work, while totally disabled, and for partial disability, since then, etc., was erroneous as permitting recovery by plaintiff for loss of work from the time of the injury until he came of age, as, until such time, plaintiff's father was entitled to his earnings.

Appeal from Superior Court, Guilford County; Cooke, Judge.

Action by Glenn Hayes, by his next friend, against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Partial new trial.

Action to recover damages for forcible ejection from the defendant's train. The court submitted the following issues: (1) Was the plaintiff injured by the negligence of the defendant? Ans. Yes. (2) Was the plaintiff injured by the defendant company negligently, wantonly, and forcibly ejecting him from its moving train, as alleged in the complaint? Ans. Yes. (3) What damages is the plaintiff entitled to recover, if any? Ans. \$1,800. To the second issue the defendant excepted. From the judgment rendered defendant appealed.

King & Kimball, for appellant. Brooks & Thompson, for appellee.

BROWN, J. 1. The second issue was unnecessary. The entire case could have been presented under the first and third issues, or, in view of the evidence, it could have been better presented under the second and third issues without the first. But it is not reversible error to have submitted all three.

2. The evidence is somewhat conflicting; but plaintiff's evidence tended to prove that plaintiff, a 17 year old boy, boarded a mixed freight and passenger train at Greensboro for the purpose of riding to Summerfield; that he and the brakeman sat down on top of a box car side by side, and rode a couple of miles when the brakeman ordered plaintiff to get off the train, cursing him, and using violent and threatening language; that the plaintiff remonstrated, saying that he was willing to get off if he would stop the train, and agreeing to do so when the train stopped at the Battle Ground, the next station; that the brakeman continued cursing, drove him from the top of the train down the ladder along the side of the train, and followed him, stamped on his fingers and finally drove him from the train, causing him to fall, when his leg struck the clearance post, which threw him under the wheels of the car, crushing off his right leg, and severely mashing his left foot. The brakeman, according to the testimony of all the witnesses, was on duty as brakeman, and was in the discharge of his usual duties as brakeman at the time of the occurrence. All the evidence discloses that plaintiff was a trespasser and wrongfully on defendant's train, and that he was attempting to perpetrate a fraud on defendant by beating his way on top the car, with the brakeman's connivance at the start. Yet it seems that under our authorities he may recover damages of the defendant for the violence of the brakeman, although the plaintiff could not recover had he been injured in an accident resulting from negligence, for the company owed him no duty as a passenger. It is said in *Pierce v. Railroad*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316, that "a trespasser's wrongful act in getting on a car does not justify making him get off in a manner calculated to kill or cripple him." To the same effect is *Lewis v. Railroad*, 132 N. C. 382, 43 S. E. 919; *Cook v. Railroad*, 128 N. C. 333, 38 S. E. 925, and authorities therein cited.

3. It was within the scope of the brakeman's agency to eject trespassers from the train, and therefore it follows that if he did it in an unlawful and violent manner, thereby endangering life or limb, the defendant is responsible for his conduct. This is so held in *Cook's Case*, supra, and many other cases. In the case of *Hoffman v. R. R.*, 87 N. Y. 26, 41 Am. Rep. 337, the Court of Appeals of New York says: "In this case the authority to remove the plaintiff from the cars was vested in the defendant's servants. The wrong consisted in the time and

mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own." *Higgins v. R. R.*, 48 N. Y. 23, 7 Am. Rep. 293; *Rounds v. R. R.*, 64 N. Y. 129, 21 Am. Rep. 597; *Railroad v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33. See, also, authorities collected in 62 Am. Rep. 381.

4. The jury accepted the plaintiff's version of the facts by answering the issues in his favor. According to this the undoubted and immediate cause of the injury was the wrongful conduct of the brakeman in forcing plaintiff off a rapidly moving train. The fact that the plaintiff struck the clearance post on the track and was thrown under the wheels does not make the brakeman's act any the less the proximate cause of the injury. The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and the second requisite is that it did produce it. *Brewster v. Elizabeth City*, 137 N. C. 395, 49 S. E. 885. The brakeman must have foreseen the great danger to the life and limb of the plaintiff in violently forcing him off a rapidly moving freight train, and but for his act the injury could not have occurred. That it was the direct cause would seem to admit of no doubt.

5. It seems from the authorities that, although the wrongful act was committed by a brakeman, the jury may in the exercise of a sound discretion, under plaintiff's version of the evidence in this case, if believed, award punitive damages, if they see proper to do so. They are not obliged to award them in any case, and should look carefully into the facts and circumstances before doing so. Mr. Thompson says if the agent of the carrier maliciously uses unnecessary force in ejecting a trespasser, it may be a case for exemplary damages. 3 Thompson on Neg. (2d Ed.) § 8263. This court has said in many cases that punitive damages may be allowed, or not, as the jury see proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury. *Knowles v. Railroad*, 102 N. C. 59, 9 S. E. 7, and cases cited. Punitive damages have been allowed by the courts for the wrongful and violent conduct of brakemen (*Hanson v. R. R.*, 62 Me. 84, 16 Am. Rep. 404; *Goddard v. R. R.*, 57 Me. 202, 2 Am. Rep. 39; *R. R. v. Condor*, 75 Ga. 51); also of engineers (*Cobb v. R. R.*, 37 S. C. 194, 15 S. E. 878). It would seem from the authorities that where the brakeman is acting for the company, and within the scope of his agency, the general principles

of the law relating to exemplary or punitive damages apply to him as well as to the conductor.

6. Upon the issue of damages the court instructed the jury that "if they come to consider the third issue, they shall allow for damages the loss of the plaintiff by reason of his total disability to work, while totally disabled, and for partial disability, since then," etc. We think this instruction contains error in that it permitted the jury to allow plaintiff for loss of work from the time of the injury until he comes of age. It is elementary law that the father is entitled to his child's earnings until the child becomes of age. For this error we award a new trial upon the issue of damages.

Partial new trial.

(141 N. C. 202)

JONES v. R. J. REYNOLDS TOBACCO CO.
(Supreme Court of North Carolina. April 24, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY—MERITS.

Failure of a master to provide a shield or covering for a saw running naked, when such protection for the operator was a reasonable protection and in general use, constituted negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 223-231.]

2. SAME—CUSTOMS—PROOF.

Where, in an action for injuries to the operator of a circular saw, plaintiff alleged negligence in that defendant failed to provide a shield or covering for the saw by which plaintiff was injured, plaintiff was entitled to show that such shield was in general use, on the issue of negligence, either by proving a general custom of mill owners to provide such shields, or by showing that a large number of factories and mills used shields in similar work.

3. SAME—PROXIMATE CAUSE.

Where shields over saws are a reasonable, usual, and proper protection for the operative in the kind of work plaintiff was engaged in when he was injured by his hand coming in contact with an unprotected saw, the master's failure to provide a shield for the saw in question, which would have prevented the injury, was the proximate cause thereof.

4. SAME—QUESTION FOR JURY.

Where, in an action for injuries to a servant by coming in contact with an unprotected saw, plaintiff alleged negligence, in that defendant failed to provide a proper shield for the saw, and there was evidence that defendant did furnish a shield, but that plaintiff refused to use it, it was error for the court to submit the question whether, if the jury found that plaintiff did refuse to use a shield furnished, such failure was the proximate cause of the injury.

Appeal from Superior Court, Forsyth County; E. B. Jones, Judge.

Action by J. P. Jones against R. J. Reynolds Tobacco Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Watson, Buxton & Watson and Manly & Hendren, for appellant. J. S. Grogan, for appellee.

53 S.E.—54

BROWN, J. Plaintiff was a boxmaker in defendant's factory, and as such operated a circular saw which projected through a table two or three inches and was alleged to be without any board or guard. The plaintiff testified that while at work he "reached out to remove some strips, when my feet slipped from under me, and I fell on my elbow, saving my face from the saw. My hand struck the back of the saw and cut off two of my fingers." The specific and only negligence alleged in the complaint and relied upon by plaintiff is as follows: "That defendant, without due care, negligently permitted this saw to remain without guard or shield, although such shield and protection was generally furnished by owners and operators of such machinery, and within a week this defendant had guards on all of its saws."

1. We think there was some evidence of negligence to go to the jury. If the defendant failed to provide a shield or covering for a saw running naked, when such protection for the operative is a reasonable protection and in general use, it would constitute negligence. *Myers v. Lumber Co.*, 129 N. C. 254, 39 S. E. 960. The plaintiff undertook to show that such shields are in general use. He could show this by proving the general custom, or by showing that such a large number of factories and mills used the shields in similar work that the jury might draw the inference of a general custom. *Marks v. Cotton Mills*, 135 N. C. 292, 47 S. E. 432. If shields are a reasonable, usual, and proper protection for the operative in the kind of work plaintiff was engaged in, and intended and calculated to prevent the very injury the plaintiff suffered, it is not only negligence not to provide them, but such negligence is the proximate cause of the injury, if the shields would have prevented it.

2. There was evidence introduced by defendant tending to prove that it did furnish the proper shield, hood, or screen for this saw, operated by plaintiff, and that he refused to use it. In that connection the judge charged: "But if you find from the evidence that defendant did furnish the hood or screen, as it contends, and the plaintiff refused to use it, and his failure to use it was the proximate cause of the injury, he would not be entitled to recover, and you would answer the first issue, 'No.'" To this charge defendant excepted. We think his honor erred in submitting to the jury any question as to proximate cause in that connection. The negligent act or omission of duty upon the part of the defendant must first be determined before it becomes necessary to ascertain the proximate cause of an injury. If the defendant did furnish the hood or shield for the saw, then the allegation of negligence is fully met, and the court should have directed the jury, if they so find, to answer the first issue, "No." There is, then, no question of proximate cause

to be considered. If plaintiff refused to use the hood, it is his own fault. The defendant discharged its duty when it caused a hood to be put over the saw. Under the instruction given, the jury are not at liberty to determine that the hood was furnished, and then answer the issue, "No"; but, before they can so answer it, they must proceed to find something else, viz., that the defendant's failure to use it was the proximate cause of the injury. If the jury shall find that the defendant furnished the hood or shield, there is no negligence on the part of the defendant proved, and that should end the case.

New trial.

(141 N. C. 248)

MEANS v. URY.

(Supreme Court of North Carolina. May 1, 1906.)

WILLS—REVOCATION—REPUBLICATION.

Under Revisal 1905, § 3116, providing that all wills shall be revoked by subsequent marriage, where a testatrix's husband died after she made a will and she remarried, her verbal declarations that the paper was her last will and testament without any further execution thereof, did not constitute a re-execution and republication of it.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 499, 500.]

Appeal from Superior Court, Cabarrus County; Justice, Judge.

Proceedings for the probate of will of Cameline Means. From a judgment in favor of Lafayette Ury, caveator, the proponent, Edward Means, appeals. Affirmed.

Adams, Armfield, Jerome & Maness, for appellant. L. T. Hartsell and M. B. Stickley, for appellee.

BROWN, J. Cameline Means, while the wife of Ephriam Means, made her will, and some time thereafter, being a widow, married Jason Carr, and during such coverture verbally declared said paper writing to be her last will and testament without any further execution thereof, in accordance with the statute. The court below adjudged the paper writing not to be the last will and testament of Cameline Means, upon the ground that it was revoked by her subsequent marriage, and that her verbal declarations could not constitute a re-execution and republication of it. We think the ruling sound. In respect to her capacity to make a will, the feme covert stands upon the same footing as the feme sole. Her will is revoked by a subsequent marriage, as much so as if she were a feme sole when she made it, and then married. The right of a married woman to make a will is guaranteed by the Constitution, but that, in no way, affects the statute declaring that such a will may be revoked by another marriage contracted after the will was made. Revisal 1905, § 3116.

Affirmed.

(141 N. C. 325)

DICKERSON v. SIMMONS.

(Supreme Court of North Carolina. May 8, 1906.)

1. FRAUDS, STATUTE OF—SALE OF LAND—MEMORANDUM.

In order to charge the seller on a mortgage sale under advertisement, there must be a writing, signed by the seller or his agent lawfully authorized, containing expressly or by implication the material terms of the contract.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 239, 240.]

2. SAME.

Where the agent of the mortgagee on foreclosure by advertisement prepared a deed after the sale, but neither he nor the mortgagee signed it, and it did not refer to the printed advertisement, under the statute of frauds there was nothing to charge the seller on the contract.

3. SAME.

Where a mortgage is foreclosed by advertisement, and the printed advertisement does not bear, after the sale, any note or memorandum, signed by the mortgagee or his agent, the advertisement alone is insufficient to take the case out of the statute of frauds.

4. MORTGAGES—REDEMPTION—PERSONS ENTITLED TO REDEEM.

A tenant in common of the equity of redemption has the same right to redeem from a mortgage that his grantor had.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1730.]

5. EJECTMENT—SUBMISSION OF ISSUES.

One of two tenants in common conveyed his equity of redemption to defendant, and thereafter on a mortgage sale defendant bid in the property; but the mortgagee refused to execute a deed, and repudiated the sale, and again sold the land to plaintiff, and in ejectment by plaintiff against defendant, defendant claimed that, shortly after the first sale, he tendered the amount of the mortgage, and that he gave due notice of his tender at the second sale and protested against the selling of the land, and that the sale to plaintiff was a sham, and that he was not a bona fide purchaser, and that defendant had kept his tender good by being able, ready, and willing to pay the mortgage debt at any time. Held, that the court should have submitted issues as to whether defendant tendered the full amount of the debt prior to the last sale, whether plaintiff had notice thereof, whether he was a bona fide purchaser for value, whether defendant kept his tender good, and what was the yearly rental value of the land.

6. MORTGAGES—REDEMPTION—TENDER.

On a tender by the mortgagor to the mortgagee, payment into court is only authorized or required when there is a statute requiring it, or when there is a suit pending to redeem, and when the effect is to discharge the mortgage; but the debtor must be ready, able, and willing at all times to pay the debt. He may retain the money, and he need not keep the identical fund; but if, by making use of it, he is not able to pay in current funds at any time when requested, the effect of the tender is destroyed.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1788-1795.]

Appeal from Superior Court, Surry County; E. B. Jones, Judge.

Action by S. M. Dickerson against Allen Simmons. Judgment for plaintiff. Defendant appeals. Reversed, and new trial ordered.

W. F. Carter, for appellant. J. M. Bodenheimer, for appellee.

BROWN, J. The court submitted the usual issues in ejectment, and, as stated in the record, "plaintiff moved for judgment upon the whole evidence." His honor granted judgment. We assume from this that his honor instructed the jury that upon the whole evidence, if believed to be true, to answer the issues for plaintiff. The land in controversy belonged to W. W. and J. L. Ashburn as tenants in common. They mortgaged it to E. S. Dickerson. On September 9, 1902, W. W. Ashburn conveyed his equity of redemption to defendant. On December 13, 1902, E. S. Dickerson by his agent, W. L. Reece, sold the land under the mortgage and defendant bid it off for \$280. The mortgagee, E. S. Dickerson, refused to execute the deed to defendant and repudiated the sale and again sold the land under the mortgage on April 22, 1903, when it was bid off by and deed made to plaintiff.

1. We are of opinion that defendant acquired no enforceable right as the successful bidder at the sale of December 13, 1902, made by Reece for the mortgagee, inasmuch as the statute of frauds is set up as a bar. No memoranda of the sale whatever was made by the agent, and consequently none was signed. In order to charge a party upon such a contract, it must appear that there is a writing containing expressly or by implication the material terms, and it must be signed by such party or his agent lawfully authorized. The only memoranda relied upon by the defendant is a blank deed in the ordinary form, prepared by Reece at his office after the sale, a distance of 100 yards away, and is not signed by E. S. Dickerson or any one else, as his agent, and in no way refers to the printed advertisement. That this is not a compliance with the statute is plain to us and in accord with the authorities. *Hall v. Misenheimer*, 137 N. C. 187, 49 S. E. 104; *Gwathney v. Carson*, 74 N. C. 5, 21 Am. Rep. 484; *Mayer v. Adrian*, 77 N. C. 83. It is not contended that there was any note or memorandum made on the printed advertisement, or any writing whatever signed by the mortgagee or his agent, showing who bought the land, price paid or terms of sale. The advertisement is only an offer by the seller to sell. The auctioneer is the agent of the plaintiff to sell, and the law constituted him the defendant's agent, when he became the last and highest bidder, to complete the sale by meeting the requirements of the statute. This the auctioneer may do by entering the amount bid on the advertisement and signing thereon the purchaser's name. *Proctor v. Finley*, 119 N. C. 536, 26 S. E. 128. Then both seller and purchaser are bound. As no memoranda whatever was made in this case, neither is bound. The "party to be charged" in this case is the seller. The advertisement, being a mere offer to sell, standing alone, nothing else appearing on it, and there being no written mem-

orandum connected with it showing a price bid and a purchaser, cannot in any sense be called a contract to convey land or a note or memorandum of a contract to convey to a particular individual. This case differs from *Proctor v. Finley*, supra, relied on by defendant. In that case the auctioneer entered the name of the party sought to be charged on the margin of the printed advertisement. This showed by a memorandum that a sale had been made under the advertisement, and that the offer to sell had been accepted. It stated the amount bid, and the name of the purchaser being duly signed thereto, it thereby became a completed contract to sell and convey land, binding under the statute. That case is no authority to support defendant's contention.

2. It is in evidence that shortly after the sale of December 13, 1902, the defendant duly and unconditionally tendered to E. S. Dickerson, the mortgagee, the full amount due on the mortgage debt, some \$416.50, which Dickerson refused to accept. There is also evidence tending to prove that defendant gave due notice of this tender at the sale in April and forbade the selling of the land, and it is contended, therefore, that plaintiff had knowledge of defendant's equity. In his answer defendant avers that the sale to plaintiff, the son of the mortgagee, was a sham; that he was not a bona fide purchaser for value and that he had due notice of defendant's rights; that defendant has kept his tender good by being able, ready and willing to pay said mortgage debt at any time, and defendant prays that he be allowed to redeem the land by paying the debt. As a tenant in common of the equity of redemption, the defendant has the same right to redeem that his grantor had and the right to pay the mortgage and have it canceled. *Boone on Mortgages*, p. 49; 25 A. & E. Encyc. (1st Ed.) 288. This brings us to consider the effect of the alleged tender. It is well settled and universally held that an unconditional tender on the day when the mortgage debt falls due, called the law day, discharges the lien of the mortgage, although the debt survives as a personal liability. 20 A. & E. Enc. 1062, and cases cited; *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. St. Rep. 250. As to the effect of a tender made, as in this case, after maturity, there is much conflict of authority. In those jurisdictions where the mortgage is treated simply as a security to a debt, the rule is that a mortgage is discharged by a proper tender made at any time before foreclosure, and that a sale under the power is void. In those more numerous jurisdictions where the common-law doctrines prevail, the lien of the mortgage is not discharged by the tender, the only effect being to arrest the accruing of interest and to free the debtor from future costs. If the mortgagor desires by his tender to discharge the lien, when it is not ac-

cepted, he must bring his suit by redemption and pay the money into court. North Carolina, Massachusetts, New Jersey, and other states are classified as jurisdictions which adhere to the common law. 20 A. & E. Encyc. (2d Ed.) 1063. In the first-named jurisdictions it is held that, where tender is made after the law day, a sale under the power is void even as to a bona fide purchaser for value. *Cameron v. Irwin*, 5 Hill (N. Y.) 272-276; *Pingree on Mortgages*, § 1342. The contrary is held in Massachusetts and some other courts which adhere to the common law. *Jones on Mortgages*, 1798, and cases cited. Those courts regard the power as one coupled with an interest which cannot be revoked, and hold that a sale under the power, after an unaccepted tender, transfers the legal title to the purchaser, and that the tender is merely a foundation for a suit in equity for redemption. It seems, therefore, that in those states a bona fide purchaser for value and without notice of tender gets a good title. It is also held that a mortgagor who has notice of an intended sale and allows it to proceed without objection cannot afterwards show a tender or even a payment in full of the mortgage debt, and thereby defeat the title of a bona fide purchaser for value without notice. *Cranston v. Crane*, 97 Mass. 459, 98 Am. Dec. 106; *Jones on Mortgages*, § 1798. It has been determined expressly by this court that "the unaccepted tender of the amount due on a debt secured by mortgage does not discharge the lien of the mortgage unless the tender be kept good, and the money paid into court. Its only effect is to stop interest and costs accruing after tender." *Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231.

The defendant after making the tender did not bring his suit to redeem and pay the money into court, and, therefore, under the authorities cited the lien of the mortgage still subsists, even if the attempted foreclosure is void. There are cases in the state where the wife's land has been pledged as security for the husband's debt wherein it seems to be held that a tender of payment or an extension of time of payment for value will discharge the lien even as against a bona fide purchaser for value without notice. The decisions are based upon the relation of principal and surety and do not apply to a case where the land belongs to the principal debtor. Notwithstanding the conflict between the courts as to the effect of a tender made after the law day, it seems to be agreed by all that a mortgagor may preserve his right to redeem against any purchaser by giving him notice of the tender before or at the sale. *Cranston v. Crane* and *Jones on Mortgages*, supra. It is unnecessary, in view of the allegations of the answer and the evidence of the defendant, to decide what effect a previous tender has upon the title when the purchaser buys in good faith, for

value and without notice. This defendant alleges and testifies that he gave due notice at the sale and further, that plaintiff is not a bona fide purchaser for value. It may become necessary to determine the question if the jury find such allegations against the defendant. His honor erred in not submitting proper issues to the jury to the end that these controverted facts might be determined.

We think the following issues substantially are necessary to be determined by the jury, viz.: (1) Did defendant tender to E. S. Dickerson the full amount due on the mortgage debt prior to the sale to plaintiff as alleged in the answer? (2) If so, did plaintiff have notice thereof at the time of his purchase? (3) Is plaintiff a bona fide purchaser for value? (4) Did defendant keep his tender good? (5) What is the yearly rental value of the land? If the defendant contests the payment of interest since the tender, the date of the tender must be determined by the jury, unless the date is agreed upon. It may be well to say that the phrase, "keeping his tender good," does not mean that defendant must have paid the money into court. It seems that payment into court is only authorized or required when there is a statute requiring it or when there is a suit pending to redeem the land, and where the effect is to discharge the mortgage lien. But the debtor must be ready, able, and willing at all times to pay the debt. He may retain the money in his own possession, but the identical money need not be kept on hand, and, if by making use of the money, he is not ready to pay the debt in current money at any time when requested, the effect of the tender is destroyed. 28 A. & E. Enc. (2d Ed.) 40.

New trial.

WALKER, J., concurs in result.

(141 N. C. 332)

PUETT et ux. v. CALDWELL & N. R. CO.
et al.

(Supreme Court of North Carolina. May 8, 1906.)

1. TRIAL—ARGUMENT OF COUNSEL—COMMENT ON EVIDENCE.

Where, in an action against a carrier by a passenger, it appeared that, owing to the conduct of the engineer, the conductor stopped the train and went after another engineer, and that during his absence an officer of defendant entered the car where the passenger was seated and stated that the passengers had better "watch out," and that the engineer had threatened to take the locomotive some distance and then run through the train, and that the passenger thereupon left the car and walked to her destination, whereby she was rendered ill, it was not error to permit counsel for plaintiff to comment upon the declaration of the officer.

2. CARRIERS—INJURY TO PASSENGER—EVIDENCE—ADMISSIBILITY.

In an action for injuries to a passenger, owing to the drunken condition of the engineer, a witness testified that when he started to enter

the train the conductor told him to not go on, as it was dangerous to do so, and the witness then stated that there were some negroes in the car. *Held*, that it was error to exclude the testimony of the witness that the conductor stated that it was dangerous, as the conductor's statement could not have referred to anything except the drunken condition of the engineer; it not appearing that the negroes were intoxicated or misbehaving themselves.

Appeal from Superior Court, Caldwell County; O. H. Allen, Judge.

Action by Walter Puett and wife against the Caldwell & Northern Railroad Company and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed, and new trial ordered.

Plaintiffs brought this action to recover damages for injuries caused by the negligence of the defendants. They had purchased tickets and boarded the train at Lenoir, intending to go to Collettsville, ten miles distant. The nature of the injury can be best described by stating the testimony of the feme plaintiff, Mrs. Martha Puett, which was as follows: "On the night of the 27th of February, 1905, my husband, W. R. Puett, and myself, boarded the train at Lenoir to go to Collettsville, and paid our fare. It was a dark, foggy, and rainy night. The train had gone about three miles from Lenoir, when it stopped. While the train was standing on the track, it was jerked backward and forward in a violent manner several times. After the train had been stopped some minutes, the engineer came back into the car where the passengers were, with a light in one hand and a pistol, which he flourished, in the other. He was cursing and swearing because some one had stopped the train. He seemed drunk and mad. I got off the train because I was afraid. I was afraid of being killed. He said nothing to me, but only came through the car, where the passengers were, cursing. He did not say anything that frightened me. My husband was there, and I had my baby with me. My husband, myself, and baby, after getting off the train, walked about one-half mile to the house of Mr. Martin, and next morning walked to Collettsville, about seven miles away. It shocked me and gave me a headache, and I was sick about three months, and during that time was taking medicine. The engineer did not say anything to me." There was evidence tending to show that the conduct of the engineer was so violent and threatening that the conductor set the brakes and placed the train in charge of a man by the name of Pope, who was an officer of the defendants. He then went to Lenoir to get another engineer and fireman. While he was gone the engineer, in a drunken condition, entered the car, and inquired for the man who had locked the train, and threatened to kill him. The engineer had jerked the train back and forth with the engine several times and alarmed the feme plaintiff. He then cut loose the engine and started up the mountain. Pope then said:

"If he goes up, he will do harm. I have done everything that I can do." When he left with the engine he threatened "to go to the top of the mountain and then come back and run through the train." Pope (the officer in charge of the train after the conductor left) went into the car where the plaintiffs were seated and told the passengers "that they had better watch out." He then repeated to them what the engineer had threatened to do, and most of the passengers left the train. The defendants introduced no evidence. There were exceptions to evidence and to the charge of the court, and also to the refusal to give instructions; but they need not be set out in the view taken of the case by this court. It is stated in the case that during the argument of the plaintiffs' counsel he commented on the declaration of Pope to the passengers, when he was stopped by the court. This is one of the errors assigned. Post Clarke testified: "When I started to get on the train at Lenoir, the conductor told me not to get on it, as it was dangerous to do so. Some negroes were in the car. The defendant objected to the statement of the conductor 'that it was dangerous,' and it was excluded. Plaintiff excepted." There was a verdict for the defendants. Judgment was rendered thereon, and the plaintiffs appealed.

Lawrence Wakefield and Edmund Jones, for appellants. J. H. Marlon and W. C. Newland, for appellees.

WALKER, J. (after stating the case). The right of the plaintiffs to recover was not seriously questioned, provided the jury had found the facts to be as alleged in the complaint. The court charged the jury upon the theory that there might be such a recovery, if they found the facts to be as the witnesses testified they were. The right of a passenger to recover against a carrier for its neglect to carry him to his destination rests not only upon contract, but the duty so to carry him is imposed by law, and for a breach of it he may recover in tort, and the liability then is, of course, independent of the contract. *Fetter on Carriers*, p. 11, § 5, and notes; *Id.* p. 1337, § 535; *Hansley v. Railroad*, 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474; Code, § 1963; Revisal 1905, § 2611. We are not now referring to the measure of damages, for that question is not before us. In the *Hansley Case*, the rule as to compensatory damages in such cases seems to have been agreed upon by all the judges, though there was a division of opinion among them as to exemplary damages. We will not even intimate whether the plaintiff is entitled to recover punitive damages in this case, if he is entitled to recover at all, but leave that question open for decision when it is presented.

We think that his honor erred in interrupting and stopping counsel in his argument. The comment he was making upon the declaration of Pope seems to us to have been

clearly within his right. What Pope said, at the time the plaintiffs were in the passenger coach, was a part of the *res gestæ*. It occurred at the very time that the plaintiffs left the car, and tended to explain why they left, and to show that they had good cause for leaving, in that they had a reasonable apprehension of danger if they remained. It also tended to corroborate the plaintiffs as witnesses. It was not merely a statement of Pope as to what had occurred, which would be hearsay, but a declaration made at the time the drunken engineer left with his engine; he having made the threat to return and "run through the train." It was an integral part of the whole transaction, as much so as the conduct of the engineer and the act of the plaintiffs, and was required to complete the story of what had been done. Being thus competent, material, and relevant, there can be no doubt of the right of counsel to make proper comment upon it in his address to the jury. This was all that he was doing when admonished by the judge to stop, which he did, as he should have done, in submission to the intimation of the court. But his client was thereby prejudiced, and prevented, through his chosen counsel, from developing his case before the jury. The judge has a large discretion in controlling and directing the argument of counsel (*State v. Caveness*, 78 N. C. 484); but this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case (*State v. Miller*, 75 N. C. 73). What is here said is subject, however, to the restrictions imposed by Acts 1903, p. 749, c. 433; Revisal 1905, § 216. The right to argue the whole case has been expressly conferred by statute. Rev. Code, c. 31, § 57, par. 13; Code, c. 4, § 30; Revisal 1905, § 216. The history of this legislation is well known to the bench and bar. *State v. Miller*, *supra*. The reason of the court for stopping counsel is not given. We assume, and we think not unreasonably, that the learned judge who presided at the trial thought the comment improper, as the declaration of Pope was immaterial. Entertaining this opinion, it was proper to interfere as he did. But we think the declaration was material, and the proper subject of comment.

We do not see why the testimony of the witness Post Clarke, which was excluded by the court, was not competent and relevant. It was ruled out, we are informed, because it was supposed to be too uncertain as to the source of danger. The witness stated, it is true, in the same connection, that there were negroes on the train; but it does not appear that he intended to imply that the conductor referred to them as dangerous. He was merely stating the fact of their presence, without regard to its relation with what the conductor had said. Nor does it appear that the negroes were intoxicated or mis-

behaving themselves. The evidence fails to disclose anything to which the conductor could have referred, except the drunken condition of the engineer and fireman. He may not have intended to refer to that; but, in the absence of proof of any other source of danger, what he said is competent as some evidence to be considered by the jury tending to show that he knew of their condition before he left Lenoir. What he really did mean may be explained at the next trial.

In unduly restraining the argument of counsel, and in excluding competent evidence as herein stated, there was error in law. New trial.

(141 N. C. 277)

RANKIN et al. v. MITCHEM.

(Supreme Court of North Carolina. May 8, 1906.)

1. CONTRACTS—AGREEMENTS TO BE REDUCED TO WRITING.

A binding oral contract may be made between parties, though there is an understanding that it is to be subsequently reduced to writing, which writing is not completed by the signatures of all the parties.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 159.]

2. SAME—ACTION—QUESTION FOR JURY.

In an action on a contract, *held* a question for the jury whether the parties made a binding oral contract before the written evidence of it was drawn up.

3. SALES—TIME OF DELIVERY—EXTENSION—QUESTION FOR JURY.

In an action on a contract for the sale of cotton, *held* a question for the jury whether the time for delivery was extended by the consent of the parties.

4. SAME.

In an action on a contract for the sale of cotton, *held* a question for the jury whether plaintiff was ready, willing, and able to deliver at the agreed time.

5. CONSIDERATION—MUTUALITY.

Where a contract for the sale of cotton provided in the last clause that the seller would take the cotton off the purchaser's hands at the market price on the delivery day, the provision was unenforceable for want of mutuality.

6. GAMING—DEALING IN FUTURES—QUESTION FOR JURY.

In an action on a contract for the sale of cotton, *held* a question for the jury whether the parties had intended that there should be no actual sale and delivery, but merely made a gambling deal on the future price.

Appeal from Superior Court, Gaston County; Chas. M. Cooke, Judge.

Action by J. C. Rankin and others against D. W. Mitchem. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Action to recover damages for an alleged breach of contract on the part of the defendant in the purchase of 100 bales of cotton. The following issues were submitted: "(1) Did plaintiffs contract with the defendant to sell and deliver him 100 bales of strict middling cotton at Lowell, N. C., on February 20, 1905, for the price of 9½ cents per pound? Answer: Yes. (2) Was the time for the delivery of said cotton extended by

mutual consent of the parties until April 10, 1905? Answer: Yes. (3) Were the plaintiffs ready, able, and willing to deliver said cotton to the defendant at the time agreed upon for the delivery? Answer: Yes. (4) Did defendant refuse to receive and accept said cotton? Answer: Yes. (5) What damage have plaintiffs sustained by reason of defendant's refusal to receive said cotton? Answer: \$949.55." From the judgment rendered, defendant appealed.

A. G. Mangum and Tillett & Guthrie, for appellants. O. F. Mason and Burwell & Cansler, for appellees.

BROWN, J. The controversy in this case, as presented, involves the consideration of the following contentions: Was the contract between the parties completed? Were the plaintiffs able, ready, and willing to deliver the cotton according to agreement? Was the contract a wagering contract?

1. The evidence for the plaintiffs is clear that a parol contract was entered into by plaintiffs on the one part and defendant on the other part whereby plaintiffs contracted to sell and deliver to defendant at Lowell on February 20, 1905, 100 bales of cotton at 9½ cents per pound, and equally clear that defendant contracted to take and pay for the same. The proposition to sell seems to have been made by Rankin, who took Robinson in as a copartner in the transaction, with the consent of the defendant. At the time that defendant proposed to draw up the contract, a complete verbal agreement had been made between the parties. The contract was reduced to writing and signed by plaintiff Rankin and the defendant. The fact that Robinson did not sign it does not invalidate either the oral or written contract. The contract had been fully completed between the parties, and the reducing it to writing was not to make a new or different contract, but evidently to preserve the written evidence of what had already been assented to. The plaintiff Robinson affirmed what his copartner had done, for, according to Rankin's evidence, Robinson was en route to Charlotte and left Rankin to fix up the writing, and told Rankin, after he "got it fixed up, to 'phone him at Charlotte and he would buy the cotton." It seems to be generally held that a binding contract may be made between parties although there is an understanding that it is to be reduced to writing, which writing is not completed by the signatures of all the parties. In the case of *Sanders v. Fruit Company*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757, the Court of Appeals of New York said: "Letters and telegrams which constitute an offer and acceptance of a proposition, complete in its terms, may constitute a binding contract, although there is an understanding that the agreement must be expressed in a formal writing, and one of the parties afterwards

refuses to sign such agreement without material modification." Where the parties orally agree upon the terms of a contract, and there is a complete assent thereto, the suggestion to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing. The question is largely one of intention. From the plaintiffs' evidence it is plain that the parties intended to contract, and did contract, before the written evidence of it was drawn up, and that defendant afterwards recognized the contract by asking an extension of time. The subject is fully discussed in 29 L. R. A. 431, note. The court very properly left it to the jury to determine whether the contract was made between the parties as alleged.

2. It is further contended by the defendants that the evidence is insufficient to warrant the finding of the jury in response to the second and third issues. The plaintiffs' evidence, if believed to be true, establishes facts amply sufficient to support those findings. Rankin testified that on February 20th he personally notified defendant that they had the cotton at Lowell and were ready to deliver it according to contract and that defendant asked for an extension of time for the delivery and payment of the cotton. The plaintiff further testified that again on March 20th he tendered the cotton; that he had it at Lowell and offered to deliver it there or at Charlotte or Gastonia. Defendant asked plaintiffs to carry it longer. At request of defendant plaintiffs carried it until April 10th, when the cotton was again tendered and defendant refused to take it and pay for it. According to Rankin's testimony, he then had the cotton at Lowell ready to deliver. The jury appear to have accepted Rankin's evidence as true, and, having done so, they could do nothing less than find the second and third issues for the plaintiffs, as his evidence proves three tenders and two extensions at defendant's request.

3. The defendant contends that the contract is, in any view of the evidence, a wagering contract and void. Among other issues, defendant tendered the following: "Was the said contract illegal and void?" We think it would have been better had his honor submitted the issue. It would have called the jury's attention more pointedly to the principal controversy in the case. But, under the instruction given on the first issue, the defendant, so far as it was a matter for the jury, was given the full benefit of this defense, as appears by the following extract from the charge: "And if the jury shall find that the said contract was entered into by the defendant, but they shall further find that it was the understanding, agreement, and intention of the parties that there should not be an actual delivery of the cotton, but that the contract should be settled by the payment of the difference between the con-

tract price of the cotton and the price of the same quantity and grade of cotton at the time named for the delivery, by and to the one side or the other, according as the difference might be, they will answer the first issue 'No'." The contention that the contract is void on its face is based upon the written contract as follows: "This contract and agreement, made and entered into this the 1st day of December, 1904, by and between D. W. Mitchem, of the first part, and S. M. Robinson and J. C. Rankin, of the second part, all of Lowell, N. C., Witnesseth: That the said S. M. Robinson and J. C. Rankin agree to sell to D. W. Mitchem 100 bales of strict middling cotton, average weight 500 lbs., the price to be 9½ cents per pound. This cotton to be delivered on February 20, 1905, at Lowell, N. C. The said D. W. Mitchem, in consideration thereof, agrees to pay to the said S. M. Robinson and J. C. Rankin 9½ cents per pound, landed at Lowell, N. C. In witness whereof, both parties have signed, this 1st day of December, 1904. S. M. Robinson and J. C. Rankin agree to take the cotton off the hands of D. W. Mitchem at the market price on February 20, 1905. [Signed] D. W. Mitchem. Jno. C. Rankin." It is the last clause which defendant contends vitiates the contract and discloses, per se, a gambling purpose. We admit that the contract does look suspicious, and if the clause referred to compelled defendant to let plaintiff take the cotton off his hands at market price on February 20th, as well as compelled plaintiffs to do so, it would be plainly a gambling contract and void on its face. The plaintiffs alone were bound by this clause of the contract, if anybody was bound by it, while both parties were bound by the first and second clauses. A reading of the instrument plainly indicates that it was the intention of the parties that both should be bound by the first two clauses, but only the plaintiffs by the last. There is no mutuality in this last clause, and consequently no consideration to support it. It is very similar to the contract in *Quick v. Wheeler*, 78 N. Y. 300. There the plaintiff and defendant entered into a written contract, the first clause of which provided for the sale and delivery by the plaintiff to the defendant of certain timber, which was fully performed. The contract then provided as follows: "And I, said Wheeler, also agree to pay said Quick 4½ cents per foot for from 6,000 to 15,000 feet of same kind and quality of the timber, as aforesaid, and delivered at the place aforesaid during the winter, to be paid on the 1st day of June, 1874." The contract was signed by both parties, but there was no agreement on the part of the plaintiff to deliver the last quantity of timber, and, although the plaintiff subsequently undertook to make deliveries in accordance with said clause of the contract, the court said: "This contract when made was not binding, as it was based upon no considera-

tion. The plaintiff parted with nothing and there was no mutuality. There was not that consideration which mutual promises give a contract. The plaintiff did not bind himself to sell and deliver the tie timber. Hence this contract can be treated only as a written offer on the part of the defendant to take and pay for the timber upon the terms stated. *Story on Sales*, § 128; *Chitty on Cont.* 15; 1 *Parsons on Cont.* (5th Ed.) 475; *Tuttle v. Love*, 7 Johns. (N. Y.) 470. This written offer could be revoked at any time before performance or a binding acceptance by the plaintiff." See, also, *Oil Co. v. Kirk*, 68 Fed. 791, 15 C. C. A. 540; *R. R. v. Dane*, 43 N. Y. 240; *Campbell v. Lambert*, 51 Am. Rep. 1; *Cherry v. Smith*, 39 Am. Dec. 150.

Under this interpretation of the contract, the last clause therein is a unilateral promise not binding, or intending to bind, the defendant, and only intended to bind the plaintiffs, and it does not purport to obligate the defendant to do anything. In order to make an agreement valid and binding, the promises must be mutual; or, if unilateral, then there must be other sufficient consideration moving from the one party to the other. The insertion of the last clause cannot be said to be conclusive evidence of the intention of both parties that the contract should be discharged only by a payment of the difference between the contract price and the market price of the cotton on the day fixed for delivery. That being so, the matter is to be settled by ascertaining the real underlying intention of the parties to the contract. Was it the intention of both parties to the contract that the cotton should not be delivered? Was it their purpose to conceal in the terms of a fair contract a gambling deal, in which the parties contemplate no real transaction as to the article to be delivered? This purpose and underlying intent his honor properly left to the jury, the contract not being a gambling one on its face. *State v. Clayton*, 138 N. C. 733, 50 S. E. 886. There are no exceptions to the evidence, and those to the charge are without merit.

No error.

(141 N. C. 341)

STATE v. SUMMERS.

(Supreme Court of North Carolina. May 8, 1906.)

1. EMBEZZLEMENT—INTENT—RESTORATION OF FUNDS—EVIDENCE.

In a prosecution for embezzlement, witness testified that he had in his pocket the amount claimed to have been embezzled which prosecutor claimed, and exhibited the money, whereupon his counsel asked him whether he was willing to deposit such money in the clerk's office to await the termination of a civil action between prosecutor and defendant involving an accounting of commissions. *Held*, that such question was properly excluded, as defendant's intent to restore the money or make good the loss constituted no defense to the embezzlement.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 34.]

2. SAME—FELONIOUS INTENT—BURDEN OF PROOF.

In a prosecution for embezzlement, the burden was on the state to prove the felonious intent beyond a reasonable doubt.

Appeal from Superior Court, Guilford County; Shaw, Judge.

George A. Summers was convicted of embezzlement, and he appeals. Affirmed.

John A. Barringer, for appellant. The Attorney General, for the State.

BROWN, J. We have examined each of the 20 exceptions in the record with that care which the importance of the case to the defendant demands at our hands, and we have concluded that such of the rulings of the court below, as are at all doubtful as to their correctness, were entirely harmless to the defendant, and therefore do not constitute reversible error. We will not comment upon each exception seriatim, as it would needlessly prolong this opinion and be of no value to our legal jurisprudence.

There is evidence in the record amply sufficient to go to the jury tending to prove that the defendant was the agent, at Greensboro, of the Singer Manufacturing Company and operated under a contract dated December 28, 1906, under which he was entitled to receive \$15 per week and certain commissions. In the course of his employment the sum of \$1,416.39 came into his possession, which, in accordance with the instructions of the Singer Company should have been deposited in the Greensboro National Bank and forwarded by check to the office of the company in Atlanta, Ga. The defendant instead placed the money to his own credit in the City National Bank in Greensboro and drew out \$100 in cash and received the cashier's check for the remainder and left the state, going to Illinois, where he was afterwards arrested, and brought back to North Carolina. The defendant contended that the company was indebted to him in a sum larger than that which he retained, growing out of commissions due him on the sales of machines, and other transactions connected with the business of selling the same. He further contended that on account of his inability to obtain a settlement of his affairs with the company, he appropriated the amount in part payment of the sum due him from the company. The defendant testified in his own behalf and among other statements said: "I have got in my pocket now the \$1,416.39 which the company claims is theirs." (Witness exhibits the money.) The defendant's counsel asked: "Are you willing to deposit that in the clerk's office to await the termination of the civil litigation in this case?" The court excluded the question. There was no error in refusing to admit this evidence. The fact that a party accused of embezzlement intended to restore the property embezzled, or even that the loss has been made good, does not constitute a defense to

a criminal prosecution for the embezzlement. Clark's Crim. Law, §13; 1 McClain, §41; Spalding v. People, 172 Ill. 40, 49 N. E. 993. In Meadowcroft v. People, 163 Ill. 56, 48 N. E. 303, 35 L. R. A. 176, 54 Am. St. Rep. 447, it is said: "It needs no citation of authorities to show that, as a matter of law, the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment and conviction for such larceny or embezzlement. The effect of the tender and payment into court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned."

The examination of the defendant shows that he was permitted to give his reasons for taking the money, and he was given the full benefit of that phase of the evidence in the following instruction by the court: "If you find from the evidence that the defendant retained the money in his hands with a bona fide belief that the company owed him money, and for the purpose of holding it until he could effect a settlement with the company, whereby his rights could be ascertained, and it could be determined how much was due him, and to hold the money for the purpose of satisfying such claims when ascertained, then the holding of the money by the defendant, even though the jury should believe it to have been wrongful, would not be such a holding or conversion as would make the defendant guilty of the crime of embezzlement." The question of intent was submitted to the jury with appropriate instructions. They were told that the burden was upon the state to prove beyond a reasonable doubt the felonious intent. The charge follows the decisions in State v. McDonald, 133 N. C. 680, 45 S. E. 582, and State v. Blackley, 138 N. C. 620, 50 S. E. 310. The evidence as to the felonious intent was reasonably sufficient to go to the jury. State v. Fain, 106 N. C. 760, 11 S. E. 593; State v. Costin, 89 N. C. 511; State v. Harris, 106 N. C. 682, 11 S. E. 377; State v. Wilson, 101 N. C. 730, 7 S. E. 872; State v. Foust, 114 N. C. 842, 19 S. E. 275.

We find no error in the record of which the defendant could justly complain, and we find ample evidence to support the verdict of the jury.

No error.

(141 N. C. 344.)

HOBGOOD v. EHLEN et al.

(Supreme Court of North Carolina. May 16, 1906.)

1. CORPORATIONS—STOCKHOLDERS—UNPAID STOCK—LIABILITY—WHAT LAW GOVERNS.

Where a corporation was organized under the laws of a foreign state, the liability of the stockholders for unpaid stock issued to them is

to be governed by the law of the state where the corporation was organized.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 829-831.]

2. SAME—FRAUDULENT ORGANIZATION—EVIDENCE.

22 Del. Laws 1901, pt. 1, p. 292, c. 167, § 14, permits corporations existing thereunder to issue stock for labor done or personal property or real estate or leases thereof in the absence of fraud in the transaction, etc. Defendant E. conceived a scheme to organize a corporation to take over the lumber business of a firm whose entire assets were valued at \$896.63. The corporation was organized under the laws of Delaware, with a capital of \$100,000. Certain of defendant's stock was issued to "dummy" directors, who without ever seeing the property of the firm purchased it for the corporation at an amount equal to the whole capital stock of the corporation, which was issued in payment thereof, after which, under a secret oral agreement, the corporation at E.'s instance paid to the firm in cash the actual value of the assets so transferred; the only thing acquired by the corporation being the good will of the firm, which was worth little or nothing. *Held*, that such facts were sufficient to establish actual fraud in the organization of the corporation, and that the stockholders were therefore liable to creditors to the amount of the par value of their stock.

Appeal from Superior Court, Forsyth County; E. B. Jones, Judge.

Action by F. P. Hobgood, as trustee in bankruptcy of the Ronda Lumber & Manufacturing Corporation, against W. B. Ehlen and others. From a judgment for plaintiff, defendant Ehlen appeals. Affirmed.

This was an action brought by the plaintiff, trustee in bankruptcy of the Ronda Lumber & Manufacturing Corporation against the defendants, who were the subscribers to and holders of the stock of said corporation, to recover from them the amount of their unpaid stock subscriptions, the plaintiff alleging that the defendants had attempted to pay for the stock in property which had no real value. The plaintiff had a judgment below, and the defendant W. B. Ehlen alone appealed.

These are the issues submitted: "(1) What amount of stock was issued to W. B. Ehlen in the Ronda Lumber & Manufacturing Corporation? Answer: \$50,300, par value. (2) What amount of stock was issued to W. H. McElwee in the Ronda Lumber & Manufacturing Corporation? Answer: \$19,500, par value. (3) What amount of stock was issued to Robert Hickerson in the Ronda Lumber & Manufacturing Corporation? Answer: \$19,500, par value. (4) Was the Ronda Lumber & Manufacturing Corporation organized and its stock issued in conformity with the laws of Delaware? Answer: Yes. (5) Was there an intent to defraud and cheat on the part of the defendants, or either of them, in the organization and issuing of the stock in the Ronda Lumber & Manufacturing Corporation to the defendants or others? Answer: Yes, all. (6) What was the value of the property of the Ronda Pin & Bracket Company at the time of the organization of

the Ronda Lumber & Manufacturing Corporation? Answer: \$896.63. (7) What is the amount of the indebtedness of the Ronda Lumber & Manufacturing Corporation? Answer: \$38,983.92. (8) In what amount is the Ronda Lumber & Manufacturing Corporation indebted to W. B. Ehlen? Answer: \$20,637.80. (9) What is the amount of assets in the hands of Hobgood, Trustee? Answer: \$5,769.36."

Busbee & Busbee, E. J. Justice, and Stedman & Cooke, for appellant. L. M. Quirk, Lindsay Patterson, and Manly & Henbren, for appellee.

BROWN, J. The first 10 exceptions appearing in the record relate to matters connected with the relations existing between Ehlen and his codefendants prior to the organization of the Ronda Lumber & Manufacturing Corporation. It is insisted that such matters are not material to the issues and that the evidence was irrelevant and calculated to prejudice the jury against Ehlen. We think the evidence was material, and the exceptions are without merit. In order to show the motives and purposes which prompted the parties in forming the corporation and the fraudulent character of the transaction, it was material to show the antecedent steps, and how the defendant Ehlen came into the enterprise.

The remaining exceptions raise the question of the sufficiency of the evidence. The defendant insists that the court should have instructed the jury that there was no evidence as to him to warrant an affirmative answer to the fifth issue, which involved the question of fraud. We think the whole controversy hinges on the correctness of that ruling. The corporation, known as the "Ronda Lumber & Manufacturing Corporation," was organized by the defendants under the laws of the state of Delaware, which contains the following provision: "Section 14. Any corporation existing under any law in this state may issue stock for labor done or personal property or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate, or leases shall be conclusive." 22 Laws Del. 1901, pt. 1, p. 292, c. 167. The liability of the defendant, as an organizer and stockholder, for the debts of the bankrupt corporation is, therefore, to be determined by the law of Delaware, the domicile of the corporation. Thompson on Liability of Stockholders, § 89. In consequence of the ruling of the judge below, it is necessary that we should determine that constructive fraud is sufficient to support the finding of the jury. Upon this issue the court charged as follows: "The law under which this case is to be tried is the law of Delaware, and I charge you that where fraud is referred to in that statute 'actual' and not 'constructive' fraud is meant. Constructive fraud, as distinguished

from actual fraud, is inferred from illegal or improper acts that result in loss or injury to others. Actual fraud is established by competent proof of corrupt purposes, wicked or unlawful intent to cheat another or others. Applying it to this case, constructive fraud would be that kind of fraud that might be inferred from an overvaluation of property conveyed to the corporation, in the absence of proof of actual intent to defraud. The directors of the Ronda Lumber & Manufacturing Corporation, having placed a valuation on the property conveyed and set over to said corporation and issued stock therefor, if you believe the evidence, their action in that matter is conclusive as to the value of said property unless you find that this was done in actual fraud. It is not enough for the jury to find that the property was valued at too much by the directors of the Ronda Lumber & Manufacturing Corporation, but in order to answer the fifth issue 'Yes' you would have to go further and find fraudulent overvaluation."

We think the facts and circumstances in evidence amply sufficient to be submitted to the jury upon the issue of actual fraud, and warranted their finding. It is very difficult to prove actual fraud in many cases. It is frequently necessary to seek out the earmarks or badges of fraud and present them to the jury as evidence from which they may infer it. A bare recital of the facts which the evidence tends most strongly to prove will suggest to the impartial mind, it seems to us, that the animating purpose in forming the corporation was to float a lot of worthless stock with the design to cheat and defraud an unsuspecting public, as well as to give a fictitious credit to a worthless concern. Not only was Ehlen's stock issued to him in direct violation of the statute for so-called services to be performed, but the entire capital stock issued was "water" pure and simple. In or about April, 1902, the defendants Hickerson and McElwee, as copartners, began a small lumber business in the town of Ronda, N. C., under the firm name of "Ronda Pin & Bracket Company," and this business was continued by McElwee and Hickerson until it was absorbed by the Ronda Lumber & Manufacturing Corporation. The tangible assets of this partnership were valued by the jury at \$896.63. In September, 1902, the defendant Ehlen proposed to the defendants McElwee and Hickerson to form a corporation under the laws of the state of Delaware, with a capital stock of \$50,000, and that the corporation should take over the assets and good will of the partnership and pay therefor its total authorized capital stock, to wit, \$50,000. The defendant Ehlen was to finance the corporation, and by the word "finance" it was meant that he was to loan to the corporation the money on which it was to do business and to take therefor the note of the corporation. This was agreed to by all the defendants, but in

a few days this agreement was modified by increasing the capital stock of the corporation to \$100,000 and agreeing that the defendants should receive that amount in payment for the assets of the partnership, instead of \$50,000. The only consideration for this increase in value was the agreement of Ehlen to finance the company to a larger extent; that is, he was to loan it more money on which to do business. It was further agreed that Ehlen was to have 51 per cent. of the stock, and the remainder to be equally divided between Hickerson and McElwee.

In accordance with these contracts, the defendant Ehlen employed Messrs. Bayard & Coe, of Baltimore, to organize the corporation, and these gentlemen obtained the services of the Delaware Charter & Guarantee Company to secure a charter under the laws of the state of Delaware, and the company did, on the 29th day of September, 1902, obtain a charter for the bankrupt corporation with authorized capital stock of \$100,000, divided into 2,000 shares of the par value of \$50 each, and by the terms of the charter the amount of capital stock with which the corporation would commence business was fixed at \$1,000, this being 20 shares. This stock was subscribed for as follows: Six shares by Richard H. Bayard, one of the attorneys employed by the defendant Ehlen, 6 shares by Josiah Marvel, an official or employé of the Guarantee & Trust Company, of Wilmington, Del., and 8 shares by Andrew Marvel, also an official of the Guarantee & Trust Company. At the first meeting of the stockholders, held at Wilmington, Del., on October 1, 1902, the stock subscribed for in the name of Andrew Marvel was assigned to W. E. Ferguson, private secretary of the defendant Ehlen. The organization was perfected by the election of the following persons as directors: Richard H. Bayard, Josiah Marvel, and W. E. Ferguson. And at the directors' meeting, held on the 13th day of October, the following persons were elected officers: Josiah Marvel, president; Richard H. Bayard, vice president; W. E. Ferguson, secretary and treasurer. The defendants thereupon presented to the stockholders and directors of this corporation the proposal hereinbefore mentioned. The directors accepted the proposition, valued the property of the Ronda Pin & Bracket Company at \$100,000, and authorized the corporation to issue to the defendants its entire capital stock, to wit, \$100,000, and in accordance therewith, on the 14th of October, a certificate was issued to the defendants for 2,000 shares of the capital stock, and thereupon the corporation took over the business of the Ronda Pin & Bracket Company. On the 29th of October, 1902, the certificate issued to the defendants was surrendered to the corporation and canceled, and in lieu thereof, and in accordance with the agreement between the defendants, certificates were issued in the amounts and to

the following named persons: W. B. Ehlen, 1,006 shares; W. H. McElwee, 390 shares; Robert L. Hickerson, 390 shares; William E. Ferguson, 8 shares; Richard H. Bayard, 6 shares; Bayard & Coe, 194 shares; Josiah Marvel, 6 shares.

Prior to the formation of the corporation and on the 19th of September, 1902, the defendants Hickerson and McElwee took an inventory of the Ronda Pin & Bracket Company, and ascertained that the total value of the partnership property was less than \$900. The result of this investigation was communicated to Ehlen. The directors who said that, in their judgment, this property was worth \$100,000, knew nothing of the property they were valuing, save such information as they gathered from the defendant Ehlen and the defendant McElwee. None of these directors were ever at Ronda, nor did they make any inquiries other than from Ehlen and McElwee. The proposition made by the defendants to the corporation, and which was accepted by the corporation, and upon which the stock was issued, purported to convey, in consideration of the receipt of the stock, the property, assets, and good will of the Ronda Pin & Bracket Company, but as a matter of fact the evidence shows there was an agreement in parol by which the corporation was to pay the owners of the Ronda Pin & Bracket Company, to wit, McElwee & Hickerson, in cash for all its tangible assets, and, after the organization of the corporation, this was done; so, as a matter of fact, the only thing obtained by the corporation for its entire capital stock was the good will of the Ronda Pin & Bracket Company. The defendant Ehlen did not own any of the property of the Ronda Pin & Bracket Company, neither did he pay anything therefor; but he was to pay for his stock in the new corporation by his services in suggesting the scheme and loaning to the corporation the money upon which to do business. On January 10, 1905, this water-logged craft, being no longer able to float, was forced into bankruptcy and plaintiff elected trustee. According to the finding of the jury the concern owes about \$19,000 to general creditors, exclusive of \$20,000 to Ehlen. The language of Mr. Justice Shiras in *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111, comes to mind as being especially appropriate in reviewing the evidence in this case: "The bare statement of the facts pertaining to the organization of the company fully justifies the opinion that the entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature."

We have not been cited to any decisions from the courts of Delaware defining the word "Fraud" in the statute quoted, but his honor construed it to mean actual fraud and the defendant cannot complain of that ruling. In New Jersey it is held that "any device by which the stock of a corporation passes to a

stockholder as fully paid without payment in full, either in cash or property purchased to the amount of the value of the stock, such as an intentional overvaluation of property on the understanding that a portion of the stock issued shall be returned for distribution among the directors voting for a purchase of the property without payment by them, constitutes actual fraud against the creditors of the corporation." *Easton Bank v. Brick Co.* (N. J. Ch.) 60 Atl. 54. It is also held that an owner of stock in a corporation issued in consideration of a transfer of property, the valuation of which is wholly speculative, visionary, and imaginary, is liable to creditors. *Trust Co. v. Turner*, 111 Iowa, 604, 82 N. W. 1029, 53 L. R. A. 136. In *Douglass v. Ireland*, 73 N. Y. 100, it is held that, to charge the stockholder with the debts of the corporation, it must be shown that the property was not only purchased at an overvaluation, but it must be also shown that the purchase was in bad faith and to evade the statutes; and that to show this it is only necessary to prove, first, that the stock issued exceeded in amount the value of the property in exchange for which it was given; and, second, that the directors or trustees deliberately and with knowledge of the real value of the property overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value.

The general rule in all the states is that a subscriber to the stock of a corporation is under a liability to pay therefor, which liability so far as creditors are concerned can only be extinguished by actual payment or a valid release. *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82; 26 Am. & Eng. Enc. (2d. Ed.) 912. This is founded upon the theory that the capital stock is the fund or resource with which the corporation is enabled to transact its business, and upon the faith of which persons give credit to the corporation. It is a trust fund for the benefit of creditors. The public has a right to assume that the capital stock has been or will be paid for in money or money's worth when necessary to meet corporate liabilities. Has the stock of this corporation ever been paid for in money, or its worth, by any one? So far as we can see not a single share has been paid for. The organizing directors were the agents and employees of these defendants, employed by them for no other purpose than to issue the stock and take over the insignificant concern known as the Ronda Pin & Bracket Company in the payment of the entire \$100,000 capital stock. The defendants were to all intent and purpose both buyer and seller. These "men of straw" were mere automatons that moved when defendants pulled the string. The will of the defendants was their will, and they exercised no independent judgment. There is no evidence that they paid a dime for the few shares of stock assigned to them. These were doubtless given to them in order

to qualify them as directors so they could pass the resolutions prepared in advance for them, and register the will of their employers. One of the most significant indications of fraud is disclosed by the examination of McElwee. Notwithstanding the written agreement of September 1, 1902, provides that the business and assets of the Ronda Pin & Bracket Company are to be turned over in payment of stock in the new corporation, and notwithstanding the directors of the latter so accepted it, there was at the same time a secret agreement between Ehlen and his codefendants that the latter were to be paid in cash \$895.65, the total inventoried assets of the Ronda Pin & Bracket Company and given their stock in addition. So it appears that the new corporation got nothing whatever from McElwee and Hickerson in payment for their stock except the so-called good will of the Pin & Bracket Company. What was the good will of this infant industry of only six months' duration with assets under \$900 worth? Plainly, nothing. In the case of *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363, the Supreme Court of the United States places its estimate upon the value of such an asset in the following language: "The experience and good will of the partners, which it was claimed were transferred to the corporation, were of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection."

The record discloses the proposition made by the defendants to their employes, the board of directors of the bankrupt corporation, to pay for the entire capital stock of \$100,000 in the following manner: (1) To turn over the entire business and assets of the Ronda Pin & Bracket Company to the corporation. (2) To turn over to the corporation any and all options that defendants McElwee and Hickerson held upon timber land. (3) The defendant McElwee was to give his services for six months from the date of the organization of the corporation in obtaining options on timber rights. (4) The defendant Ehlen was to bear the expenses of the organization of the corporation over and above \$250 and was to "finance" it. The corporation did not get the assets and business of the Ronda Pin & Bracket Company, but only its good will, as we have already shown. The assets were paid for in cash and the good will is worthless. McElwee and Hickerson owned no options at the time. They only had some "in view," and of those only one ever materialized. These "options in view" cannot support the issuance of the stock for the statute uses the words "real estate or leases thereof." If the options had been "in hand," much less "in view," they would not come within the terms "real estate and leases thereof," for an option is neither. The defendant McElwee agreed to give his services for six months from the date of the organization in obtaining options on timber. This was a plain violation of the statute, which uses the words "labor done."

The directors had no power to accept prospective services, which might be worthless to the corporation, in payment for its stock. Ehlen's proposition to finance the corporation means simply to loan it money, and his other proposition to bear the expenses of the organization over and above \$250 cost him nothing as there is no evidence that he was called upon to pay a penny on that account. So it seems to us that the evidence is conclusive that this dummy board of directors at the instance of these defendants issued \$100,000, the entire capital stock of the corporation and received nothing whatever of value in payment for it. The law seems to be well settled, and the consensus of all the authorities is to the effect that, in the absence of charter restrictions, a corporation may take property, which is reasonably necessary for its legitimate business, in payment for its stock, but when so received the property must be taken at its reasonable monetary value. Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made, while its acceptance may blind the corporation, is a fraud on creditors and they may proceed against the stockholder individually, who sells the property, as for an unpaid subscription. *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111. All the authorities are collected in 26 Am. & Eng. Encyc. (2d Ed.) 1013.

Applying the settled principles of law to the facts of this case as found by the jury, we have no hesitation in holding that the defendants Ehlen, McElwee and Hickerson are liable for their unpaid subscription to the capital stock of the bankrupt corporation to the extent that it is necessary to pay the just claims of its creditors. If it should turn out that the judgment rendered against these defendants is larger than is necessary for such purpose, it may be corrected in the future and the necessary order made upon petition to the superior court.

Affirmed.

(41 N. C. 341)

BIVINGS et al. v. GOSNELL.

(Supreme Court of North Carolina. May 16, 1908.)

1. EVIDENCE — HANDWRITING — EXPERTS — QUALIFICATIONS.

A witness is not entitled to testify as a handwriting expert without proof of his qualifications.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2347, 2383, 2384.]

2. APPEAL—EVIDENCE—ADMISSION—HARMLESS ERROR.

Where, in ejectment, plaintiff offered certified copies of certain deeds from the registry, which were properly admitted, and such deeds were not necessary to the establishment of plaintiff's case, the erroneous admission of the deeds themselves, because not properly proved, was harmless.

3. EVIDENCE—DECLARATIONS—RES GESTÆ.

In ejectment to recover certain land, evidence that witness rented the land from one M.

and held the same for a year under such lease, and that at the time the lease was made M. stated that he was acting for plaintiff, was admissible as *res gestæ*.

Appeal from Superior Court, Rutherford County; Council, Judge.

Action by Mary M. Bivings against William Gosnell. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

McBrayer & McBrayer, for appellant. Sol. Gallert, for appellee.

HOKE, J. There seems to be some force in the objection of the defendant to the evidence of the plaintiff's witness, M. O. Dickinson, who was allowed on the trial to testify to his opinion of the handwriting of T. F. Birchett, a former clerk of the superior court of Rutherford county, by comparing his signature to the probate of a deed from William Garrett, Jr., to James Morris, dated December 7, 1833, offered in evidence by the plaintiff, with the signature of said Birchett to other records of the court, while he was clerk, which were in evidence in the case and admitted to be genuine, or certainly not denied. The records were such as the law permits to be used for the purpose of a comparison of handwriting. *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28. But the witness does not seem to have qualified himself as an expert, or to have been asked any questions tending to qualify him as such. This was very likely done and omitted from the case on appeal by inadvertence, but the record as it now stands does not disclose that it was done, and the admission of the evidence over the defendant's objection was improper.

Objection was also made to another deed from Wm. Garrett to James Morris, dated April 14, 1834, on same ground. While there may have been an erroneous ruling in the admission of these deeds, the same, we think, does not present a reversible error, and for two reasons: First, the plaintiff subsequently offered certified copies of these deeds from the registry of Rutherford county, and while the defendant objected to their admission, and excepted, it is nowhere set out or suggested wherein the copies were defective or improperly admitted. These copies therefore being in evidence without valid objection, the error, if any as to the original deeds, became immaterial. Again, the case does not disclose that these deeds were necessary to the plaintiff's case. He was seeking to establish his title by adverse occupation under color, and, so far as appears, there were other deeds and muniments of title amply sufficient to make good his claim by adverse possession, and for the requisite length of time. The burden of showing error is on the appellant, and as the case on appeal does not disclose that these deeds were necessary to make out the

plaintiff's cause, or in what way they worked to the injury of the defendant, the verdict and judgment against him will not be disturbed on account of their admission.

Again, it is urged for error that S. O. Cantrell, a witness for the plaintiff who testified that he rented the land from one James Morris and held the same for one year (about 1870) under that lease, was allowed over the defendant's objection to testify further that James Morris said to the witness, at the time of the renting, that he was acting for the plaintiff. This testimony, we think, was competent as accompanying and characterizing the witness's occupation and possession of the property. The declaration of the tenant would be clearly competent for such purpose, and the declaration of Morris made to the tenant, assented to and acquiesced in by him, is equally competent. It was a part of the act of taking and holding possession, a part of the *res gestæ*. In 1 Greenleaf on Ev. Sec. 108, it is said: "Again the occupation of land is a merely physical act capable of various interpretations, and may need to be completed by words in order to have legal significance. What a man says when he does a thing shows the nature of his act and is a part of the act; it determines its character and effect. Tenancy is a continuation of acts in a certain relation to another, and declarations during the tenancy by a man that he is a tenant and of a particular person, may be put as a part of the *res gestæ* so far as it is necessary to learn the significance of the act." Our own authorities are to like effect. *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Kirby v. Masten*, 70 N. C. 540. It is sometimes held that declarations characterizing and accompanying possession are only admitted when in disparagement of title, and are only to be sustained on the ground that they are declarations against interest. Greenleaf and other authorities intimate to the contrary. But conceding this to be the correct ground, this evidence is admissible, for the qualification means in disparagement of the declarant's title. His interest would be to hold as owner, and when he declares, as accompanying his entry or characterizing his possession, that he enters and holds as tenant, this is characterizing an act and giving it its true significance, and is likewise in disparagement of the declarant's title.

It will be noted that this declaration was at the very time of the renting, and it also appears, we think, by fair interpretation of the evidence, that the parties were then and upon the land. Certainly nothing is shown to the contrary, and, as we have heretofore stated, the burden is on the appellant to establish error or the results of the trial will not be disturbed.

No error.

(141 N. C. 337)

WESTHALL v. HOYLE et al.

(Supreme Court of North Carolina. May 16, 1906.)

1. JUDGMENT—ENTRY—VACATION.

Judgment may be entered in vacation by consent.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 522.]

2. SAME—CONSENT.

Where counsel agreed that the case should be continued until the next term upon the payment of the costs of the term by defendants within 10 days, and that, if the costs were not paid within that time, plaintiff should have judgment which might be signed out of term, a judgment entered pursuant to the stipulation upon failure to pay the costs was valid.

Appeal from Superior Court, Burke County; W. R. Allen, Judge.

Action by W. H. Westhall against J. S. Hoyle and others. A judgment entered for plaintiff pursuant to a stipulation was set aside as irregular, and plaintiff appeals. Reversed.

Self & Whitener, for appellant. Witherspoon & Witherspoon, for appellees.

CLARK, C. J. It was agreed in open court, by counsel of both parties, that this case be continued till next term upon payment of the costs of the term by the defendants in 10 days, and that if the costs were not paid within 10 days the plaintiff should have judgment for the amount of his claim, and that the judgment might be signed out of term. This agreement was not reduced to writing nor entered on the minutes, but it is not denied. That judgment can be entered by consent in vacation is well settled, *Bank v. Gilmer*, 118 N. C. 670, 24 S. E. 423, and a long list of cases there cited, and many cases since.

This is not a conditional judgment, but it is absolute in terms. That it was to be signed upon a certain condition does not invalidate it, as the contingency happened. This, too, is discussed and held in *Bank v. Gilmer*, supra. The defendants "cannot object to action which could not have been taken but for their assent and which was based upon it." *Hawkins v. Cedar Works*, 122 N. C. 91, 30 S. E. 14, citing *Benbow v. Moore*, 114 N. C. 263, 19 S. E. 156; *Bank v. Gilmer*, 118 N. C. 663, 24 S. E. 426. In *Benbow v. Moore*, this court sustained a judgment signed by Judge Connor, by virtue of such consent, not only in vacation but out of the district. Here the judgment was signed in 30 days and within the district. *Hahn v. Brinson*, 133 N. C. 7, 45 S. E. 359, is merely a repetition of the familiar doctrine that the court will disregard any alleged oral agreement between counsel, if denied, for it will not try an issue of veracity which could have been avoided easily, either by putting the agreement in writing, or by causing it to be entered on the minutes. But this agreement is not denied, and the judgment signed in vacation was valid.

Molyneux v. Huey, 81 N. C. 112; *Shackelford v. Miller*, 91 N. C. 185; *McDowell v. McDowell*, 92 N. C. 229, in neither of which was the consent in writing nor entered on the minutes.

This judgment was not entered contrary to the course and practice of the court, and it was error to set it aside as an irregular judgment. The consent of counsel is stated in the judgment, and is binding upon the defendants in the absence of fraud and collusion. *Hairston v. Garwood*, 123 N. C. 345, 31 S. E. 653.

Reversed.

(141 N. C. 400)

JANNEY et al. v. ROBBINS.

(Supreme Court of North Carolina. May 16, 1906.)

1. PRINCIPAL AND AGENT—POWER OF ATTORNEY—DESCRIPTION OF LAND—DEFINITENESS.

A power of attorney authorizing the appointee to sell and convey "all our land in the state of North Carolina" is sufficiently definite in its description of the land to be admissible, together with a deed executed pursuant to the power, as evidence of title.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 21.]

2. ADVERSE POSSESSION—COLOR OF TITLE—UNREGISTERED DEED.

Under Revisal 1905, § 980, relative to the registration of deeds, an unregistered deed may, as against one claiming from a different source of title, be admitted as color of title upon which to found a plea of adverse possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 463.]

3. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a suit to enjoin defendant from cutting timber on certain land, defendant denied plaintiff's title. Plaintiffs offered deeds showing a chain of title from a certain grant, and defendant offered deeds running back to a different grant and sought to prove adverse possession under such deeds. The deeds were erroneously excluded and denied effect as color of title, on the ground that they were unregistered. Thereafter plaintiffs proved a superior title as to a part of the land under the grant under which defendant claimed. Held that, as the defense of adverse possession was nevertheless good as to the remainder of the land, the error in excluding the deeds offered to show color of title was not harmless nor cured.

Appeal from Superior Court, Caldwell County; O. H. Allen, Judge.

Action by J. W. Janney and others, as trustees, against T. O. Robbins. From a judgment for the plaintiffs, defendant appeals. Reversed and remanded.

Civil action to restrain defendant from unlawfully cutting timber on land of plaintiffs. Defendant, admitting the cutting of timber on certain land referred to in the complaint, denied plaintiffs' title to the land in controversy, averring that no wrongful cutting or other trespass had been committed by defendant. Issues submitted: (1) As to plaintiffs' ownership and right to immediate possession of the land sued for. (2) As to damage done by wrongfully cutting timber on said land.

Plaintiff first put in evidence a grant from the state to W. D. Sprague, being grant No. 918, dated 1875, for 640 acres, and offered evidence to show that the grant covered the land in controversy, and also a deed from W. D. Sprague to Louisa W. Bond, dated 1876, covering the land in the above grant. To show title from this source in plaintiff, it became necessary for plaintiff to avail himself of a power of attorney from L. W. Bond to J. McDowell Tate, dated January 6, 1887, to sell said land, and a deed by said Tate pursuant to the power. The descriptive words of the power of attorney from L. W. Bond were to "negotiate to sell and convey, by proper deeds of conveyance, any and all of our real estate in the state of North Carolina." Defendant objected to the power of attorney because of the "vague and indefinite description of the land authorized to be conveyed." Objection overruled and defendant excepted. The papers in this line of title seem to have been all registered by January 7, 1890. Defendant then offered in evidence a grant from the state to J. L. Hawkins, dated December 3, 1891, a deed from J. L. Hawkins to A. M. Church and wife, dated 1895, and a deed from Church and wife to defendant in 1903. The grant and deeds in this chain of title were all registered in the year 1903. Defendant offered evidence to show that these deeds covered the land in dispute, and further offered evidence to show that defendant and those under whom he claimed had been in the adverse continuous possession of the land for more than seven years prior to the institution of this suit under and by virtue of the grant to Hawkins and the deeds to Church and to the defendant—the deeds being necessary to give color of title for the requisite length of time. Plaintiff objected to any evidence tending to show title by adverse possession by reason of any occupation of the property which antedated the registration of the deeds under which defendant claims. Objection sustained, and defendant excepted. Plaintiff in reply then offered a deed from J. L. Hawkins to W. L. Bryan, dated March 29, 1892, for 83 acres of land covered by the grant to Hawkins of date December 3, 1891, and a deed in fee from W. L. Bryan to plaintiff, dated May 7, 1892, for this same 83 acres of land bought of J. L. Hawkins; these deeds being registered, respectively, May 9, 1892, and May 12, 1892, and it was admitted that the 83 acres of land contained in these deeds was a part of the land trespassed upon. The plaintiff further offered evidence to show that, under a correct and proper location of the deeds to and from A. M. Church, under which defendant claims, they would not cover any of the lands in controversy, and so defendant was entirely without color of title to any part of the land. The court charged the jury, if they believed the testimony, to answer the first issue "Yes," and, under further and proper instructions, referred to the jury the question of damages. Verdict for plain-

tiff, and from the judgment thereon defendant appealed.

W. H. Bower and M. N. Harshaw, for appellant. Edmund Jones, for appellees

HOKE, J (after stating the case). Defendant rests his claim to a new trial on two exceptions: First, that the description in the power of attorney is too vague and indefinite to authorize the conveyance of any land; and, second, that the court ruled out the testimony offered with a view of showing title in defendant by adverse occupation. On the first point, the authorities in this state are against the defendant's position. Conceding that a power of attorney to sell and convey real estate must contain on its face sufficient data to permit parol testimony to fit the description to the property, or it must refer for description to some deed or written paper which does contain such data, the language of this power of attorney, "all of our land in the state of North Carolina," expresses a description sufficiently definite to permit evidence *alunde*, and would authorize a conveyance of all the land the person owned in the state at the time of the execution of the instrument. *Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 267; *Farmer v. Batts*, 83 N. C. 387; *Perry v. Scott*, 109 N. C. 374, 14 S. E. 294.

On the second point raised by defendant's exceptions, we are of opinion that there was error which entitles the defendant to a new trial. In developing their case before the jury, plaintiffs had put in evidence a grant from the state to W. D. Sprague, bearing date in 1875, and connected themselves with this grant by a line of deeds registered on or before 1890. In answer, the defendant had put in evidence a grant from one J. L. Hawkins, bearing date December 1891, and connected himself with the grant by a line of deeds, the first in order being a deed from Hawkins to A. M. Church in 1895. This grant and these deeds were not registered till 1903. Defendant then offered evidence tending to show continuous and adverse occupation of all the land in controversy under these deeds for seven years next before action brought, contending that such occupation under them would mature his title as against the Sprague title, the only one then presented by plaintiff. The evidence was excluded, and defendant excepted. This ruling was predicated upon the idea that, under our present registration laws, an unregistered deed can never be used as color of title and was no doubt caused by the headnote in *Austin v. Staten*, 126 N. C. 733, 36 S. E. 338, in which it is declared to be the decision of the court "that an unregistered deed does not now constitute color of title." An examination of this case, however, will disclose that the headnote is too broadly stated, and goes entirely beyond the scope and effect of the decision. The portion of our present registration law (ordinarily spoken of as the "Connor Act," Revisal 1905, § 980) was

not designed to interfere with the doctrine of maturing title by adverse occupation and does not do so except to the extent as limited and defined in the decision referred to. There is a decided intimation to this effect in *Collins v. Davis*, 132 N. C., at page 111, 43 S. E. 579. The law was enacted in order to establish and declare the rights of persons who claim under the same title, intended to be the true title, or the one presumably the true title, because both parties claim under a common grantor, and undertook to do this by simply applying to deeds, and contracts concerning realty and leases of land of over three years duration, the same provisions that had long prevailed as to mortgages, to-wit, that no such instruments should be valid to pass the property as against creditors or purchasers for value, but from the registration thereof. In *Austin v. Staten*, supra, the plaintiff claimed under a deed to himself from H. W. Staten and two others, dated March 31, 1896, registered the same day. The defendant claimed under a deed from himself to the same parties dated December 31, 1887, registered May 31, 1897. It will be noted that there both parties claimed from the same grantor, and the plaintiff's deed, though dated nine years or more later than the defendant's, had been registered more than a year prior to defendant's deed. There were questions of fraud involved in the case, in no way material to the point now considered. By the express provisions of the registration act, the plaintiff, on the record and face of the papers, had the superior right because his deed had been first registered. Defendant then took the position that though his deed, by virtue of the registration acts, was avoided as against plaintiff, yet the same was good as color of title, and proposed to maintain his title by showing occupation under his unregistered deed for seven years. The court held that to allow this would be "in effect to destroy chapter 147, p. 233, Acts 1885 [the Connor act referred to], and this we cannot do." Whatever might be the position of the court if this were an open question, we think it clear that the principle there announced must be confined to the facts of the case to which it was then applied, and does not extend to a claim by an adverse possession held continuously for the requisite time under deeds foreign to the true title or entirely independent of the title under which plaintiff makes his claim. As to such deeds and claimants, our present registration law does not, and does not intend to, modify or interfere with the doctrine of maturing title by adverse occupation as heretofore expounded and applied by the decisions of this court.

At the time the evidence was offered, the plaintiff had introduced a line of deeds connecting himself with the Sprague grant covering the land in controversy. Defendant then offered a line of deeds taking their source in a grant to one J. L. Hawkins, also covering the land in controversy, and proposed to offer

evidence to show continuous and adverse occupation under these deeds for seven years next before action brought. The deeds not being registered, the court, acting no doubt on this syllabus, excluded the testimony, and in this there was error. The plaintiff, however, contends that, though this may have been erroneous, it afterwards became harmless, and the same was in fact cured by testimony subsequently offered by him showing that plaintiff had also the better title to the land in controversy under this very Hawkins grant, and if this be true, then the plaintiff and defendant do claim title from the same source, and the ruling would come directly within the correct principle of *Austin v. Staten*, supra. This would be a satisfactory and complete reply to defendant's position, but that the case states that plaintiff's line of deeds, which connect him with the Hawkins grant, cover but 83 acres and only a part of the land in controversy. The defense, then, of title by adverse occupation was open to defendant as to all the land in dispute outside of the 83 acres, and as to such land the deeds of defendant were good as color of title without registration, and the evidence should have been received on that question. This is not an action of ejectment simply, in which, when a defendant fails to disclaim but enters a general denial, a recovery of the any portion of the land was sometimes held to warrant a general verdict in plaintiff's favor. Here, the defendant in his answer has set out and described by metes and bounds the land which he claims, and on which he admits he has entered and cut timber, claiming the right to do so. He offers evidence tending to make his assertion good as to part of the land, and this is denied him by an adverse and erroneous ruling of the court. By reason of the verdict rendered, pursuant to such ruling, the plaintiff has obtained an injunction against the defendant, restraining him from entering or cutting timber on any portion of the land in controversy, and this, we think, is substantial error, and entitles the defendant to a new trial.

Apart from this, the technical strictness of the old law as to the effect of a failure to disclaim on the part of the defendant has been very much modified, if not altogether done away with, except, perhaps, on the question of costs, as to actions for land under the Code. This change and the effect of certain kinds of pleading, as affecting the rights of parties in controversies of this character, are well set forth by Chief Justice Smith in *Cowles v. Ferguson*, 90 N. C. 308, as follows: "We do not attach the same significance to the form of the answer, however interpreted, as the court has in its bearing upon the rights of the defendant. Assuming that the defendant claims title and possession as following it to the whole tract, and upon the proof is unable to make good his claim, shall he for this reason be denied the right to retain the part to which he does show title and

possession? Conceding, as we must, in reviewing the ruling of the court, that by a long adverse possession the defendant has acquired title to the part so occupied, and it is the same if his evidence would warrant the jury in so finding, the plaintiffs will not fall in their action, because they do not show themselves entitled to the whole area claimed in the complaint. They will recover so much as they show title to, though less than the whole; and this, because the claim to all is a claim to all the parts which make the whole, the greater including the less. The same principle applies to the defense with equal, if not greater, force. The defendant cannot be denied the right to retain so much of the land in dispute as he proves himself to be the owner of, because his assertion of title and possession to all could not be sustained. He is not to be deprived of what is his own because he claimed more than belongs to him. Indeed, his case is stronger, for he retains all to which the plaintiffs cannot show title in themselves, because, though the defendant's possession may be wrongful as to the true owners, it is not wrongful as to the plaintiffs, whose recovery is confined to what is proved to belong to them. The true and governing rule applicable to conflicting claims set up to the same land by the parties to the action is, and must be, that they recover and retain respectively what each shows himself entitled to upon the evidence, unaffected by the fact that both set up claims to the whole, with this qualification, that so much as does not belong to either remains undisturbed with the one in possession. This rule, just in itself, seems to have been subordinated to some technical principle of pleading which refused to the defendant his right to hold what was his own, because he did not disclaim as to the residue of the tract; in other words, he claimed too much, and therefore cannot keep what is his own. The court was perhaps misled by what is said by Pearson, C. J., in *McKay v. Glover*, 52 N. C. 41, that 'if a plaintiff succeeds in showing title to any part of the land contained in the demise of which the defendant is in possession, the jury may return a general verdict; although, as to the other part, the plaintiff failed to show title.' But, he adds: 'The court may, in its discretion, direct the jury to find specially so as to run the line between the plaintiff and the defendant; but the usual course is not to complicate the inquiry, and to allow a general verdict, if the plaintiff makes out his case as to any part of the land held by the defendant, and the plaintiff then takes out a writ of possession at his peril.' This is said about the old form of the action of ejectment, whose object is to get possession for the lessor of the plaintiff, and the determination affects no right of property in either. Its results are unlike the result of the action under the Code of Civil Procedure, which may, as in other actions, conclude and settle the title when that is put in issue, and such is the effect of the

judgment rendered in this case, if allowed to stand."

We have only referred in the opinion to the case of *Austin v. Staten*, supra, because that is the case in which the broad doctrine that an unregistered deed can never be color of title is supposed to have had its origin and support, and we desired to correct the erroneous impression which the decision may have made. We are not inadvertent to the cases of *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811, and *Utley v. Railroad*, 119 N. C. 720, 25 S. E. 1021. So far as it affects the question here considered, *Lindsay v. Beaman* only passed on the record of a partition proceeding as color of title. The effect of an unregistered deed as color was in no way involved in the decision, and the expression of the judge as to this was entirely obiter. The decision in *Utley v. Railroad*, supra, is in accord with our present ruling except as modified by *Austin v. Staten*, and in the restricted interpretation we have here given this last case. It might well be suggested that in *Austin v. Staten* the unregistered deed relied on as color could not avail for any such purpose, because, until a second deed was executed and registered, the first passed the title, and a deed never operates as color which conveys the real title. Where a second deed is registered, however, the effect of a prior unregistered instrument as color will always be presented, and we have considered it proper to approve the decision in *Austin v. Staten*, to the extent as indicated and heretofore expressed.

There is error, and a new trial will be awarded.

New trial.

WALKER, J., concurs in result.

(141 N. C. 240)

ALLEN v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of North Carolina. May 16, 1906.)

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate walked on the crossing of defendant railroad, and was struck and killed by defendant's train. If intestate had looked at a point 20 yards from the crossing she could have seen down the railroad in the direction from which the train approached for a distance of 200 yards, but she went on the crossing without looking, listening, turning her head, or paying any attention to the train. *Held*, that she was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1043-1043.]

Appeal from Superior Court, Cleveland County; Justice, Judge.

Action by J. B. Allen as administrator of N. A. Allen, deceased, against Atlanta & Charlotte Air Line Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Quinn & Hamrick, for appellant. Geo. F. Bason, and W. B. Rodman, for appellee.

PER CURIAM. The plaintiff's evidence was to the effect that the intestate walked on the railroad crossing, and was killed by the defendant's train, and that the intestate at a point 20 yards from the crossing, by simply looking, could have seen down the railroad 200 yards in the direction from which the train approached. The testimony of the plaintiff further showed that the intestate did not look, listen, or turn her head, and was paying no attention to the train. On this testimony, the court was clearly correct in giving an adverse intimation as to the plaintiff's right to recover.

No error.

(141 N. C. 339)

AIKEN v. RHODHISS MFG. CO.

(Supreme Court of North Carolina. May 16, 1906.)

1. APPEAL—DISCRETION.

Where an application to amend the summons by making a corporation a party defendant was denied by the trial court without giving any reasons, it would be presumed on appeal that the motion was denied in the exercise of the trial court's discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3824.]

2. SAME—ADDITIONAL PARTIES.

Where a corporation sought to be joined as a party defendant was a proper but not a necessary party, the denial of such application in the exercise of court's discretion was not reviewable on appeal.

Appeal from Superior Court, Burke County; Justice, Judge.

Action by Puri Aiken, by his next friend, against the Rhodhiss Manufacturing Company. From an order denying plaintiff's application to amend a summons, he appeals. Affirmed.

Avery & Avery, for appellant.

PER CURIAM. The plaintiff moved to amend the summons and complaint by making the Fidelity & Casualty Company of New York a defendant and for process against said company. The plaintiff, upon the facts set out in his complaint, might have brought his action against the defendant and the said Casualty Company. The said company is not, however, a necessary party, for the plaintiff may prosecute his action against the defendant alone. His honor denied the motion without giving any reasons. As there is a presumption in favor of the correctness of the ruling, we assume his honor denied the motion in the exercise of his discretion. As the Casualty Company is a proper, but not at all a necessary party, his honor had the right to exercise his sound discretion, which is not reviewable. Jarrett v. Gibbs, 107 N. C. 304, 12 S. E. 272; Henderson v. Graham, 84 N. C. 496. Affirmed.

(141 N. C. 224)

MILLIKEN v. DENNY.

(Supreme Court of North Carolina. April 24, 1906.)

1. EASEMENTS—ACQUISITION.

An easement may be acquired either by grant, dedication, or prescription.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 1, 13, 35, 42.]

2. DEDICATION—DESIGNATION IN PLATS AND SALE OF LOTS.

Dedication may be either by express language, reservation, or by conduct showing an intention to dedicate, which conduct may operate as an express dedication, as when a plat is made showing streets, alleys, or public squares, and land sold either by express reference to such plats or by showing that they were used and referred to in the negotiations.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 12, 34.]

3. SAME—EVIDENCE.

Where plaintiff claimed the right to use an alley by virtue of an alleged dedication by a remote grantor, evidence on the issue of dedication as to the understanding of the public regarding the alley 11 years afterwards was inadmissible.

4. SAME.

Where, on the issue of a dedication of an alley, a witness, when asked regarding the termini of the alley, replied that it was from one street to another, and he did not know how much farther, his testimony was properly excluded.

5. SAME.

Where plaintiff claimed a right to use an alley on which his property abutted by virtue of an alleged dedication thereof by a remote grantor, a map made long after such grantor's deed, there being nothing connecting the map with the deed or showing that such grantor knew anything of it, was inadmissible.

6. SAME.

Where, at the time of executing a deed of property, the grantor neither expressly or by implication dedicated a strip of land in the deed referred to as an alley to the use of the lot conveyed, thereby creating an easement appurtenant thereto, which passed with the title to the lot to a subsequent grantee, nothing thereafter said or done by the parties would impose the burden on the property.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 13.]

7. SAME—INTENTION.

The question whether one has dedicated land to the use of the public is one of intention.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 13.]

8. SAME — CONVEYANCE — CONSTRUCTION — ESTOPPEL.

A deed of property describing the same as running from a certain stone, "thence north 84 degrees 22 minutes west, 340 feet, along the south side of the 10-foot alley," did not of itself impose an easement on the alley referred to which passed to the grantee or estopped the grantor from closing such alley.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 77.]

9. SAME — EASEMENT — SUFFICIENCY OF EVIDENCE.

Evidence examined, and held insufficient to show an alleged dedication of an alley whereon plaintiff's property abutted or the imposition of a private easement thereon.

Appeal from Superior Court, Guilford County; Ward, Judge.

Action by J. M. Milliken against G. W. Denny. Judgment for defendant, and plaintiff appeals. No error.

King & Kimball, for appellant. Douglas & Douglas and Scales, Taylor & Scales, for appellee.

CONNOR, J. When this cause was before us at the Spring term, 1904, upon demurrer to plaintiff's complaint, we were of the opinion, and so decided, that the mere fact that the deed from Geo. A. Dick, trustee, and Mrs. Mary A. Dick, the beneficial owner, to Mrs. Julia P. Dick, called for a "stone," thence north 84 degrees and 22 minutes west, 340 feet, along the south side of the 10-foot alley, was not per se sufficient to impose an easement upon the 10 feet of land referred to as an alley, which passed to the owners of the lot conveyed. When the decision of this court was certified to the superior court of Guilford, the plaintiff, by leave of the court, amended his complaint to meet the objection raised by the demurrer, by alleging "that at the time the land was conveyed by George A. Dick, trustee, and Mrs. Mary E. Dick, to Mrs. Julia P. Dick, the said grantors in said deed owned said 10-foot alley and the land on Percy and Chestnut streets on the opposite side of said alley from the above described lot, and the said grantors conveyed said lot next Summit avenue, a part of which was afterwards conveyed to plaintiffs, to Julia P. Dick, and the said land across said alley to Geo. A. Dick, and left the alley open between said lots for the benefit thereof, and because by doing so the said lots were rendered more convenient and more valuable to the owners." They further allege that said alley was opened and dedicated to the use of the owners of said lots, and also to the use of the public when said lot was conveyed as aforesaid, and said alley, being so opened, was being used by the owners of said lots and by the defendant up to the time defendant took a deed therefor and closed said alley; "that said alley was distinctly dedicated to the use of the owners of said lots by being left unconveyed when the said lots were conveyed as aforesaid, by being open to use of the owners of said lots and the public generally, by being actually kept open and used by the owners of the lots and the public from the time of said original conveyance, etc.; that it was the purpose and intention of Mrs. Dick and her trustee, and of the other persons, who conveyed either of the lots, when the conveyance was made, to dedicate said alley to the use of the owners of said lots for all time; and that same was so dedicated." The amendment to the complaint alleges a dedication of the alley by Geo. A. Dick, trustee, and Mrs. Mary E. Dick, to the use both of the grantees of the lots and their successors in title and to the public at the time of executing the deed to Mrs. Julia P.

Dick. The manner of dedication, it is alleged, "was by being left unconveyed when the lot was conveyed as aforesaid." It is not very clear from the language of the amendment whether the plaintiff claims an easement in the 10 feet of land called an alley in the deeds as appurtenant to his lot as a private way dedicated to the use of both lots, or as a public alley. Of course, if the land was dedicated to the use of the public, over which all persons, without regard to the ownership or use of the adjoining property, might pass, it became, upon acceptance by the public, a public highway, which excludes the idea of private ownership. No issues were tendered by plaintiff. There being no allegation nor evidence that the way was ever accepted by the public—that is, by the duly constituted authorities—we assume that plaintiff's claim is based upon an easement appurtenant to the lot conveyed by Mrs. Dick to Mrs. Julia P. Dick, the title to which by successive conveyances is vested in him. *Boyden v. Achenbach*, 79 N. C. 539; *Kennedy v. Williams*, 87 N. C. 6. It is elementary learning, laid down in all of the books and adjudged cases on the subject, that an easement may be acquired either by grant, dedication, or prescription. The plaintiff says that the easement which he claims was acquired by dedication, and that such dedication is evidenced by the fact that the alley was not conveyed when the lots were conveyed. It is well settled that dedication may be either by express language, reservation, or by conduct showing an intention to dedicate. Such conduct may operate as an express dedication, as when a plat is made showing streets, alleys, or public squares, and the land is sold, either by express reference to such plats, or by showing that they were used and referred to in the negotiation, as in *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; by *Conrad v. Land Co.*, 126 N. C. 776, 36 S. E. 282; *Hughes v. Clark*, 134 N. C. 457, 46 S. E. 956, 47 S. E. 462. The plaintiff here does not allege that any plat was shown or in existence when the lot was conveyed to Mrs. Julia P. Dick, or that she took title with an understanding, or that there was any agreement made between the grantors and grantees that the alley was to be kept open. He says that the grantors left the said alley open between said lots for the benefit thereof, and because by so doing the said lots were rendered more convenient and more valuable to the owners. "The said alley was opened and dedicated to the use of the owners of said lots."

We think that upon a fair construction of the amended complaint the plaintiff alleges that, omitting any reference to the title of the trustee, Mrs. Dick, being the owner of the entire tract, conveyed August 14, 1895, to Mrs. Julia P. Dick, the lot now owned by plaintiff by the following descrip-

tion: "Beginning at a stone on Chestnut street 10 feet south of the southwest corner of Geo. A. Dick's home lot; running thence along Chestnut street, south 3 degrees and 45 minutes west, 378½ feet, to a stone; thence south 84 degrees and 22 minutes east, 316½ feet, to a stone on Percy street; thence north 6 degrees and 39 minutes east, 389 feet, to a stone; thence north 84 degrees and 22 minutes west, 340 feet, along the south line of the 10-foot alleyway, containing three acres."—and thereby dedicated said alley to the use of the owners of said lots. It is said in defendant's brief that the lot was given to Mrs. Julia P. Dick but only the description is set out in the record and there is no evidence in regard to the consideration upon which the deed was made. His honor was of the opinion that upon the whole of the evidence plaintiff was not entitled to the relief demanded, and rendered judgment dismissing the action. Before considering the exception to the ruling of his honor in this respect, it is necessary to pass upon his exceptions directed to the exclusion of testimony. Plaintiff was asked in regard to "the understanding of the public about the alley at the time he purchased." This, upon objection, was excluded. Plaintiff purchased the lot in 1901. We concur with his honor that the testimony was not competent. The plaintiff was claiming by virtue of an alleged dedication by Mrs. Dick in August, 1890. We cannot perceive how the understanding of the public 11 years afterwards was relevant to that question. Plaintiff was asked regarding the termini of the alley and his answer showed that he did not know. He says, "From Percy street across Chestnut street, and I do not know how much further." The ruling was correct. The other exceptions are directed to the exclusion of a map made long after the deed to Mrs. Julia P. Dick. There is nothing connecting the map with the deed or tending to show that Mrs. Dick knew anything of it. These exceptions are not pressed in plaintiff's brief. We have considered them in examining the entire evidence. They cannot be sustained.

We are thus brought to a consideration of his honor's ruling upon defendant's demurrer to the evidence. Very much of the evidence is directed to the manner in which the 10 feet of land, referred to in the deeds as an alleyway, has been used since the execution of the deed of August, 1890. As 20 years have not passed since that date, plaintiff concedes that he has not established a right to the easement by prescription. We find no evidence of any declaration made by Mrs. Dick or her trustee Geo. A. Dick contemporaneous with or subsequent to the deed. If Mrs. Dick did not, at the time she executed the deed of August, 1890, either expressly or by implication, dedicate the strip of land referred to as an alley to the use of the lot conveyed to Mrs. Julia Dick thereby creating

an easement appurtenant thereto which passed with the title to the plaintiff, nothing said or done by the persons thereafter could impose the burden thereon. The description in the deeds made by her do not cover the land, therefore the title remained in her and passed to defendant in the same plight and condition as she held it. We are thus brought to a consideration of the question whether, in the language of the complaint, the strip of 10 feet was dedicated "by being left unconveyed when the lots were conveyed." The authorities in regard to acts which will by implication operate to impose an easement upon land are more numerous than uniform. After reviewing a large number of decisions, Mr. Washburn says: "The acts and declarations of the landowner indicating the intent to dedicate his land to the public use, must be unmistakable in their purpose and decisive in their character to have that effect." *Easements* (8d Ed.) 188. The question whether one has dedicated his land to the use of the public is one of intention. "There can be no such dedication contrary to the intention of the landowner. The intention to dedicate must clearly appear, though such intention may be shown by deed, by words or by acts. If by words, the words must be unequivocal and without ambiguity. If by acts they must be such acts as are inconsistent and irreconcilable with any construction except the assent of the owner of such dedication." *Jones on Easements*, § 425; 13 Cyc. 451. We find that the question as to what act or conduct will amount to a dedication of one's land to public use as a highway has been often considered by the courts of this country. *Gibson, C. J., in Gowen v. Philadelphia Ex. Co., 5 Watts & S. (Pa.) 143, 40 Am. Dec. 489*, discussed it at length, drawing the distinction between a dedication and a mere license. An examination of the decided cases discloses that in almost every case where a private right of way was asserted, express language is found in the deed describing and defining such rights, the litigation growing out of a difference of construction. In the absence of any such language indicating that an easement was created over lands of the grantor not included in the description, constituting a perpetual burden upon them, the evidence should be clear and unmistakable.

It may well be that, as Mrs. Dick owned other land lying back of the lots conveyed, she reserved the alley for her own use or that as she was providing homes for her own children she reserved the alley conferring upon them a license to use it without any intention of imposing a permanent easement upon it. The testimony casts no light upon her purpose, and, in the absence of testimony tending to show that she dedicated it, as alleged, there was nothing to be submitted to the jury. The evidence does tend to show that plaintiff and others sup-

posed that the alley was a private way. This was so because of the manner in which it was used, and upon the question of prescription was both relevant and forceful, but threw no light upon Mrs. Dick's intention in reserving it at the time she executed the deed to Mrs. Julia P. Dick. Mr. Cone, who purchased the lot in 1895, and sold to plaintiff, says that no verbal representation was made to him in regard to the property. He does not remember that any map was shown him. We do not think that the language of Mrs. Dick's deed estopped her from closing the alley, and whatever right she had passed to her grantee, the defendant. If purchasers of property wish to acquire a right of way or other easement over other lands of their grantor it is very easy to have it so declared in the deed of conveyance. It would be a dangerous invasion of rights of property after many years and after the removal by death or otherwise of the original parties to the deed and conditions have changed to impose, by implications, upon the slippery memory of witnesses, such burdens on land. No party to the deeds made by Mrs. Dick respecting this property was called. No one testifies to any declaration of either grantors or grantees. The testimony, when analyzed, leaves nothing to guide us, as to Mrs. Dick's intention, than the language of the deed itself. There is no evidence respecting the value of the property at the date of the deed, or to what extent, if at all, the alley affected its value. It does not appear that it was necessary to the use of the property that a right of way over this alley should attach. It was bounded on two sides by streets. "No implication of a grant of a right of way can arise from proof that the land granted cannot be conveniently occupied without it. Its foundation rests on necessity, not convenience." 14 Cyc. 1173.

Upon consideration of the entire evidence, we are of the opinion that his honor properly sustained defendant's demurrer.

There is no error.

(141 N. C. 210)

DOBBINS et al. v. DOBBINS et al.

(Supreme Court of North Carolina. April 24, 1906.)

1. TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Under Code 1883, § 413 (Revisal 1905, § 535), providing that no judge in his charge to a petit jury shall give an opinion whether a fact is fully or sufficiently proven, it was error for the court in a partition suit, in which there was a disputed fact depending on the credibility of witnesses, to charge that "on the evidence" plaintiffs were not entitled to recover, and that the jury should answer on the issue, "No."

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 436-438.]

2. APPEAL—INSTRUCTIONS—OBJECTIONS NOT RAISED AT TRIAL.

A judgment will not be reversed on appeal because of an error in an instruction which the exception taken to the instruction did not present to the trial court.

3. TENANCY IN COMMON—NATURE OF POSSESSION.

Tenants in common hold their estates by several and distinct titles, but by unity of possession, and hence an entry or possession by one inures to the benefit of his co-tenants, not only as concerns themselves, but also as to strangers.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, § 29.]

4. SAME—ADVERSE POSSESSION—DISSEISIN.

Where a tenant in common and those under whom she claimed held exclusive, quiet, and peaceable possession of the entire common property for more than 40 years without any demand or claim for an accounting of rents and profits, it will be presumed that there was an actual ouster of the other co-tenants' possession at the beginning and not at the end of such period, and that the possession of the tenant in possession was adverse, and converted the estate in common into one in severalty, and defeated the rights of the co-tenants who were ousted and their successors in the land.

5. SAME—DISABILITY OF PARTIES.

Disability of some of the parties claiming an interest in land, which originally was common property during the period when the possession held by certain of the co-tenants and those under whom they claimed was adverse, did not rebut the presumption of ouster arising from a continued adverse possession for more than 40 years, where the parties under disability claimed under an ancestor who was under no disability at the time the adverse possession commenced.

Appeal from Superior Court, Iredell County; Council, Judge.

Partition by David Dobbins, by his next friend, and others, against Sarah Dobbins and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Proceeding for partition of land, which was transferred from the clerk, upon the issue of sole seisin raised by the pleadings, and tried before Judge Council and a jury at January term, 1906, of Iredell superior court. The land, which consisted of two tracts, the home and Holman tracts, was originally owned by Milas Dobbins, who died in 1863, leaving two sons, Alfred and Augustus Dobbins. Alfred died September 25, 1878, leaving three children by his first marriage, George, Fannie, and John, and two by his second marriage, David (one of the plaintiffs), born January 22, 1875, and Una May, born April 12, 1878, and married to R. E. Stafford April 9, 1901. She died in August, 1905, leaving a child, R. E. Stafford, Jr., then 3 or 4 years old, who is the other plaintiff. Augustus Dobbins, the other son of Milas Dobbins, took possession of the land when his father died, and has remained in possession until his death in 1901, when his widow, the defendant Sarah Dobbins, continued in possession of the home tract to the bringing of this suit, and of the Holman tract until September 3, 1903; her husband having devised all of the land to her by his will, which was duly admitted to probate and introduced in evidence. On September 3, 1903, she conveyed the Holman tract to the defendant Geo. B. Nicholson, trustee, for the use and benefit of the other defendants R. F.

Long, D. M. Furches, and A. L. Coble. The trustee took possession on that day and has held it ever since. The court admitted the evidence of the probate of a paper writing purporting to be the will of Milas Dobbins, the appointment of the administrator with the will annexed, and his qualification. The will was not put in evidence, nor did the nature of its contents in any way appear. Plaintiff objected to this testimony. At the conclusion of the testimony "the court instructed the jury that, upon the evidence, the plaintiffs were not entitled to recover, and they should answer the issue, 'No.'" Plaintiffs excepted.

Armfield & Turner and J. B. Armfield, for appellants. Furches, Coble & Nicholson, for appellees.

WALKER, J. (after stating the case). When the plaintiff had rested, there was no evidence of any possession of the lands by the defendants. The only testimony in regard to it came from the defendants' witnesses, and the court could not properly give a peremptory instruction to find for the defendants, when the burden of proof had shifted to them by the plaintiffs' proof of title in Milas Dobbins and the descent from him to the plaintiffs and his other heirs mentioned in the case. When there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always an open question for the jury; and this is so, though the testimony may be all on one side and all tend one way. In the latter case, the judge may charge the jury, if they find the facts to be as testified by the witnesses, to answer the issue in a certain way, but not, upon the evidence, so to answer it, as by such a charge he passes upon the credibility of the witnesses. We considered a similar instruction at this term in *Smith v. Lumber Co.*, 53 S. E. 233, and such an instruction has been condemned in many previous decisions besides being expressly forbidden by statute. "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." Code 1883, § 413; Revisal 1905, § 535. We should be compelled to order a new trial for this error, if it did not clearly appear that the exception to this instruction was not based upon this ground, but was intended to raise the question whether the bare possession of the defendants (nothing else being proved) was in law sufficient to bar the plaintiff's right of entry, and to put the case upon its real merits. There is no reference made in the brief of the plaintiffs' counsel to any error in the instruction other than the one relating to the character of the defendants' possession and its legal

sufficiency to defeat the plaintiffs' recovery. In this case the error in the form of the instruction was not, perhaps, very material, and seems to have been so regarded by the plaintiffs' counsel, as there was no serious controversy as to the facts, and a new trial on that ground would be of little or no avail. Before leaving this part of the case, we will remark that the case on appeal was not prepared or revised by the presiding judge, who is always careful and painstaking; and we infer that the charge as given was in proper form, and that it was worded by counsel as it is now inadvertently; the purpose being to present the real question involved, without paying much, if any, heed to matters of form. We will therefore consider the case, as counsel have done in their briefs, as presenting the single question whether the defendants' proof was sufficient in itself to toll the plaintiffs' entry and defeat their action.

This question has been before this court so often that it ought not now to be difficult of solution. We undertook at the last term, as our predecessors had frequently done before, to state the principle of law by which such cases are governed. Some misunderstanding has arisen by failing to distinguish between the doctrine of adverse possession, as applied to the relation of tenants in common and as applied in ordinary cases, where there is no such relation and consequently no privity or fealty as between the parties. The distinction between an actual and a presumed ouster has, perhaps, not been sufficiently taken into account. We will endeavor again to "run and mark the line," and to restate the principle of adverse possession as applicable to tenants in common. Such tenants hold their estates by several and distinct titles, but by unity of possession, because none of them can know his own severalty, or, as Littleton puts it, no one of them can tell which part is his own, and for this reason they occupy promiscuously; the only unity being that of possession. 2 Blk. 192. An entry or possession by one of the tenants inures to the benefit of his co-tenants, not only as concerns themselves, but also as to strangers. *Locklear v. Bullard*, 133 N. C. 260, 45 S. E. 580; *Carothers v. Dunning's Lessee*, 8 Serg. & R. (Pa.) 381. There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his co-tenant to bring ejectment against him; but it must be by some clear, positive, and unequivocal act, equivalent to an open denial of his right and to putting him out of the seisin. It is needless to do more than to restate the simple proposition that such an actual ouster, followed by possession for the requisite time, will bar the co-tenant's entry. But the law goes further, and the rule has been well settled for many years in this state, as it had been before in England, that when one tenant in common has been in undisturbed possess-

ion and use of the land for 20 years, in an ejectment brought against him by his co-tenant, the jury will be directed to presume an actual ouster when the possession was first taken, and consequently to find a verdict for the defendant. Ouster, or dispossession, says Blackstone, is a wrong or injury that carries with it the motion of possession, for thereby the wrongdoer gets into actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order to gain possession of the freehold and damages for the injury sustained. It is effected by one of the following methods: (1) Abatement. (2) Intrusion. (3) Disseisin. (4) Discontinuance. (5) Deforcement. The first two consist in a wrongful entry when the possession is vacant, an ouster of a freehold in law. The third, disseisin, is a wrongful putting out of him that is seised of the freehold, an attack upon him who is in the actual possession and turning him out, an ouster from a freehold in deed. The fourth, discontinuance, occurs when the feoffee of tenant in tail holds beyond the life of the feoffor, under a feoffment for a greater estate than the latter can convey, his possession thus retained being considered as an injury to the heir in tail, whose ancient legal estate is thereby destroyed or at least suspended or for awhile discontinued. The fifth and last, deforcement, signifies the holding of any lands or tenements to which another person hath a right and includes all the others and any other species of wrong whatsoever, whereby he who has a right to the freehold is kept out of possession, but is contradistinguished from them in that it is only a detainer of the freehold from him who has the right of property, but never had any possession under that right. 3 Blackstone, 167 et seq. A species of deforcement is when the ancestor dies seised of an estate in fee simple, which descends to two of his heirs as parceners and one of them enters before the other, and will not suffer the coparcener to enter and enjoy her moiety. 8 Blk. 174; Fitzherbert, Nat. Brev. 197.

We have thus reviewed this subject to show the nature of an ouster, and in order that we may understand clearly what it is the law means when it is said to presume an ouster. It is a disseisin by one tenant of his co-tenant, the taking by one of the possession and holding it against him by an act or series of acts which indicate a decisive intent and purpose to occupy the premises to the exclusion and in denial of the right of the other. This is what the law presumes, whether it be in exact accordance with the real facts or not. It is a presumption the law arises to protect titles, and answers in the place of proof of an actual ouster and a supervening adverse possession. The presumption includes everything necessary to be proved when the title can be ripened only by actual adverse possession as defined by this court, and is a most reasonable infer-

ence of the law and justified under the circumstances, first, because men do not ordinarily sleep on their rights for so long a period, and, second, because a strong presumption arises that actual proof of the original ouster has become lost by lapse of time. The period of time requisite to raise the presumption, which anciently was required to be of much greater length than now, has by this court been fixed at 20 years in analogy to the statute of limitations barring titles. The rule which has long obtained with us was well stated by Nash, J., for the court, in *Black v. Lindsay*, 44 N. C. 467. "The possession of one tenant in common is in law, the possession of all his co-tenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right, and is under no disability to assert it, it will be considered evidence of title to such sole possession; and where it has so continued for 20 years, the law raises a presumption that it is rightful, and will protect it. This it will do, as well from public policy, to prevent stale demands, as to protect possessors from the loss of evidence from lapse of time. Possession, then, for 20 years under the above circumstances, will amount to a disseisin or ouster of the co-tenant, and furnishes a legal presumption of the fact necessary to uphold an exclusive possession, as that the possession was adverse in its commencement, and tolls the entry of the tenant not in possession." There was no more proof in that case than in the one now before us. But in *Thomas v. Garvan*, 15 N. C. 223, 25 Am. Dec. 708, the facts were practically identical with those we have here, and the same rule was applied; Judge Gaston, for the court, saying: "The sole enjoyment of property for a great number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such sole enjoyment; and this, not because it clearly proves the acquisition of such right, but because from the antiquity of the transaction, clear proof cannot well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by stale claims when the testimony to meet them cannot easily be had. Where the law prescribes no specific bar from length of time, 20 years have been regarded in this country as constituting the period for a legal presumption of such facts as will sanction the possession and protect the possessor. We think the judge who tried this cause was correct in charging the jury that the 21 years exclusive possession of the defendant, and her deceased husband, since the petitioner became discover, did raise the legal presumption of an ouster"—and barred the plaintiff's recovery. This was followed by *Cloud v. Webb*, 15 N. C. 290, 25 Am. Dec. 711, which clearly shows the nature and extent of the presumption: "The

possession of one tenant in common is in law the possession of all the tenants in common. One may, however, disseise or oust the others, and from the time of such ouster the possession of him who keeps out the rest is not their possession, but is adverse to their claims of possession. The sole silent occupation by one of the entire property, without an account to, or claim by the others, is not in law an ouster, nor furnishes evidence from which an ouster can be inferred, unless it has been continued for that length of time which furnishes a legal presumption of the facts necessary to uphold an exclusive possession." This case was in turn followed by *Linker v. Benson*, 67 N. C. 150; *Covington v. Stewart*, 77 N. C. 148; *Neely v. Neely*, 79 N. C. 473; *Caldwell v. Neely*, 81 N. C. 114; *Page v. Branch*, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 281; *Bullin v. Hancock*, 138 N. C. 198, 50 S. E. 621; *Whitaker v. Jenkins*, 138 N. C. 476, 51 S. E. 104. The same doctrine was applied in *Fisher v. Prosser*, 1 Cowper, 217, decided by the King's Bench, in which Lord Mansfield presided as Chief Justice. It was said by Justice Aston in that case: "Now in this case there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand or claim for an account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near 40 years is not?" And by Justice Willes: "This case must be determined upon its own circumstances. The possession is a possession of 16 years above the 20 prescribed by the statute of limitations, without any claim, demand, or interruption whatsoever; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession."

The proof in this case showed an exclusive, quiet, and peaceable possession by the defendants and those under whom they claim for more than 20 years, indeed for more than 40 years, and the law presumes that there was an actual ouster, not at the end of that period, but at the beginning, and that the subsequent possession was adverse to the co-tenants who were out of possession. This converted the estate in common, as between the former co-tenants into one in severalty, in the defendants, and defeated plaintiffs' right to partition or to an ejectment. The disability of some of the parties, during the period when the possession was held by the defendants and those under whom they claim, cannot be permitted to rebut the presumption of the law as to the ouster, for the possession commenced in the lifetime of their ancestor, from whom they claim and who was at the time under no disability. *Seawell v. Bunch*, 51 N. C. 195. That was a case in which a deed was presumed to have been made after 20 years' possession. *Pearson, C. J.*, said: "Presumptions of the kind we are consider-

ing are made on the ground of public policy, in order to discourage litigation of stale demands and to quiet the possession of estates, and this policy would be in a great degree obstructed, if, after the presumption had commenced to arise, it was allowed to be stopped by some intervening circumstance other than an assertion of the right. Where the one party is exposed to an action at the commencement, and the other neglects to pursue his remedy, a subsequent disability cannot be allowed to prevent the principle from being carried out; for otherwise, in a large proportion of cases, it would fail to take effect, and the policy of the law would be defeated. Our conclusion, both from analogy and from the "reason of the thing" is, that when the presumption has commenced, it is not stopped by a subsequent disability." The two cases are analogous. See, also, Justice Ashhurst's opinion in *Fisher v. Prosser*, 1 Cowper, at pages 219, 220. The ruling in *Seawell v. Bunch* is sustained by many cases, but we will cite only a few of them. *Mebane v. Patrick*, 46 N. C. 23; *Pearce v. House*, 4 N. C. 722; *Chancy v. Powell*, 103 N. C. 159, 9 S. E. 298; *Frederick v. Williams*, 108 N. C. 189, 9 S. E. 298; *Andrews v. Mulford*, 2 N. C. 311; *Anonymous*, 2 N. C. 416; *Copeland v. Collins*, 122 N. C. 619, 80 S. E. 315. The rule as to the effect of 20 years' possession was adopted in analogy to the statute of limitations, and, when that statute begins to run against the ancestor, it is not suspended by any disability of the heirs at the time of descent. *Wood on Limitations*, 11; *Frederick v. Williams*, *supra*.

The view we have taken of the case makes it unnecessary to consider the question presented by counsel in their argument as to what is ordinarily necessary to render a possession sufficiently adverse to bar a right if continued for the requisite time, and as to whether any change in this respect has been wrought by Code 1883, § 146 (Revisal 1905, § 386). Too many cases have been decided by the court since that section was enacted as law, in which the rule we have stated as to a presumed ouster has been recognized and applied, for us at this time to hold that the rule has been changed by it, at least where the eviction or ouster took place prior to 1868. *Bryan v. Spivey*, 109 N. C., at page 70, 13 S. E. 767. In that case the ouster was in the same year as in this case (1863). See, also, *Monk v. Wilmington*, 137 N. C., at page 327, 49 S. E. 347, and *Ruffin v. Overby*, 88 N. C. 369. What is the true construction of section 146 of the Code with reference to causes of action founded upon an ouster, which occurred since the date of its adoption, is left open for future consideration, when the matter is directly presented.

The court correctly charged the jury as to the effect of the facts proved in this case upon the plaintiffs' right to recover.

No error.

(141 N. C. 832)

STATE v. MARTIN.

(Supreme Court of North Carolina. April 24, 1906.)

1. FIXTURES—ANNEXATION TO FREEHOLD—INTENT.

The mere intention to make a chattel a part of the freehold is not by itself sufficient for the purpose of making it so, as there must be some kind of physical annexation to the land, though the nature and strength of the union is not material, if it in fact be annexed.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 3, 14.]

2. MALICIOUS MISCHIEF—PERSONAL PROPERTY—ELECTRIC CARS.

Under Revisal 1905, § 3676, providing that, if any person shall wantonly and willfully injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, etc., an electric street car is personalty so as to render a willful and wanton injury to it criminal.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Mischief, § 5.]

3. SAME—ELEMENTS OF OFFENSE AT COMMON LAW—DESTRUCTION OF PROPERTY.

In order to sustain a conviction at common law for malicious mischief, it must appear that the property was destroyed.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Mischief, § 1.]

4. CRIMINAL LAW—APPEAL—PRESUMPTIONS.

The presumption is that the trial court charged the jury fully and correctly, and that the jury found all the facts necessary to constitute the crime.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3014, 3015, 3032.]

5. SAME—INSTRUCTIONS—NECESSITY OF REQUEST.

A defendant in a criminal prosecution, desiring a special instruction, must ask for it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2006.]

6. SAME—VERDICT AGAINST WEIGHT OF EVIDENCE—REMEDY—MOTION TO SET ASIDE.

Where there is evidence to support the verdict in a criminal prosecution, but the jury decide contrary to its weight, the remedy of the defendant is an application to set the verdict aside.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2297, 2298.]

7. SAME—APPEAL—PARTIES ENTITLED TO ALLEGE ERROR.

In a prosecution for a misdemeanor, there is no error available to defendant, though a person against whom the grand jury return "not a true bill" was nevertheless put on trial with defendant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3005.]

8. SAME—EVIDENCE.

Though an indictment be returned "not true" as to one of two defendants, evidence competent against both of them may be used against the other defendant.

Appeal from Superior Court, Forsyth County; Peebles, Judge.

Reed Martin was convicted of a misdemeanor, and appeals. No error.

Criminal action tried before Peebles, judge, and a jury, at February term, 1906, of Forsyth superior court. The defendant Reed Martin was indicted with Henry Revels for willfully and wantonly injuring an electric street car by breaking its windows with a

rock. The grand jury, as appears from the indorsements on the indictment, returned "not a true bill" as to Henry Revels and "a true bill" as to Reed Martin. Both were put on trial. J. M. Chitty, a witness for the state, testified: "I was motorman of the car the day the two defendants entered it at Fourth street. After going about a block or two, one of the defendants appeared to be intoxicated and was put off the car. One of the defendants, Reed Martin, picked up a rock and threw it. The rock missed the conductor, but broke a glass in the window of the car." There was other testimony on the part of the state which corroborated this witness. The defendants did not introduce any testimony, but requested the court to charge the jury that there was a variance between the allegation in the indictment and the evidence, and that the latter would not sustain a verdict of guilty. This prayer was refused, and the defendants excepted. The defendant Revels was acquitted. There was a verdict of guilty as to the defendant Reed Martin, who moved in arrest of judgment. The motion was overruled, and he excepted. Judgment was pronounced upon the verdict, and the defendant appealed. He assigned the following errors: (1) The refusal of the court to instruct the jury, as requested, that there was a variance; (2) there was a misjoinder of parties; (3) the offense could not be committed jointly; (4) that testimony competent only against the defendants jointly was admitted and used to convict the defendant Martin, when it appears that the indictment was returned "not a true bill" as to Revels, and he was actually acquitted on the trial.

J. S. Grogan, for appellant. The Attorney General, for the State.

WALKER, J. (after stating the case). The learned counsel for the defendant, in his argument before us, relied chiefly upon the position that the street car was not personal property, and therefore that the alleged offense was not within the language or the meaning of section 3676 of the Revisal of 1905. He therefore contended that the judgment should be arrested. It does not appear from the indictment where the car was when it was injured by the defendant, but the evidence shows that it was then being operated on the track of the Fries Power Company in the city of Winston. The defendant's prayer for instructions is, perhaps, sufficient to raise this question, apart from the motion in arrest of judgment, though it does not distinctly point out this as a defect in the evidence, and seems to have been intended to apply only to the question of variance. We will assume that the point is sufficiently presented, as it was clearly intended to be.

The method of changing property, personal in its nature, into realty, is well settled in the law. Such property does not become

realty by mere use in connection with the land, for, if that were true, implements of husbandry, though used only for agricultural purposes, would thereby become a part of the land. Whether or not a chattel has become a part of the realty must to a great extent depend upon the facts of the particular case. The mere intention to make it a part of the freehold, though it may enter largely into the determination of the question of permanency (*Foot v. Gooch*, 96 N. C. 270, 1 S. E. 525, 60 Am. Rep. 411), is not, by itself, sufficient for the purpose of making it so. There must be some kind of physical annexation of the thing to the land, though the nature and strength of the union is not material, if in fact it be annexed. The annexation is in some cases by gravitation alone, or, in other words, the thing is kept in position by its own weight, as in the case of the planks laid down as the upper floor of a gin house and used to spread cotton seed upon, though not nailed or otherwise fastened to the building. *Bryan v. Lawrence*, 50 N. C. 337; *Latham v. Blakely*, 70 N. C. 368. In such a case the planks are necessary for the completion of the structure and essential to its occupation, use, and enjoyment for the purposes of the trade or business to which it is adapted and has been appropriated. *Latham v. Blakely*, *supra*; *Railroad v. Deal*, 90 N. C. 110. They have, as it were, a permanent and fixed position, and are in a certain sense stationary—not movable, so as to be in one place to-day and in another to-morrow. "The very idea of a fixture," says the court, in *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) at page 630, "is of a thing fixed or attached to something as a permanent appendage, and implies firmness in position. But that which becomes by annexation a part of the soil is something more than a fixture, and requires at least as much permanence as to constitute a fixture. The maxim 'Quicquid plantatur solo, solo cedit' which tersely expresses the principle, makes the affixing of the chattel to the soil the test by which it is declared to belong to the soil. Hence courts, in determining the questions that have arisen, have looked at the mode and intention of annexation, the object and customary use of the thing annexed, and, in determining the intention, the character of the claimant has had its weight." And again, at page 635 of 31 Barb. (N. Y.), the court, in discussing the difference between railroad cars and a loom in a factory, says that the latter are permanently placed, although not strongly affixed, while rolling stock is incapable of permanence or of being annexed in any one place, as it is intended for, and the whole use is in its locomotive facilities, and the court then proceeds: "The term by which it is ordinarily designated 'rolling stock' implies the very reverse of annexation and a permanent fixture. It is essential to the successful operation of the railroad, but is not a part of the railroad itself. It is an accessory to the

trade and business of the road, and not to the road itself. The road is completed when the bed is graded, the superstructure laid, the rails put down, and everything is ready for the reception of the locomotives and cars; it is equipped when the rolling stock and all other necessary appliances and facilities for business are finished and put upon it for use." That seems to be the leading case in the books. The opinion delivered by Judge Allen (afterwards a judge of the Court of Appeals) is devoted to a careful discussion of the subject and goes fully into the authorities. It is well considered and has been followed as a controlling precedent in several subsequent cases. A decision by the same court, in which the question is also learnedly and ably treated and the same conclusion reached, is *Stevens v. Railroad*, 31 Barb. (N. Y.) 590. The Court of Appeals of New York has expressly affirmed those cases and approved the principles upon which they were decided. *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747; *Hoyle v. Railroad*, 54 N. Y. 314, 13 Am. Rep. 595. To the same effect are *State Treasurer v. Railroad*, 28 N. J. Law, 21, and *Williamson v. Railroad*, 29 N. J. Eq. 311. In the last cited case it is said, at pages 329 and 331 of 29 N. J. Eq.: "The criterion for determining whether property, ordinarily regarded as personal, becomes annexed to and part of the realty, is the union of three requisites: First, actual annexation to the realty or something appurtenant thereto; second, application to the use or purpose to which that part of the realty with which it is connected is appropriated; third, the intention of the party making the annexation to make a permanent accession to the freehold. Tested by the foregoing criterion, it is manifest that the rolling stock of a railroad must be regarded as chattels which have not lost their distinctive character as personality, by being affixed to and incorporated with the realty. It is true that engines and cars are adapted to move on the track of the railroad, and are necessary to transact the business for which the railroad was designed. But unattached machinery in a factory, the implements of husbandry on a farm, and furniture in a hotel, are similarly adapted for use in the factory, on the farm, or in the hotel, and are equally essential to the profitable prosecution of the business in which they are employed. When regard is had to the fundamental and necessary condition under which the law permits chattels to become a part of the realty, engines and cars and the rolling stock of a railroad utterly fail to answer the requirement of the law." It does not appear in this case that the power company owned the land on which its rails were laid and over which its cars ran. Indeed, it must be that it did not, and this is the fair inference. The only right it had, in respect to the land, was a license to use the streets of the city for the operation of

its line of railway. This being so, it had no land of its own to which it could annex its personal property and thereby convert it into realty. Having only a right to use the land for a definite purpose and subject to its joint occupation and use by the city and its citizens, so far as they do not interfere with or obstruct the use by the company, we cannot suppose that either of the parties intended that the nature of the property, that is, the cars, should be changed from personality into that of realty. There is no valid reason for holding that such a change was contemplated, or that it was wrought by a mere use of the streets in the manner already described. The cars were in no way actually and physically attached to the realty, nor were they constructively so annexed; the latter method implying that there exists both adaptation to the enjoyment of the land and localization in use as obvious elements of distinction from mere chattels personal, which are movable and intended to be so. While there is here an adaptation to use, there is no annexation, no immobility from weight, and no localization in use. Were the same contrivance adopted by a tenant for the purpose of carrying on his trade upon leased lands, his right to remove both cars and rails would seem to be beyond question. *Hoyle v. Railroad*, supra; *Moore v. Valentine*, 77 N. C. 188; *Overman v. Sasser*, 107 N. C. 432, 12 S. E. 64, 10 L. R. A. 722; *Elwes v. Mawe*, 3 East, 38, 2 Smith's Leading Cases (9th Ed., 1888) p. 1423. We conclude that the cars were personality so as to render a willful and wanton injury to them criminal under section 3676 of the Revisal of 1905. But the indictment is not sufficient to sustain a conviction at common law for malicious mischief, as contended by the state. In such a case, it must appear that the property was destroyed, and it will be difficult to find a case where an injury, short of destruction, has been held to be indictable at common law. The weight of authority both here and in England is decidedly against the proposition that a criminal offense has been committed, where there has been mere injury without destruction. *State v. Manuel*, 72 N. C. 201, 21 Am. Rep. 455; *State v. Helmes*, 27 N. C. 364; *State v. Robinson*, 20 N. C. 129, 32 Am. Dec. 661. The act must also have been committed with malice towards the owner of the property. *State v. Robinson*, supra; *State v. Landreth*, 4 N. C. 331; *State v. Jackson*, 34 N. C. 329; *State v. Sheets*, 89 N. C. 543. And the indictment must either expressly charge malice against the owner or fully otherwise describe the offense in that particular. *State v. Jackson*, supra; *State v. Hill*, 79 N. C. 656. The statute (Revisal 1905, § 3676), it seems, was passed to change the law in this respect, though not, perhaps, to supersede the common law as to malicious mischief.

There was no variance, that we can see, with the present record before us. As the

charge of the court is not set out, we are unable to know how the judge instructed the jury. We suppose the variance is alleged to consist in the fact that the evidence tended to show that the rock may have been aimed at the conductor in anger, or in resentment for having been ejected from the car, and that consequently the car was not injured with malice against the owner, nor yet willfully and wantonly, as alleged in the indictment. It is undoubtedly true that malicious mischief is not committed when the act alleged to be criminal is prompted by sudden resentment of an injury or supposed affront (*State v. Landreth*, 4 N. C. 331); nor is the act willful and wanton when committed under like circumstances, that is, when it is not preconceived and done with reckless indifference to the rights of others, but is merely done impulsively under the influence of suddenly aroused passion. *State v. Brigman*, 94 N. C. 888. But the jury may have found, under proper instructions from the court, that the deliberate intention was to injure the car, and not merely to attack the conductor, and that the act really possessed all the ingredients of a crime within the meaning of the statute, and was not done in the heat of passion. It was for the jury to pass upon the evidence and to find the facts. We cannot presume error to have been committed by the court below. The presumption here is the other way. We must take it that his honor charged the jury fully and correctly, and that the jury found all of the facts necessary to constitute the crime. If the defendant desired any special instruction upon this feature of the case, he should have asked for it. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. There was some evidence to support the verdict, and, if the jury decided contrary to its weight, the remedy of the defendant was an application to the judge to set the verdict aside. *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562.

The trial proceeded a little irregularly, it seems, in the lower court, as the grand jury returned "not a true bill," as to one of the defendants, who was nevertheless put on trial. We do not perceive though how there has been any misjoinder, nor why the original defendants could not have jointly committed the offense; one doing the act, and the other, as principal, aiding and abetting him, or participating with him. *State v. Stroud*, 95 N. C. 626; *State v. De Boy*, 117 N. C. 702, 23 S. E. 167; 1 McClain, Cr. Law, § 210. "The authorities agree that there are in misdemeanors no accessories either in name or in the order of the prosecution. When, therefore, one sustains in misdemeanor a relation which in a felony makes an accessory before the fact, if what he does is of sufficient magnitude, he is to be treated as a principal. The indictment charges him as such, and, unless the pleader chooses to make the allegation in the accessorial form, as he may, it does not mention that the act was

through another, and he may be proceeded against either in advance of the doer or afterward, or jointly with him." 1 Bish. Cr. Law (8th Ed.) § 685; 1 Wharton, Cr. Law (9th Ed.) § 223. Nor do we see why the testimony which was competent against both of the defendants could not be used against this defendant, or how he has been prejudiced by its use, even though the indictment was returned "not true" as to Revels.

There was no error in the trial, and it will be so certified.

No error.

(141 N. C. 253)

STEWART v. RALEIGH & A. AIR LINE R. CO. et al.

(Supreme Court of North Carolina. May 1, 1906.)

1. EVIDENCE—EXPERTS—RAILROAD RULES—EXPLANATION.

In an action for death of a railroad engineer in a collision, it was proper to refuse to permit an expert train dispatcher to explain the effect of various rules of the railroad company, which were couched in language of ordinary meaning and significance.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2326.]

2. MASTER AND SERVANT—DEATH OF SERVANT—RAILROADS—COLLISION—ACTION—EVIDENCE.

Where, as a matter of law, deceased was running his engine, at the time he was killed in a collision, on telegraphic orders in connection with defendants' rules, and defendants were permitted to introduce all their orders and rules of which deceased had notice, it was not error for the court to refuse to permit the train dispatcher to answer whether the engine which deceased was running at the time was operating solely under telegraphic orders.

3. SAME.

In an action for death of an engineer in a collision, defendants' time-table, and the train sheets of the day on which the collision occurred, were admissible to show the movements of the trains on that day.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 924-926.]

4. TRIAL—PURPOSE OF EVIDENCE—LIMITATION—REQUEST.

Where evidence was admissible for a particular purpose, it was defendants' duty to request an instruction restricting the jury's consideration thereof to such purpose, if it desired such restriction.

5. EVIDENCE—EXPERTS—SUBJECTS OF EXPERT TESTIMONY.

In an action for death of a railroad engineer in a collision between a light engine and a train, what constituted a train crew generally and what was a proper train crew for a light engine were proper subjects for expert testimony.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2323.]

6. MASTER AND SERVANT—DEATH OF SERVANT—NEGLIGENCE—RES IPSA LOQUITUR.

A collision between a freight train and a light engine in the daytime, resulting in the death of an engineer, is sufficient to raise a presumption of negligence on the part of the railroad company.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 881, 888.]

7. SAME—QUESTIONS FOR JURY.

In an action for death of an engineer, caused

by a collision between a light engine and a freight train, resulting from a failure to notify the operatives of the engine of the whereabouts of the freight train, evidence as to defendant's negligence and deceased's contributory negligence in operating the engine held to require submission of such questions to the jury.

8. SAME—INSTRUCTIONS—MODIFICATION.

Where, in an action for death of an engineer in a collision, there was sufficient evidence to show that the block system increased safety and decreased the danger of collision, an instruction that if the system of moving trains on defendant's road at the time of the injury was reasonably safe and one in general use on railroads in the United States, defendant was not negligent in failing to provide a safe system, was properly modified by adding the words "unless the jury further find that the block system was a safer system and was in general use by railroad in the United States of like character" to that operated by defendant.

9. SAME—TELEGRAPH STATIONS—DUTY TO MAINTAIN.

A railroad company is only bound to establish such telegraph stations along its line as are necessary for the proper running of its trains, with regard to the safety of its employees and passengers.

10. SAME—INSTRUCTIONS—MODIFICATION.

In an action for death of an engineer in a railroad collision, a requested instruction that if defendant's rules permitted the running of an engine and tender with a crew of only an engineer and fireman, and such was the standard rule of the American Association of Railways, defendant was not negligent in that respect, was properly modified by adding a clause requiring that the running of an engine with such a crew as on such a trip as the one in question was reasonably safe, etc.

11. SAME—QUESTION FOR JURY.

Where, in an action for death of an engineer in a railroad collision, negligence was claimed in that defendant had failed to install the block system and witnesses had testified that such system diminished the danger of collision, tended to give one train exclusive use of the track between certain points, and was an additional safeguard, whether defendant's failure to install such system was negligence was for the jury.

12. SAME—TRIAL—MISLEADING INSTRUCTIONS.

In an action for death of an engineer in a railroad collision, the court modified a requested instruction that, if defendant's system of signals and rules were the same as those in general use at the time of the collision, then defendant was not guilty of negligence in failing to adopt another system, etc., by adding a clause, "unless such system is safer or most approved, and in general use in the United States by railroads of like character as the defendant." Held, that such modification was not objectionable as misleading the jury to believe that defendant was bound to provide the most approved appliances.

13. SAME—CONTRIBUTORY NEGLIGENCE.

Where, in an action for death of a railroad engineer in a collision, a witness testified that on seeing deceased's engine and another train approaching on a single track, witness endeavored to signal deceased to stop, but that deceased paid no attention to him, an instruction that if deceased saw witness, or by the exercise of ordinary care could have seen him, wave his hat, it was deceased's duty to have stopped his engine, and, if such violation was the proximate cause of his injury, deceased was guilty of contributory negligence, was proper.

14. SAME—BURDEN OF PROOF.

Where a railroad engineer was killed in a collision, the burden was on defendant to remove the presumption that deceased exercised

due care for his own safety and was not guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 34. Cent. Dig. Master and Servant, §§ 881, 898.]

Appeal from Superior Court, Wake County; Cooke, Judge.

Action by Mary A. Stewart, as administratrix, etc., against the Raleigh & Augusta Air Line Railroad Company and the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendants appeal. Affirmed.

See 50 S. E. 312.

Action by plaintiff to recover damages for the death of her intestate by reason of alleged negligence of defendant. There was evidence tending to show: That plaintiff's intestate was on June 23, 1903, in the employment of defendant as locomotive engineer; had run train No. 6 on the main line. He was given a copy of defendant's book of rules and stood an examination as required by the company, which was put in evidence. At 5:57 o'clock a. m. of June 23, 1903, he received a telegraphic order from the proper authority in the following words: "To Conductor and Engineman of Engine 200: Engine 200 will run extra Johnston Street to Aberdeen, speed 20 miles per hour. A. W. T." He left Johnston Street station at 6:10 a. m. on engine No. 200, tender attached, with fireman, travelling southward. Defendant on that day was operating over its road between Raleigh and Hamlet, including Aberdeen, moving northward, the following trains, to wit: No. 66, a first-class train, schedule time leaving Hamlet 8:55 a. m., and Southern Pines 9:45; then to pass No. 6, a third-class local freight; Manly 9:48; Vass 9:58. No. 38, first-class mail, leaving Hamlet 7:50; Southern Pines 8:45; Vass 9:04; Cameron 9:14. No. 8, a second-class vegetable express, leaving Hamlet 7:00; Aberdeen 8:15; then to pass No. 6, Southern Pines 8:25; Vass 8:45. No. 6, a third-class local freight, leaving Hamlet 6:10; arriving Aberdeen 8:15, leaving Aberdeen 9:10, and is passed there by No. 8 and 38; Southern Pines 9:45, and is passed there by No. 66; Manly 10:05; Vass 10:25. The foregoing is the schedule put in evidence for the several trains moving northward between Raleigh and Hamlet, between 6:10 and 12 m. All of these trains were regular, run by time-table, and are known by number. No. 200 was an extra, and run by telegraphic orders. At Sanford the engineer on No. 200 received at 8:33 a. m. the following order: "To Engineman and Conductor, Extra 200 South: No. 8, engine 659, will wait at Vass until 10 a. m. for extra 200 south." Also: "No. 66, engine unknown, will run 40 minutes late Hamlet to Sanford, and 30 minutes late Sanford to Johnston Street." No other orders were given No. 200. Time-table June 23, 1903, was introduced by defendant and showed the movement of trains: "Extra 200 left John-

ston Street Station 6:10 a. m., arrived at Sanford 8:33, Cameron 9:10, left 9:21, arrived at Vass 9:38, left 10:02." No. 6 left Hamlet 7 a. m., arrived at Aberdeen 8:18, left 9:33, arrived Southern Pines 9:47, left at 10. No. 8 left Southern Pines 9:42, arrived at Vass 9:59, and passed extra 200. The conductor of No. 6 received at Aberdeen the order in regard to moving of No. 66, same as received by No. 200. No meeting place was made for No. 6 and No. 200 extra. F. W. Taylor, defendant's operator at Vass, testified: That Stewart, the plaintiff's intestate, came into his office and asked if he could not get more time on No. 8. That he wired dispatcher asking for more time on No. 8 for 200 extra. He answered that No. 8 would be there in a few minutes, and that it passed Vass at 9:59. As Stewart was going out of the door of his office, the witness asked him how much time he had on No. 66, and he replied that he had 40 minutes on 66, and was going to try to make Southern Pines. The witness did not remember that any thing was said about No. 6. He left at 10:02. The witness reported to train dispatcher, who wired him to go out and see if Stewart was gone, and he had gone. The witness reported to dispatcher, who told him to try to get Niagara or Manly over the telephone, which he did, but failed. There was a private telephone at both places. The witness was unaware of the movement of trains, except what Stewart told him. He put out white board of semaphore when Stewart left Vass, which signifies safety and is a signal to go on. C. W. Jones, the defendant's operator at Southern Pines, testified: That No. 6 left there at 10 a. m., and that he reported at 10:02 to train dispatcher at Raleigh, who immediately asked him to stop it. He tried by use of telephone, but could not do so. He had no orders for No. 6. No. 8 ran one hour late from Hamlet to Cameron. This was communicated to No. 6. Stewart was given a clearance card at Sanford. Page, the conductor on No. 6, testified that he arrived at Southern Pines at 9:47, and left at 10 o'clock, passed Manly at 10:06, and at 10:12 collided on the curve with No. 200 extra, when Stewart was killed. The witness had orders that No. 66 would run 40 minutes late; had no orders in regard to extra No. 200. Manly is 6.7 miles south of Vass, and Southern Pines 1.5 miles south of Manly, making 8.2. There is no telegraph office at Manly; a siding there. Niagara is a siding, being near Southern Pines, having no telegraph office. No. 200 had no conductor or flagman. It was going to Aberdeen to be used as a shifting engine. By the rules "extras are distinguished as passenger extras, freight extras, and working train extras."

Defendant was operating over the road from Norlina to Hamlet, on June 23, 1903, 15 trains during the 24 hours, including

extra No. 200. Defendant did not maintain a block system in the operation of its trains. Telegraph offices were maintained at an average distance of six miles between Hamlet and Raleigh. The rules (382, 383) provide that all extra trains are of inferior class to all regular trains of whatever class. A train of inferior class must in all cases keep out of the way of a train of superior class. Defendant introduced a large number of rules, not necessary to set forth at this point. It introduced the depositions of six witnesses, being general managers and superintendents, in regard to the use of the block system by their own and other roads and systems of railroads in this country. The general import of this testimony tended to show that the block system was in use on roads having a very heavy traffic, and when two or more very fast passenger trains are moving within short distances of each other, but that they did not consider it necessary for the protection of trains on single-track roads when the number of trains was not large. Several of the witnesses thought about 15 or 20 per cent. of the mileage of railroads used the block system. They agreed in the opinion that it tended to minimize the danger to operatives of roads using a single track and which is much crowded with traffic, and that it was an additional safeguard. Defendant introduced George Lutterloh, who testified: That on the day of the collision he was at work in his field near the track, that he saw two trains coming from opposite directions, knew there was no siding near Niagra, and knew they would run together. Ran to the track. No. 200 was coming round the curve. He went upon the track about 250 yards ahead of train. That engineer blew whistle as he came through the cut. Witness waived a large straw hat across the track. Engineer was hanging his head out of the window; did not slack up, but had plenty of time to do so after witness waived hat. Saw the fireman looking at him, and saw the collision. Witness thinks the engineer saw him, because he blew the whistle. Stewart was running fast. Plaintiff introduced Mr. B. R. Lacy, who qualified himself as an expert locomotive engineer and testified: "A train crew ought to consist of an engineer, a fireman, a conductor, and a flagman; but it depends entirely upon how many cars and how many brakemen you want. I do not think an engine ought to be sent out without a conductor. A light engine ought to have an engineer and a fireman and a conductor. I think there was a great deal more risk in trusting one man with one watch, than in trusting two men with two watches. I cannot tell you the degree, but two men intrusted with an engine, both watching the schedule and both with watches that have been examined by your examiner, there is very much less danger than in trusting

the train with one man to look after the engine, to look at the schedule and his watch also. I am familiar with the rules under which the Seaboard runs. Under these rules it is not possible to have a head-on collision without somebody violating some of them. If there had been a conductor on extra No. 200, he would never have let engineer leave the station. You have never heard of a head-on collision with a conductor and engineer on such a train. Know the curve on which the collision occurred. It was so that the engineer had to get almost on it before he could see the other train. According to Lutterloh's testimony the curve would appear on the fireman's side of the engine."

Plaintiff alleged that the defendant was negligent in the following particulars: "(a) In that defendant sent intestate upon the said trip without furnishing a conductor and flagman for the said engine and tender which he was driving. (b) In that defendant failed to arrange a meeting place for extra 200, the train which plaintiff's intestate was operating, and train No. 6, which was moving in an opposite direction. (c) In that defendant's operator and agent at Vass failed to promptly notify the train dispatcher at Raleigh of the arrival at and contemplated departure of extra 200 from Vass. (e) In that defendant's agent and operator at Southern Pines failed to notify the defendant's train dispatcher at Raleigh of the arrival of No. 6 at Southern Pines, and the departure of said No. 6 from said station. (f) In that defendant permitted extra 200 to leave Vass, and No. 6 to leave Southern Pines, without giving to the crew of either train any knowledge of the movements of the other, when said trains were moving in the opposite direction and at a time when said defendant should have known that said trains would collide. (g) In that the crew of No. 6 violated rule 309 of said defendant in leaving Southern Pines in less than 20 minutes after another train, No. 8, moving in the same direction, had left said station. (h) In that the crew of No. 6 violated rule No. 405 of said defendant in leaving Southern Pines before the arrival and departure of No. 66, a passenger train which was delayed 40 minutes and was moving in the same direction. (i) In that defendant failed to have and maintain telegraph office and operators for the government of their trains, and in the management and protection thereof, at Manly, Niagra, and Lake View stations on the said road. (j) In that defendant did not deliver unto the said Stewart and the persons having charge of the said north-bound train, which collided with said Stewart's engine, full, perfect, and proper orders to govern the running of said engine and north-bound train No. 6. (l) In that, while that portion of defendant's line of railroad upon which said collision occurred was much used and was congested with the traffic

of very many trains, defendant neglected and failed to adopt and use in operation of the said train said Stewart was operating, and the train with which he collided, and of its other trains, that system of signals, telegraphic, electric, and mechanical devices, services, or operatives, rules, and regulations, commonly known as the 'block system,' which was at said time in general use, and was a necessary and proper safeguard and protection of the safety of the operatives of the defendant's trains." Defendant denied that it was negligent in either respect, and alleged that plaintiff's intestate was guilty of contributory negligence, in that he violated the orders of the company, failed to observe the signals that were given to him, and failed to stop when signaled by Lutterloh, and was guilty of contributory negligence in other respects. The specific exceptions and assignments are set out in the opinion, together with such portions of the judge's charge as are excepted to. There was a verdict for the plaintiff upon all of the issues. Motion for new trial denied. Judgment and appeal.

Pou & Fuller, Womack, Hayes & Pace, and Murray Allen, for appellants. W. O. Douglass, Busbee & Busbee, and R. N. Sims, for appellee.

CONNOR, J. (after stating the case). It will be well to dispose of certain exceptions pointed to his honor's ruling upon objections to the admissibility of testimony before proceeding to discuss the instructions given to the jury and the refusal to give several of those asked. These exceptions are grouped in defendant's brief, because, as said, they present practically the same questions of law.

A number of rules prescribed by the company for the government of engineers in the operation of trains were introduced by defendant. It was shown that they were contained in a book, a copy of which was delivered to and in the possession of plaintiff's intestate. After qualifying Mr. Lane, chief train dispatcher, as an expert in the knowledge of the rules of the company relating to the management of trains, he was asked to explain the effect of various rules, to designate which rules were applicable to an existing state of facts, and to state the duty of an employé under these rules upon certain hypothetical facts. This class of testimony was, upon objection of plaintiff, excluded, for that, the rules being in writing, their construction, application, and effect were for the court. The learned counsel for defendant concede that his honor's ruling is based upon a correct principle, but insist that there were a number of terms and expressions used in the rules which have a peculiar and restricted meaning, known to and understood only by those who operate trains. They do not cite any authorities to aid us in the decision of the question. It is well settled that where terms of art, or language peculiar to certain trades, business, etc., are

used in writings, parol evidence may be introduced to show how, among persons engaged in such trade, etc., such terms are understood, to aid the court in interpreting the instrument. 1 Greenleaf, 280. When this is done, and technical terms, abbreviations, etc., are explained, it becomes the duty of the court to interpret the instrument in the light of such testimony. In doing so it may not call to its aid expert testimony. 1 Greenleaf, 277. We find nothing in the rules requiring or justifying resort to expert evidence in regard to the meaning of the language used. While there are a large number of rules, and, to one not familiar with the operation of trains, not so clear as might be desired, we see no reason why they may not be interpreted by giving to the language used its ordinary meaning and significance. The question was so decided in *Penna. R. R. v. Stoelke*, 104 Ill. 201, in which it was said: "The law, and not the rules of the company, define negligence. In the next place, it was asking the witness to construe the rule, which was not within the domain of verbal evidence." Treating the rules as a part of the contract of service made by defendant with plaintiff's intestate, it is clear that, being in writing, or what is the same thing, print, their construction is for the court.

Exception 7. Defendant proposed to ask Mr. Lane whether extra No. 200 was running solely by telegraphic orders. The question was, upon objection, excluded, and defendant excepted. Mr. Lane testified that regular trains were run on schedules, and extras on telegraphic orders. The orders which plaintiff's intestate received on June 23, 1903, were put in evidence by defendant, and its witness, through whom the orders came, testified that no other orders were given him. He met and passed No. 38 at Cameron without orders. Defendant contended that Stewart was bound, in the movement of his train, by the rules which were put in evidence, and that the special order did not in any way modify or abrogate such rules. We were of the opinion on the former appeal (137 N. C. 687, 50 S. E. 312) that as a conclusion of law, in the light of the rules, No. 200 was running solely by telegraphic orders. It was competent, and defendant was permitted to introduce all orders and rules of which Stewart had notice. It became the duty of the court to declare the law in regard to Stewart's duties and rights upon a construction of such rules and orders. Mr. Lane could not aid the court in that respect. He could not give his opinion, but only state facts, which he was permitted to do. There was no contradictory testimony in regard to the orders and rules. We concur with defendant's counsel that the special orders to Stewart did not abrogate the rules. The question is, what was his duty in the light of the order and rules? We shall discuss this question when we reach the exceptions to his honor's instructions to the jury. The exception cannot be sustained.

We have examined exceptions No. 17, 18,

and 19, and do not find any harmful error, if error at all. There was no suggestion that the rules were unreasonable, and his honor, in his charge, treated them as binding upon plaintiff's intestate, constituting the measure and standard of his duty in operating his train.

In regard to exceptions 26 and 27 it is sufficient to say that the time-table and train sheets of June 23d were put in evidence, showing when No. 6 and No. 8 left Aberdeen. The testimony objected to was competent to show the movement of trains on the day of the collision. If defendant desired to have the jury restricted in their consideration of it to some particular phase of the case, a request to that effect should have been made. The same is true in regard to exception 30.

Exceptions 28 and 29 are abandoned in the brief.

Exceptions 31 to 34, inclusive, refer to the admission of testimony of Lacy, who was found by the court to be an expert as to the management, running, and equipment of trains. He was asked as to what constituted a train crew generally, also as to what was a proper train crew for light engines, and testified that an engine should not be sent out without a conductor. To the questions and answers the defendant excepted, insisting that the testimony was not within the rule admitting opinion evidence. "An experienced railroad man, who has made a business of the running and management of railroads, is as fairly an expert as one skilled in any other art, and he may give testimony as an expert in questions of railroad management. The running and management of railways is so far an art, out of the experience and knowledge of ordinary persons, as to render the opinions of ordinary persons skilled therein admissible in evidence." Rogers, Ex. Test. § 104, where cases are cited illustrating the extent to which this class of testimony has been received. Lawson, Ex. Ev. rule 22, and illustrations. In *Ogden v. Parsons*, 23 How. (U. S.) 167, 16 L. Ed. 410, it is said: "What was a full cargo for the ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment in such matters." In *McCreary v. Turk*, 29 Ala. 244, Rice, C. J., said: "Upon such a question as the sufficiency of the number of the officers and hands on a steamboat at a particular time to run her on a particular river, the judgment of ordinary persons, having an opportunity of personal observation and of forming a correct opinion and testifying to the facts derived from that observation, is admissible. The effect of admitting such opinion as evidence is not to submit to the decision of the witness a point which the jury alone can try, but merely to assist them in judging of a question of common sense, as well as science, with which the witness may reasonably be sup-

posed, on account of his superior opportunities for becoming acquainted with it and forming a correct judgment, to have been more competent to judge than they themselves." The opinion of a machinist that machinery was unsafe was admitted in *C. & A. R. R. Co. v. Shannon*, 43 Ill. 338. The decisions in which the general principle is applied are not uniform. We are of the opinion that the weight of authority and the reason of the thing sustain his honor's ruling. 12 Am. & Eng. Enc. 436.

The order upon which plaintiff's intestate operated the engine was directed to "conductor and engineman," as was also the order in regard to meeting No. 8 at Vass. Defendant's counsel requested his honor to instruct the jury, if they found all of the evidence to be true, to answer the first issue, "No," and to the refusal to do so excepted. This exception presents defendant's contention in regard to the several allegations of negligence. If there was evidence fit to be considered by the jury tending to sustain any one of the allegations, it is conceded that his honor could not have properly given the instruction. The controversy in this aspect of the case is narrowed to the duty which defendant owed to Stewart, in the light of the conditions shown to have existed on June 23, 1906. There was a presumption of negligence arising out of the proof of a collision in the daytime. *Wright v. Railroad*, 127 N. C. 229, 37 S. E. 221; *Stewart v. Railroad*, 137 N. C. 687, 50 S. E. 312, in which Clark, C. J., said: "If there were facts consistent with the absence of negligence on the part of the defendant, still there would be a conflict with the presumption of negligence—citing *Coffin v. U. S.*, 156 U. S. 459, 15 Sup. Ct. 394, 39 L. Ed. 481. His honor could not, therefore, have instructed the jury as requested, unless the uncontradicted evidence was sufficient matter of law to rebut the presumption. The train dispatcher knew, when Stewart reached Vass, that No. 66 was running 40 minutes late, and that the schedule required that No. 66, a first-class train, should pass No. 6, a third-class train, at Southern Pines. The dispatcher further knew that Stewart, when he reached Vass, wanted "more time on No. 8, which he had orders to pass there. It will be noted that Stewart's order stated that No. 8 would wait until 10 o'clock for his train. When he arrived there at 9:38 No. 8 was not there. The dispatcher knew that No. 6 was at Southern Pines at 9:47. He wired operator at Vass that No. 8 would soon be there. It was due at Vass on schedule at 8:45, and was, therefore, running more than an hour late. In this condition of the trains, we look for some rule by which No. 6 should have been governed. Was it to wait at Southern Pines until No. 66 had passed, or to go on its schedule? The defendant says that it should have proceeded on its schedule. The only rule which seems to throw light upon the question is 405, which is as follows: "A train starting

from its initial station on each division, or leaving a junction, when a train of the same class running in the same direction is overdue, will proceed on its own time and rights, and the overdue train will run as provided in rule 388 or 389." Rule 388 directs that passenger trains following each other must keep not less than 10 minutes apart. Rule 389 directs that freight trains must keep 10 minutes apart. Whether rule 405 applies in other respects, it certainly does not as controlling No. 6 in the conditions existing when it reached Southern Pines. It was a third-class local freight, while No. 66 was a first-class train.

Mr. Lane, one of defendant's witnesses, says that it was the duty of No. 6 to proceed on its schedule from Southern Pines, and his honor so charged the jury in special instruction No. 21. But plaintiff says that defendant was guilty of negligence, for that, when Stewart asked the train dispatcher at Vass for more time on No. 8, it put him on notice that he intended to proceed from Vass immediately upon the arrival of No. 8, and, knowing that No. 6 would proceed on its own time, and if Stewart left Vass at the same time a collision would occur, he should have notified Stewart to remain at Vass. While it is true that railroad companies may make reasonable rules for the government of their employes, and that it is the duty of the employes to obey such rules, and their failure to do so is evidence of contributory negligence, it is equally true that the ultimate standard of duty is fixed by the law, and not the rules; that the rules do not absolve the company from all duty to care for the safety of their employe. Independent of the statute of 1897, abolishing all assumption of risk by employes of railroads, no assumption of risk against defendant's negligence would be recognized. When the defendant's train dispatcher sent Stewart out on an extra with no conductor, to move over a road on which he must meet four trains, all but one of which were running "off time," and that one so running until it reached Southern Pines, it was its duty, measured by the standard of a prudent man, to keep a lookout for his safety—keep him advised of the movement of approaching trains. The measure of this duty was increased when the dispatcher learned that, having obeyed instructions to Vass, in the absence of any further orders, he intended moving from there immediately after No. 8 passed; and that, we think, was the reasonable construction of his request for "more time on No. 8." It was certainly a question for the jury to decide whether, with this information before him, the dispatcher should not have immediately notified Stewart that No. 6 was on time and leaving Southern Pines. While he may, in the absence of any suggestion to the contrary, have reasonably relied upon Stewart's knowledge of the rules and schedules, yet, when notified that for some reason Stewart was going for-

ward, it seems to us that it is a reasonable requirement that he should have warned him of his danger. His failure to do so was at least evidence of negligence and proper to be considered by the jury.

His honor, at the request of the defendant, in the light of Lane's testimony, instructed the jury that the order in regard to No. 66 "enabled No. 6 to proceed from Southern Pines ahead of No. 66." This was Lane's construction of the rules, and, in the absence of any other evidence, accepted by his honor. The plaintiff excepted to the evidence. This, of course, goes for nothing, as the plaintiff does not appeal. After answering the question, Lane proceeds to give an illustration of the practical operation of the rule. He says that the order received by Stewart that No. 66 would run 40 minutes late "makes the schedule time of the trains named between the points mentioned as much later as the time stated in the order, and every other train receiving the order is required to run with respect to this later time, the same as before required to run with respect to this later time as can be easily added to the schedule time, that the order 40 minutes late could be added to the schedule time." On page 159, rule book, we find this identical language used by way of illustration. We also find in the same connection: "No. 41, engine 228, waits for train at Moncure until 10 a. m. for No. 6, engine 549. The train of inferior right is required to run with respect to the time specified, the same as before required to run with respect to the regular schedule time of the train of superior right." This language, as well as the reason of the thing, appears to us to mean that the schedule of No. 66 was fixed by the order to arrive at Southern Pines at 10:25, being 40 minutes added to the regular schedule, 9:45; that this change in the schedule of No. 66 operated to make a like change in that of No. 6, thereby causing the regular schedule of both trains to correspond, and leaving Southern Pines as the passing point as fixed in the time table. This is certainly the practical operation of the rule requiring any other train receiving the order to run with respect to this later time. Construed otherwise, No. 6 has no passing point with No. 66, and in the absence of any other orders it is to feel its way along the road without any knowledge whatever in regard to No. 200 extra. It is manifest that the construction which we have indicated was put upon the rule by Stewart and Taylor, the operator at Vass. There is no other explanation of their language and conduct. Taylor says: "Just as he was going out of the door, I turned around, and didn't even get out of my seat, and asked him how much time he had on No. 66, and he replied back to me from the door that he had 40 minutes on 66, and he was going to try to make Southern Pines. This was the last word he spoke to me." It is impossible to understand this language other

wise than by putting the construction upon it that they both understood that No. 66 was the controlling train, and that its schedule made the schedule of No. 6 at Southern Pines. No. 66 was a first-class train; No. 6, a third-class local freight. To say that both these men knew that No. 6 was leaving Southern Pines at the same time that Stewart was leaving Vass is to conclude that they were insane or demented. That they were neither is conceded. With 40 minutes on No. 66, Stewart had 25 minutes to make Southern Pines, a distance of 8 miles. We think it manifest that such was his understanding, and we further think that, if he had read the example and illustration in his book of rules (page 159), he would have reasonably come to that conclusion. It is in this case a significant fact, shown by the defendant's evidence, that, while other trains were notified of conditions between Vass and Southern Pines, No. 6 had no notice that No. 200 extra was out, and No. 200 had no notice of the movement of No. 6. It is equally manifest that the failure to advise them was the cause of the collision. As we have said, this condition was permitted to continue after the operator at Vass knew Stewart was leaving on what is claimed to be the time of No. 6, and the dispatcher had knowledge of conditions which put him upon notice. The train sheet introduced shows that he had notice of the arrival and departure at each station of every train. There was other evidence, the testimony of Lacy in regard to the crew and that of witnesses in regard to the block system, which we will discuss in connection with the charge.

The defendant asked his honor to instruct the jury that, if they believed the entire evidence, the plaintiff's intestate was guilty of contributory negligence. To the refusal to give this instruction the defendant excepted. The burden of proof on this issue was upon the defendant, and it is conceded that the court could not direct an affirmative finding, unless the evidence relied upon to sustain it is uncontradicted and so clear that but one reasonable inference could be drawn from it. There was undoubtedly evidence tending to show negligence on the part of the plaintiff's intestate unless he was running solely on telegraphic orders, and then it would seem that he should have asked for orders at Vass before proceeding. It would seem, however, that, taking that view of the evidence, he may have reasonably relied upon the conduct of the defendant's dispatcher in regard to his request for time on No. 8. The defendant further says that he was guilty of contributory negligence in not stopping when signaled by Lutterloh. The prayer in this respect assumes that he saw Lutterloh, and in defiance of his signal drove forward to his death. We do not think his honor could have so found as a fact; it was a question for the jury.

His honor gave at the request of the de-

fendant the following instructions in regard to contributory negligence: "If the jury shall find from the evidence that though there might have been a safer way of operating the defendant's trains, but that, notwithstanding this fact, if plaintiff's intestate had followed the rules of the company he would have been safe, and that his neglect in violating the rules, which, if followed, would have been safe to him, was a proximate cause of his death, then the intestate was guilty of contributory negligence, will answer the second issue 'Yes.' If the jury shall find from the evidence that the intestate was running an extra train under an order limiting his speed to 20 miles an hour, and that he ran his engine from Vass to the point of the accident at a greater speed than 20 miles an hour, and that this was the proximate cause of his death, and that, had he confined himself to the speed named in the order, the meeting of the trains would have taken place on a straight track, under such circumstances that the collision might have been avoided, then the intestate was guilty of contributory negligence and the jury will answer the second issue 'Yes.' (29) If the jury shall find from the evidence that the witness Geo. Lutterloh was in a position to see that a collision was imminent, and endeavored to stop the intestate in time to avert the same, and that the intestate saw him, or could have seen him by the exercise of ordinary care, and disregarded his efforts and continued to run the engine, thereby immediately and directly bringing about the collision, which he might have averted had he heeded the warning, he was guilty of contributory negligence, and the jury will answer the second issue 'Yes.' * * * (31) If the jury shall find from the evidence that the intestate was running an extra train from Johnston Street to Aberdeen, and that he had no orders against No. 6, and that No. 6 was a regular scheduled train, and that he ran upon the time of No. 6 without such orders, then the intestate was guilty of a violation of the rules of the company. * * * (b) If the jury shall find from the evidence that the intestate was running an extra train, and that No. 6 was a regular scheduled train, then, under the rules of the company, it was his duty to clear the schedule of No. 6, and if he failed to do so he was guilty of a violation of the rules of the company. (c) If the jury shall find from the evidence that the intestate left Vass at 10:02, and that the scheduled time of No. 6 at Manly was 10:05, and that he was running an extra train without orders against No. 6, and that No. 6 was a scheduled train, and that the intestate could not clear any of the sidings before reaching Manly, five minutes before the scheduled time of No. 6, he was guilty of a violation of rules 390 and 383, which the court will read to the jury. (d) If the jury shall find, under the instructions just given by the court, that the intestate violated any of the rules of the

company, and that such violation was the proximate cause of his death, then he was guilty of contributory negligence, and the jury will answer the second issue, 'Yes.'" His honor in his general charge instructed the jury in regard to contributory negligence, to which there was no exception. We are of the opinion that he gave the defendant the benefit of all to which it was entitled upon the second issue. He gave all that was requested, except the first, which would have taken the question from the consideration of the jury. He gave a large number of special instructions at the defendant's request upon the first issue. To his refusal to give others the defendant excepted. We will examine them in their order.

Exception 39. "That, if the jury shall find from the evidence that the system of moving trains on the defendant's road at the time of this injury was reasonably safe, and one in general use on railroads in the United States, then the defendant has not been guilty of negligence in this respect, and the jury will answer the first issue 'No.'" This he gave, after adding, "unless the jury shall further find that the block system was a safer system, and was in general use upon railroads of the United States of like character in respect of construction, and the amount of traffic as the defendant company." The criticism made by defendant of the modification of this instruction is that there was no evidence to sustain it. We have examined with care the depositions upon this question. They abundantly show that the block system used in moving trains increases safety and relatively decreases the danger of collision. This must be so upon the reason of the thing. It is difficult to tell to what extent the depositions show that the system is in general use. A number of railroad systems are named as using it. We are unable to tell the mileage, etc., of such roads. It is true that the witnesses generally describe the conditions in respect to number of trains run per day and the number of tracks. Certainly it would not show a general use of any system that only a few persons or corporations are using it. It is equally true that, as a matter of common observation, we know that in obedience of legislation, both state and national, and the ruling of commissions and courts, and as a matter of necessity for the security of life and property, railroad companies are rapidly adopting all such methods, systems, and improvements shown to reduce the number of accidents from collisions. What was regarded a safe system in this respect 10 years ago would now be regarded as utterly insufficient. In respect to such questions, the courts seek to secure the highest practicable safety for the public and employes. We think that there was evidence fit for the jury upon the general use of the block system, which, if enforced, prevents such disastrous collisions as the one shown by this record.

Several instructions were asked in regard

to the duty of defendant to maintain telegraph offices along its road. His honor declined them, and in lieu thereof instructed the jury: "It is the duty of a railroad company to establish only such telegraph stations along its line as are necessary for the proper running of its trains, with regard for the safety of its employes and passengers; and, if you find that the defendant's telegraph stations were sufficient for this purpose, then the defendant has been guilty of no negligence in that regard." We think that this was a correct charge and covered the instructions asked.

Defendant requested his honor to instruct the jury that if they found that the rules of the defendant company permitted the running of an engine and tender with a crew of only an engineer and fireman, and such were the standard rules of the American Association of Railways, the defendant was not guilty of negligence in that respect. The instruction was given, with the words, "and that the running of an engine with such crew on such a trip as this one was reasonably safe," etc. We find no error in the charge as given.

Defendant requested his honor to charge the jury "that upon all of the evidence in this case it was not negligence to fail to use the block system." To the refusal defendant excepted. One witness testified that the system tended to give one train exclusive use of track between certain points. Another, that it induced to safety and economy—an additional safeguard, etc. The same witnesses testified as to the extent of the use of the system. In the light of the decisions of this court in *Troxler's Case*, 122 N. C. 904, 30 S. E. 117, and *Greenlee's Case*, 122 N. C. 979, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734; *Troxler v. Southern Ry. Co.*, 124 N. C. 192, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, often cited with approval, his honor correctly refused to give the instruction. He properly submitted the question to the jury. *Stewart v. Railroad*, 137 N. C. 687, 50 S. E. 312.

Defendant requested his honor to charge that, if the jury found the system of signals and rules for the operation of its trains in use by defendant were the same in general use at the time of the collision, then defendant was not guilty of negligence in failing to adopt another system, etc. The instruction was given, with the words, "unless they shall find that such system is safer or most approved and in general use in the United States by railroads of like condition as the defendant." To this language defendant excepted. Defendant contends that the language used by his honor does violence to the well-settled principle that the employer must use such appliances as are in general use, and not the most approved appliances. If his honor has inadvertently placed upon the defendant a heavier burden in this respect than the law permits, it is reversible error.

In *Bottoms v. Railroad*, 136 N. C. 472, 49 S. E. 348, we held that it was error to charge the jury that the employer must use "the best approved devices and appliances for arresting sparks." It will be observed that in *Bottoms' Case* no reference was made to the "general use," which is an essential element in defining the test by which the duty is imposed. The Chief Justice in that case reviews the several decisions of this court. In *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125, the court made the test to use "all known and improved machinery." This was held error; this court saying that the rule requires the use of "all such improved appliances which are in general use." The reasoning of the interesting opinion by the present Chief Justice shows clearly that the being in general use is the test. His honor evidently had that test in view in giving the instruction. It was not the "most approved," but "the most approved in general use." We do not think the jury could have been misled by the instruction as given.

In regard to the testimony of Lutterloh, his honor instructed the jury that if Stewart saw the witness, or by the exercise of ordinary care could have seen him, wave his hat, it was his duty to have stopped his engine, and if such violation was the proximate cause of the injury they would answer the second issue "Yes." This was correct.

There are 57 exceptions in the record. All of them are not assigned as error in the case on appeal. We have examined the record and briefs of counsel with care, and while it is not practicable to set out and discuss each exception, with the instruction asked, modified, and given, or refused, we are of the opinion that the case has been fairly submitted to the jury. It was tried by counsel of learning and experience. Every point was contested in the lower court and here. The jury have upon a full and fair charge found the facts. It may not be improper to say that, while many rules were introduced and commented upon, we are impressed, as said by the Chief Justice on the first appeal, with the view that No. 200 extra was running solely under telegraphic orders, and that the engineer was entitled to have such orders at each station. His last recorded words to the operator at Vass show that he regarded the road clear to Southern Pines; that he had 40 minutes on No. 66. This may account for his failure to take notice of Lutterloh's warning. Certain it is that No. 6 was the only train which seemed to have been overlooked by every one. No orders were given it, or others in regard to it. This was the cause of the collision. The case, stripped of all complications, comes to this: Some one overlooked No. 6. The law raises the presumption that it was the negligence of some of defendant's agents. The jury have found in accordance with this presumption. On the second issue the burden was on defendant to remove the presumption that Stewart exer-

cised due care for his own safety. *Cogdell v. Railroad*, 132 N. C. 852, 44 S. E. 618. The court gave defendant every instruction asked, save one, upon this view of the case. The jury found the issue against defendant, and we think that there was evidence to sustain the verdict. We find no error in his honor's rulings.

The judgment must be affirmed.

(141 N. C. 284.)

WINSTON CIGARETTE MACH. CO. v.
WELLS-WHITEHEAD TOBACCO CO.
(Supreme Court of North Carolina. May 8, 1906.)

DAMAGES—LOSS OF PROFITS.

Where plaintiff, a manufacturer of a machine for making cigarettes, contracted with defendant, a cigarette manufacturing company, to operate and exhibit a model of the machine at an exposition, a breach of the contract by defendant's failure to operate and exhibit the model, even in bad faith, did not entitle plaintiff to recover estimated profits to accrue from the operation and exhibition thereof, in the absence of evidence that plaintiff had actually secured any contracts for the purchase of its machines if they proved satisfactory when the model was exhibited and operated, or that plaintiff would have made any particular number of sales.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 75.]

Appeal from Superior Court, Forsyth County; E. B. Jones, Judge.

Action by the Winston Cigarette Machine Company against the Wells-Whitehead Tobacco Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed in part, and reversed and remanded in part.

In August, 1903, the defendant, being a manufacturer of cigarettes and desiring to advertise its brands, contracted with the plaintiff, who is the manufacturer of the Briggs cigarette machine, that if the plaintiff would furnish one of its machines well equipped for the purpose, the defendant would operate and exhibit it at the St. Louis Exposition in 1904. The plaintiff alleged that it performed the contract on its part by preparing the machine for exhibition and did so at considerable expense, but that the defendant, just before the Exposition was opened and when it was too late to make other arrangements to have its machine exhibited, refused to operate and exhibit the machine at the Exposition as it had undertaken and promised to do, without any reasonable or valid excuse for so doing. The defendant admits the contract as alleged, except that it alleges there was a condition precedent annexed to it, namely, that it could procure free, or without any charge therefor, such space in the Exposition Building as was needed for the purpose of operating and exhibiting the machine, and that this it failed to do without any fault on its part. Plaintiff alleged that by reason of the breach of the contract by the defendant, it has not only sustained damages in the way of money

actually paid out to put the machine in readiness, but that it has suffered further damage by the loss of profits it would have made if the contract had been performed and the loss of the benefits that would have accrued to it in increased sales of its machines, by the exhibition of said machine at St. Louis while in actual operation and by the advertisement of its peculiar features and its advantages over other machines of a like kind. The issues submitted to the jury, with their answers thereto, were as follows: "(1) Did the defendant contract to exhibit at the St. Louis Exposition the cigarette machine of the plaintiff, known as the 'Briggs Machine,' as alleged in the complaint? Ans. Yes. (2) Did the defendant fail and refuse to carry out the contract aforesaid, as alleged in the complaint? Ans. Yes. (3) What amount, if any, is plaintiff entitled to recover for the construction and preparation of the machine contracted to be delivered to defendant for exhibition? Ans. \$211. (4) What amount, if any, is plaintiff entitled to recover for the failure of defendant to exhibit the machine at the Universal Exposition, as alleged in the complaint? Ans. \$5,000."

Upon the question of damages, so far as it related to the fourth issue, the material part of the charge to the jury, was as follows: "In answering this issue the court charges you that if you find the defendant violated its contract by failure to exhibit the machine at St. Louis, as agreed upon, the plaintiff would be entitled to at least nominal damages. And by nominal damages I mean a penny or some such small amount. And if the plaintiff has failed to show to you by the greater weight of the evidence that its damages exceed a nominal amount, you should answer the fourth issue one penny, or some other small amount. Now the plaintiff contends that, at the time of the execution of this contract, both parties had in contemplation the profits that would result to them from such an exhibition. That is, the sale of defendant's cigarettes would be increased by such exhibition, and the sale of plaintiff's machine for making cigarettes would be increased, and thereby the anticipated and probable profits of both would be materially increased; and that by failure of defendant to comply with its part of the contract the plaintiff has lost the sale of many machines, and consequently the profits that would naturally follow a sale. In this branch of the case, gentlemen, the court finds it very difficult to lay down a certain rule by which you are to be governed in ascertaining and measuring the plaintiff's damages, if you should first find it has suffered damages by reason of defendant's failure to exhibit the machine at St. Louis. The plaintiff contends that this contract to exhibit at St. Louis had some value, and that the conduct of the defendant has deprived it of the value and profits which would naturally have grown out of the exhibition had defendant complied

with its contract. A party seeking to recover profits for breach of contract is not required to prove, either that profits would have accrued, or the amount of them, by any other or higher evidence than one is required to produce in any other civil action. So, if the plaintiff has made it appear by a fair preponderance of the evidence that profits would have resulted from an exhibition of the machine at St. Louis, and if it has produced such evidence as will authorize a jury upon legitimate and proper inference to ascertain the amount of profits which would have been made, it would be entitled to recover such amount of damages as the jury may honestly and consistently believe due it by reason of the breach."

There was no evidence that the plaintiff had secured any contracts for the purchase of its machines, if they proved satisfactory when the model was exhibited and operated at St. Louis, nor was there any evidence that the plaintiff would have made any particular number of sales, nor was there any other proof which would enable the jury by any certain and reliable standard to estimate the losses, unless the evidence hereinafter stated is sufficient for that purpose. It was shown that the plaintiff had another offer for the exhibition of its machine but declined the same because of the contract with the defendant. There was also evidence tending to show that the machines sold for \$1,600 apiece, and that the company had already sold from 150 to 160 of them in different parts of the world; that they were advertised usually by operating them where they could be seen by those interested in the purchase of such machinery; and that one is constantly kept in New York on exhibition, as it is found necessary to prove the value of the machine to those who may buy by the actual operation of a machine in their presence. This particular machine which was to be exhibited at St. Louis had been exhibited elsewhere. The exhibition of them usually led to sales, and almost all of them had been sold by reason of their value being demonstrated in the presence of the purchasers. The Briggs machine will turn out 125,000 to 150,000 cigarettes per day, and is of simple construction. It costs about half as much as the Bonsack machine. About 50 of them are in operation. The plaintiff had intended to make an exhibit of one of its machines at St. Louis before the contract to do so was made with the defendant, and had decided to spend between \$5,000 and \$6,000 on the exhibition and operation of the machine at the exposition. Plaintiff further offered evidence tending to show that it would have cost \$5,000 to have exhibited and operated the machine itself, which it had intended to do before contracting with the defendant, and that it did not have the time and opportunity to make the required preparation for doing so after it was notified by the defendant that it would not perform the con-

tract on its part. Exceptions were taken by the defendant to his honor's rulings and charge upon the fourth issue. There was a judgment upon the verdict, and defendant appealed.

Lindsay Patterson and Connor & Connor, for appellant. Manly & Hendren and Watson, Buxton & Watson, for appellee.

WALKER, J. (after stating the case). There is no serious objection made by the defendant to the rulings and charge of the court upon the first, second, and third issues; and, after a careful perusal of the charge, and an examination of the rulings of the court, so far as they bear upon those issues, we are satisfied that no exception can well be taken thereto. The defendant frankly and fully placed its right to the favorable consideration of this court upon its exception to that part of the charge which relates to the fourth issue, and around this single question the contention of the parties was waged. While the inquiry we are about to make is important, it is by no means a novel one, and does not open up any new field of legal investigation. It involves, not the discussion of any new principle but merely the application of one of some antiquity to the actual facts of this case. We usually experience difficulty in adjusting even a well-settled rule to any particular state of facts, but those in this case are so few and so simple that we should have little or no embarrassment in reaching a correct conclusion. Generally speaking, the amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. *Benjamin v. Hillard*, 23 How. (U. S.) 149, 16 L. Ed. 518; *Mace v. Ramsey*, 74 N. C. 14. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. *Ashe v. De Rossett*, 50 N. C. 290, 72 Am. Dec. 552; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

It is the rule last stated which principally raises the doubt as to whether profits of the future should be included in any estimate of damages. They may be necessary to completely indemnify the injured party, and they may also answer the other requirement, in that the loss of them may naturally be expected to proximately result from a breach of the contract; but there still remains another important element to be considered, and that is whether there is any reliable standard by which they can be ascertained, for we have seen that the damages must be certain, and this certainty which is required does not refer solely to their amount, but also to the

question whether they will result at all from the breach. It is clear that, whenever profits are rejected as an item in the calculation of damages, it is because they are subject to too many contingencies and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages. *Griffin v. Colver*, supra. "The law may, and often does, fail of doing complete justice, from the imperfection of its means for ascertaining truth, and tracing and apportioning effects to their various causes; but it is not liable to the reproach of doing positive injustice by design. Such a doctrine would tend, not only to make the law itself odious, but to corrupt its administration, by fostering a disregard of the just rights of parties. In actions upon contract, especially, and in those nominally in tort, but substantially upon contract, courts have thought it generally safer, upon the whole, to adopt certain definite rules for the government of the jury by which the damages could be estimated, at the risk of falling somewhat short of the actual damages, by rejecting such as could not be estimated by a fixed rule than to leave the whole matter entirely at large with the jury, without any rule to govern their discretion, or to detect or correct errors or corruption in the verdict. In such cases, therefore, there has been a strong inclination to seize upon such elements of certainty as the case might happen to present, and as might approximate compensation, and to frame thereon rules of law for the measurement of damages, though it might be evident that further damages must have been suffered, which, however, could only be estimated as matter of opinion, and must therefore be excluded under the rules thus adopted." *Allison v. Chandler*, 11 Mich. 542.

It will be seen, therefore, that the earlier rule, which excluded profits altogether as an element of damages, as being in their very nature too uncertain to be considered (*Hale on Damages*, 72), has been modified so as to permit their inclusion in the assessment if they are proximate and certain. The doctrine of *Domat*, as adopted by *Sedgwick*, that "the law does not aim at complete compensation for the injury sustained, but seeks rather to divide than satisfy the loss," has not been accepted by the courts as the true principle by which to measure the compensation for a breach but may safely said to have been rejected, for the law does seek to give full satisfaction in damages, including gains prevented and losses sustained so far as is consistent with a just regard for the rights of the party who has broken the contract and, what is of more importance, for reasonable certainty in the administration of legal principles. In pursuit of this end it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case furnishes a standard by which their amount may be determined with sufficient

certainty. Illustrations of this principle are to be found in several cases heretofore decided by this court. In *Mace v. Ramsey*, 74 N. C. 11, the defendant contracted to furnish the plaintiff a boat to carry passengers, who were expected to arrive on an excursion train, from Morehead City to Beaufort and other points in the harbor. The plaintiff was allowed to recover profits prevented by defendant's breach of his contract because their loss was not only the proximate result of the breach as being within the reasonable contemplation of the parties, but because it appeared that the plaintiff had already engaged enough passengers for the boat to be furnished by the defendant and this fact introduced the element of certainty into the question of damages. The damages were thus made certain, both in their nature and in respect to the cause from which they proceeded. The distinction between such profits as can be thus definitely ascertained by some standard furnished by the contract itself or by the law, and those for the calculation of which there is no standard, but which are shadowy, uncertain, and speculative and therefore incapable of legal computation, is clearly recognized in *Willis v. Branch*, 94 N. C., at page 149, where it is said by the court: "If the plaintiff had existing engagements for theatrical entertainments, that were disappointed by the injury, damages sustained on that account might be embraced, but not for such as he might probably have had. The instruction given by the court was far too broad and indefinite, it embraced possible speculative damages, arising indirectly and remotely as a possible consequence of the trespass. Such damages are not recoverable." So in *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302, where the defendant failed to deliver corn to the plaintiff at his mill to be ground at a stipulated price, under a contract to that effect, the court held that the profits the plaintiff would have made should be included in the damages allowed by the jury, as the difference between the cost of grinding and the contract price furnished a sufficiently certain standard by which to measure the damages and was the true rule applicable to the facts of that case. "It is now well established (the court says at page 111 of 79 N. C. [28 Am. Rep. 302]) that the profits which a plaintiff would have made if the contract had been complied with, is the measure of damages for its breach, in cases like the present. There are of course cases not within the rule, as where the profits are speculative and incapable of accurate ascertainment, or so remote that they cannot be supposed to have been within the contemplation of the parties, or where they depended on facts of which the defendants had no notice, and which therefore could not have been in their contemplation." And in *Lewis v. Rountree*, 79 N. C. 122, 28 Am. Rep. 309, the court held that the contract being for the sale and delivery of a specified number of barrels of rosin at a stipulated price which

was bought for the purpose of being resold in another market, the profit that would have been realized if the contract had been fulfilled was recoverable as a part of the damages, it being the difference between the price to be paid and the market price, where it was to have been resold, which rendered it capable of being estimated with reasonable certainty and therefore not contingent or speculative.

This modification of what appears to have been the former rule as to profits is strikingly illustrated in the recent case of *Johnson v. Railroad* (at this term) 53 S. E. 362. The plaintiff sued to recover damages for the negligent destruction of his box factory by the defendant, it having been set on fire by sparks emitted from defendant's engine. It was shown that the plaintiff had outstanding and unfilled orders for a large number of boxes and we held, contrary to the ruling below, that the profits which would have been made upon those contracts were proper to be considered in computing the damages. The question is fully discussed by Mr. Justice Connor, who delivered the opinion of the court, and the distinction to be observed in such cases clearly defined. The same principle is also recognized and applied in *Tompkins Co. v. Dallas Cotton Mills*, 180 N. C. 347, 41 S. E. 988. The rule as thus declared by this court has been generally, if not universally adopted in the other states, and in the federal jurisdiction. *Hale on Damages*, p. 72 et seq.; *Aber v. Bratton*, 60 Mich. 357, 27 N. W. 564; *Masterton v. Mayor*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; 1 *Sutherland on Damages*, § 64; *Allison v. Chandler*, supra; *McKinnon v. McEwan*, 48 Mich. 106, 11 N. W. 828, 42 Am. Rep. 458. In the case last cited, the court says: "There are undoubtedly many cases where upon the breach of a contract the injured party is entitled to recover as damages the profits he would have made had the contract not been broken. Where a party is to perform labor from which a profit would arise as the direct result of the work done at the contract price, such profits may be recovered. Or where a party is to furnish and deliver material under a contract and is prevented. The principles recognized in this class of cases are well established and have been applied in a great variety of cases. So in cases of tort the loss of profits may be allowed." While anticipated profits may be recovered in cases of the class we have mentioned, where there is a certain method afforded by which they can be estimated, we believe the courts are well-nigh unanimous in holding that when they are of uncertain, contingent, or speculative character, they are not to be allowed in compensation for the injury. This principle is stated concretely by Mr. Justice Bynum, with his usual terseness and vigor, in *Sledge v. Reid*, 73 N. C., at page 448, as follows: "In an action of covenant for not furnishing machinery for a steam mill, at a stipulated time, the plaintiff cannot recover in damages the estimated

value of the profits he might have made, if the covenant had been complied with, because they are too vague and uncertain to form any criterion of damages. Such has been the uniform course of decisions in this state. We think they are founded upon the soundest principles and sustained by the weight of authority." The authorities to sustain this proposition may be numerous cited. *Boyle v. Reeder*, 23 N. C. 607; *Foard v. Railroad*, 53 N. C. 235, 78 Am. Dec. 277; *Roberts v. Cole*, 82 N. C. 292; *Walser v. Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *Lumber Co. v. Iron Works*, 130 N. C. 584, 41 S. E. 797; *Memphis v. Brown*, 20 Wall. (U. S.) 289, 22 L. Ed. 264; *Aber v. Bratton*, supra; *Hair v. Barnes*, 26 Ill. App. 580; *Red v. Augusta*, 25 Ga. 386; *Pennypacker v. Jones*, 106 Pa. 237; *Willingham v. Hooven*, 74 Ga. 233, 58 Am. Rep. 435; *Greene v. Williams*, 45 Ill. 206; *Bingham v. Walla Walla* (Wash. T.) 13 Pac. 408; 1 *Joyce on Damages*, § 1285.

Summing up the law upon this subject, it is said in *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168: "The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the language of Chief Justice Nelson, in the case of *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.) 69, 42 Am. Dec. 38, they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary." But that court has expressly repudiated the claim that the possible or even probable benefits of a business yet in fieri can afford a safe rule by which to estimate damages. There was said to be so much uncertainty in such a rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in

sustaining its legal correctness, that it was not believed proper to entertain it. The *Amlable Nancy*, 3 Wheat. (U. S.) 560, 4 L. Ed. 456; *La Amistad de Rues*, 5 Wheat. (U. S.) 385, 5 L. Ed. 115. Judge Story said that, independent of all authorities, he was satisfied upon principle that an allowance of damages, upon the basis of a calculation of profits, is inadmissible where there is no certain standard to guide the jury. The rule would be in the highest degree unfavorable to the interests of the community, and the subject would be involved in utter uncertainty. The computation would proceed upon contingencies, and would require a knowledge of markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend upon the vigilance and activity of the party who it is supposed would have made the profits and much upon the momentary demand and other considerations purely speculative. After all, it would be a mere calculation upon conjectures and not upon facts. *Schooner Lively*, 1 Gall. 315, Fed. Cas. No. 8,403. Any such estimate would be based upon imaginary and uncertain profits depending upon a variety of circumstances, the failure of any one of which would subvert the whole calculation, and for this reason they would be too remote and indeterminate to enter into the measure of damages. *Manufacturing Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602.

Should the rule contended for prevail, the breach of a very simple contract, or failure in some part, might bring ruin upon the party in default, by leaving the damages to the unbridled discretion of the jury, when in fact no such loss was contemplated. The adoption of such a rule would, therefore, be extremely dangerous. If such consequences are to follow, it is much better that the parties, when contracting, expressly provide for such enlarged responsibility. This they may do by liquidating the amount when the damages cannot be otherwise ascertained and are such as the law will not allow because of their uncertainty. *McKinnon v. McEwan*, supra. It is one of the very cases where parties may agree upon the amount of damages to be recovered upon a breach. "Where the damages resulting from a breach of contract cannot be measured by any definite pecuniary standard, as by market value or the like, but are wholly uncertain, the law favors a liquidation of the damages by the parties themselves; and where they stipulate for a reasonable amount, the agreement will be enforced." *Hale on Damages* 133. But in the absence of some such standard fixed by the parties when they make their contract, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances and which are perhaps merely fanciful, to be considered by the jury as part of the compensation. Speaking of such profits, Chief Justice Blackley, in *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58, once said: "If anything is

speculative, remote, and contingent, it is the net income of a business never begun. That anticipated profits from a business intended to be carried on by the plaintiff upon the premises cannot be allowed, is as well settled as anything can be in an age of legal skepticism," citing *Giles v. O'Toole*, 4 Barb. (N. Y.) 261; *Greene v. Williams*, 45 Ill. 208, and other cases. "The recovery of profits which might have been made in a new business cannot be sustained, because it cannot be proven that they would have been realized." *Sedgwick on Damages*, § 183 and cases cited; 3 *Sutherland on Damages* (3d Ed.) p. 2136; *Arctic Ice Mach. Mfg. Co. v. Central Trust Co.*, 77 Md. 202-235, 26 Atl. 493; *Ice Co. v. Jenkins*, 58 Ill. App. 519. But we do not see why the case of *Jones v. Call*, 96 N. C. 337, 2 S. E. 647, 60 Am. Rep. 416, which discusses and applies the principle we have been considering to a case identical with this in its main features, is not decisively against the plaintiff's contention. There it appeared that the plaintiff, a manufacturer of patented tobacco machines, was stopped from manufacturing by the wrongful act of the defendant, and it was held that, while he could include in his damages for the wrong profits on machines already sold but not manufactured he could not recover estimated profits of the business as they were too speculative, conjectural, and remote to constitute a basis for computing damages. Such anticipated profits, it was said, involve too many contingencies, the failure of any one of which might prevent their realization. They are not therefore susceptible of exact ascertainment or of being proved with reasonable certainty. We are unable to distinguish the two cases. So in *Eisenlohr v. Swain*, 35 Pa. 107, 78 Am. Dec. 328, where the defendants had failed to advertise a sale as they had contracted to do, it was held that the plaintiff could not recover for any loss of a better bargain than he made at the sale as it was speculative. It could not be known how many bidders would have attended the sale if it had been advertised, or whether they would have come, and if any, how many. The supposed profit which he alleged was prevented by the defendants' wrong, was too contingent and illusory. The case of *Stevens v. Yale* (Mich.) 72 N. W. 5, was much like the one last cited. The defendant failed to advertise, as she had contracted to do, that her wares could be purchased at the plaintiff's drug store, but inserted in her advertisement the name of another druggist. He sought to recover the profits he would have made out of the advertisement contracted for. They were ruled out, as too uncertain and conjectural for a safe estimate of his loss.

A party who has broken his contract, cannot, we admit, escape liability because of the difficulty there may be in finding a perfect measure of damages. In this case it appears that the jury, by their verdict, have said that the defendant violated the contract without any just cause or legal excuse. The

claim that it was to have free space in the Exposition Building was either negatived by the jury, or it was found by them, upon the evidence, of which there was an abundance to support the finding, that the free space could have been had for the asking. While the bad faith of the defendant would ordinarily entitle it to little consideration from the court, it cannot have the effect to reverse a well-settled rule of law, which must be general in its application. We should administer the law as we find it. Its proper administration will sometimes apparently work individual hardship, but this is true of all general rules. It is a much less evil than to construe it to meet the supposed injustice of the particular case or merely to redress a wrong, because we may think it is of so grievous a nature that it should be, in this way, specially rebuked, without regard to the strict principles of the law which have been adopted for all cases. "It is, then, an established rule to abide by former precedents, stare decisis, where the same points come again in litigation, as well to keep the scales of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land, not delegated to pronounce a new law, but to maintain and expound the old one, 'jus dicere et non jus dare.'" *Broom's Legal Maxims* (8th Ed.) p. 147. The defendant, it is true, has willfully broken the contract at a time too late for the plaintiff to repair the wrong or retrieve the resulting loss, but this should not change the rule of law, although it may justly provoke our condemnation of the act. "Our duty," said Baron Alderson, "is plain. It is to expound and not to make the law, to decide on it as we find it, not as we may wish it to be." *Miller v. Salomons*, 7 Ex. 541. It is not our province to invent new rules for avoiding hardship, however unjustly we may think a party has been dealt with, but to discover and be governed by those rules which were adopted by our predecessors for their guidance. The authorities we have cited strongly support our conclusion, some by direct similitude and others by consequential reasoning and clear deduction and as they are quite uniform to the same point, they ought to have weight with us, and be respected as precedents, in order that the law may be known. The perfect agreement of many judges upon one and the same proposition, is cogent proof of its correctness.

We have examined the cases cited by the learned and able counsel for the plaintiff in their excellent brief, and in the argument before us, and do not think that, with one or

two exceptions, they conflict at all with our view. Those that do so conflict, are not in accord with the decisions of this court nor with the great weight of authority upon the subject, if their value as precedents is not also impaired by later expressions of the courts where they were decided. There was error in the charge of the court upon the fourth issue. The verdict will stand as to the other issues but, as to the fourth, a new trial is awarded.

New trial.

(141 N. C. 300)

ROLIN v. R. J. REYNOLDS TOBACCO CO.

(Supreme Court of North Carolina. May 8, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CHILDREN—ILLEGAL EMPLOYMENT—NEGLIGENCE.

Where plaintiff, a child under 12 years of age, was employed to work in defendant's tobacco factory, in violation of Acts 1903, p. 819, c. 473, § 1, prohibiting employment of such children, plaintiff's employment was evidence of negligence in an action for injuries to him by the operation of one of the machines in such factory.

2. SAME—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

Plaintiff, a child under 12 years of age, was employed to work in defendant's tobacco factory, in violation of Acts 1903, p. 819, c. 473, § 1. He believed it was part of his duty to clean up one of the machines, and, as he was doing this, another boy employed in the factory threw a piece of cut tobacco into the machine, and plaintiff, believing it his duty to extricate the same, reached his hand in to take it out, whereupon the boy who threw it in pulled the lever and started the machine, by which plaintiff's hand was caught and torn off. *Held*, that whether defendant's negligence in employing plaintiff, or whether the prank of his fellow servant, was the proximate cause of his injury, was for the jury.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CHILDREN.

A child under 12 years of age is presumed to be incapable of so understanding and appreciating dangers from negligence or conditions produced by others as to make him guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 124.]

4. SAME—QUESTION FOR JURY.

In an action for injuries to a child under 12 years of age, while employed in a tobacco factory, in violation of Acts 1903, p. 819, c. 473, § 1, while endeavoring to take certain tobacco from a machine, whether he was guilty of contributory negligence was a question for the jury on proof of his age, intelligence, and knowledge of the machine and his capacity to know and appreciate the danger.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 347, 348.]

Appeal from Superior Court, Forsyth County; Jones, Judge.

Action by Willie Rolin, by his next friend, against the R. J. Reynolds Tobacco Company. From a judgment for defendant, plaintiff appeals. Reversed.

Action for damages for personal injuries sustained by plaintiff while in defendant's employment. Plaintiff testified: "I commenced work for the defendant about a year

ago, May, 1904. I went in there one Monday morning. Mr. Nichols, boss man in the room, spoke to me and asked me if I wanted to weigh fillers. I told him, 'Yes.' He took me over and put me to weighing. Then he put me to cutting lumps on a table. They were making three-inch work. I worked at that place three days on one fortnight, and on the second fortnight six days. After cutting lumps I then was a sweeper on the floor. I cleaned up about machines and around the floor. That evening at 4 o'clock we got out of the factory. The weigh boy went down the house to wash his hands. The man that run that machine went down the house to clean up another machine. I was cleaning up that one I worked at. The weigh boy ran up and threw a piece of cut tobacco in the machine. I reached my hand in there to take it out. He pulled the lever and run, and the machine caught my hand and tore it off. I don't know the fellow who took me out of the machine. Mr. Nichols took me up in the house above and he said, 'Did you not tell me you were 12 years old?' I said 'No.' I was eleven years old in June, 1903. When cutting off lumps I was 12 inches away from the machine. No one explained to me the dangerous character of the machine, nor told me anything about it. I was born June 4, 1892. I would not have been hurt if the boy had not pulled the lever. The machine was set, and you had to pull the lever that made it work and set it. At time I was hurt I worked by the side of John Dillon all that day. Table and truck between me and the machine. The lever is in front of the machine. I did not get a lump and try to press it in the machine. He (Dillon) had pressed a lump that day for me. It was not after quitting time when I got hurt. If it was, all hands had not gotten out of the factory. No one told me to clean up the machine. I saw others cleaning up the machine, and I did so. No one ever asked me to clean up the machine, or do anything about it. It was part of my duty to clean up around the machine. Will Halrston is the name of the boy that pulled the lever of machine on me. He is working down there in the factory now. There was a belt attached to the machine running at the time. No one told me to clean up around the machines. Other boys were at work cleaning up." There was other evidence in regard to plaintiff's age, extent of injury, etc. At the conclusion of the evidence defendant demurred and moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted. Judgment. Appeal.

L. M. Swink, for appellant. Manly & Hendren, for appellee.

CONNOR, J. (after stating the case). The plaintiff bases his right to recover on the facts admitted by the demurrer upon two propositions: That his employment by the defendant, he being under 12 years of age, was in violation of the provisions of section 1, c. 473, p. 819, Acts 1903, prohibiting em-

ployment of children under 12 years of age, was per se negligence, or at least evidence of negligence, and that such negligence was the proximate cause of the injury sustained by him. The appeal, for the first time, presents to us for construction and application the act passed by the Legislature for the protection of young children by expressly prohibiting their employment in mills and factories. The first section is plain and calls for no construction by the court. It provides: "That no child under twelve years of age shall be employed in any factory or manufacturing establishment in this state." The provision in regard to oyster-canning factories is not material to any question presented by this appeal. The second section prescribes the hours during which persons under 18 years of age shall work. The third section provides that parents of children seeking employment shall give certificates in regard to their age, and makes any person knowingly and willfully violating the provisions of the act indictable, etc. The act is the result of the well-considered, and we think wise, conclusion of the General Assembly, reflecting and crystallizing into law the will of the people of the state. It is therefore not only our duty, but in entire harmony with our judgment, to give to the statute such a construction and application as will effectuate the intention of the General Assembly, remedy and prevent the continuation of an evil which threatens the welfare of the young children, and, thereby, the best and highest interest of the state. Referring to, and applying the provisions of, an act in almost the same language as ours, the Court of Appeals in New York, in *Marino v. Lehmaier*, 66 N. E. 572, 61 L. R. A. 811, says: "It has been said of the last century that it was the age of invention. Machines had been devised and constructed with which very many articles used by mankind were manufactured. Numerous factories had been established throughout the country filled with machines, many of which were easily operated, and the practice of employing boys and girls in their operation had become extensive, with the result that injuries to them were of frequent occurrence. We think it is very evident that these reasons induced the Legislature to establish definitely an age limit under which children shall not be employed in factories." The Supreme Court of Tennessee, in *Queen v. Dayton*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935, held that the employment of a minor within the age prohibited by the statute was negligence; that the breach of the statute was actionable negligence. In *Perry v. Tozer*, 90 Minn. 431, 97 N. W. 137, 101 Am. St. Rep. 416, it is said: "Authorities of the highest respectability hold that the violation of a statute prohibiting the employment of a child in a hazardous occupation, when such employment is prohibited by law, establishes a right to recover for negligence; hence, in such cases, liability is to be presumed from the employment in diso-

bedience of law. * * * Unless we can say that the statute has no effect in a suit for damages when the law had been violated, we are required to hold that the employment which the Legislature positively forbids furnishes evidence tending to show, at least presumptively, that one of the causes of the injury in this case was the violation of the statute, in analogy to the well-known doctrine that ordinances regulating the hitching of horses, the speed of trains in cities, or other subjects of municipal control are held to be evidence to sustain the charge of negligence. * * * It is well settled that a wrongdoer is at least responsible for the results likely to occur, or resulting as a natural consequence from his misconduct or such as might have been reasonably anticipated.

We have, in accordance with the uniform current of authority, held that the violation of a town ordinance regulating the speed of trains and street cars is at least evidence of negligence. *Norton v. Railroad*, 122 N. C. 910, 29 S. E. 886; *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 780; *Davis v. Traction Co.* (at this term) 53 S. E. 617. The principle was applied to the violation of a statute requiring fire escapes to be maintained in houses rented to tenants. *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Earle, J.*, saying: "Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy." In *Marino v. Lehmaier*, supra, *Parker, C. J.*, in a concurring opinion, says: "Against such accidents the state attempted to guard this boy, among others. But the defendant disregarded the law and employed and gave directions to one of the subjects of the state in violation of the state's policy, and the outcome of it was an injury to the child, which could not have happened had the law been observed. In such a case it would seem that the necessary and logical practice would be that the jury should be permitted to consider the violation of the statute, in connection with the other facts, as evidence tending to show negligence on the part of the defendant." The learned chief judge cited a number of cases to sustain his conclusion. Before the passage of the statute the present chief justice, in *Ward v. O'Dell*, 126 N. C. 948, 36 S. E. 194, speaking for two members of this court, said that, notwithstanding there was no statute prescribing the age within which children should not be employed in mills and factories, "There is an aspect in which the matter is for the courts, that is, whether it is negligence per se for a great factory to take children of such immature development of mind and body and expose them for 12 hours per day to the dangers incident to a great building filled with machinery constantly whirling at a great speed." The same line of thought

is expressed and sustained by numerous authorities, in *Fitzgerald v. Furniture Co.*, 131 N. C. 636, 42 S. E. 946. Certainly, with the positive prohibition imposed by the Legislature against the employment of a child under 12 years of age, there can be no question that such employment is very strong, if not conclusive, evidence of negligence. If the age is known to the defendant, the employment is a positive defiance of the law; if the employment is without pursuing the method prescribed, and so easily followed, to learn the truth, its failure to do so gives it but little, if any, better status. Independent of the statute, the courts have uniformly held, and the text-writers so declare, that the employment of young children either upon or in buildings where dangerous machinery is operated imposes the duty of carefully explaining to them the danger, and constant warning and watchfulness for their protection and safety. It is not an unreasonable burden upon employers, because they take children into their service with full knowledge of the risk to which they are exposed, and should be required to take the consequences of such employment.

We do not entertain any doubt that, upon the evidence before the court, the question of defendant's negligence should have been submitted to the jury. Defendant says that, notwithstanding its negligence, no cause of action accrued to plaintiff because the injury was not the proximate result of such negligence, but of an entirely unforeseen and unavoidable agency, the other boy who pulled the lever. It does not appear whether this boy was under 12 years of age. It has been frequently held that when persons negligently left dangerous machines or other instrumentalities exposed to the interference of children, and by reason thereof they have sustained injury, such result should have been contemplated as reasonably probable, fixing liability on the original negligent act. In this connection it is said in *Marquette Coal Co. v. Dielle*, 110 Ill. App. 684, referring to the same suggestion made by defendant: "If plaintiff was injured while absent from the post of duty, or while violating his orders, or if it was carelessness or negligence for him to run between the sides of the moving cars and the mine wall, still, in our judgment, those facts would not prevent a recovery under the second count. The statute absolutely forbids the employment of a child of that age in a mine. One reason, no doubt, is that immature children are liable not to understand the significance and importance of the regulations prescribed for the mine and the employes therein. They may thoughtlessly disobey orders or expose themselves to peril, or do acts which would be careless in an adult. The company which violates the statute ought not to be allowed to screen itself from liability because the child has been injured by reason of those childish traits which give rise to the statute.

* * * Such statutes are sustainable under

the police power of the state and should be so construed as to accomplish the object sought to be attained, and to correct the evils sought to be remedied. Holding the employers of children in violation of this statute to a strict liability for injury that may happen to the child while engaged in such inhibited employment ought to have a wholesome influence tending to check the evils against which this legislation is directed." The court concluded: "We hold defendant assumed all risk of injury to the boy arising from his employment of the boy." The Court of Appeals of New York, in *Hickey v. Taaffe*, 105 N. Y. 36, 12 N. E. 286, after discussing the duty of giving such instruction as will enable him to fully understand and appreciate the danger incurred, says: "If a person is so young that even after full instructions he wholly fails to understand them and appreciate the dangers arising from want of care, then he is too young for such employment, and an employer puts or keeps him at such work at his own risk." It is therefore a question for the jury to say whether, upon competent testimony, the plaintiff was given that full and careful instruction in regard to the danger incident to his employment, and whether he was capable of understanding such danger after instruction. *Morris v. Stanfield*, 81 Ill. App. 264, was an action by a minor for injuries sustained by an unprotected saw. The defendant contended the proximate cause of the injury was the interference of another person. The court said: "If appellee was under 13 years of age and was employed in appellant's factory, every day of his employment was a separate and distinct violation of law. * * * If it was negligent to put a boy under 13 years of age at work in a factory within a few inches of an unprotected buzz saw, any act of negligence of a fellow servant, not willfully intended to injure appellee, that brought him in contact with the saw, was a concurrent act of negligence. Such act may have been the immediate intervening cause, but the unlawful employment, continuing, was in combination with the intervening act a proximate cause of the injury." The principle was applied in *Nagel v. Railway*, 75 Mo. 653, 42 Am. Rep. 418: "The defendant owned or had control of a turntable located in a portion of the town where children were in the habit of playing. The turntable was not locked or otherwise fastened. The plaintiff's child, with other children, was playing upon it when the child was killed." In passing upon one of the defendant's exceptions, the court said: "It is also urged that the objection to the evidence should have been sustained because the petition shows that the plaintiff's son was injured by the acts of other children in revolving the turntable. This point we think is not well taken. If the defendant was negligent in not securing the turntable so that it could not be revolved by children to their injury, the mere fact that

* was revolved by other children who were

playing upon it at the time the child was injured will not excuse the defendant, if such act ought to have been foreseen or anticipated by it. That it ought to have been foreseen and provided against is shown by the case of *Koons v. Railroad*, 65 Mo. 592." In *Railroad v. Fort*, 84 U. S. 553, 21 L. Ed. 739, in which a parent was suing for injury sustained by his son, a boy of 16 years of age, the court said: "This boy occupied a very different position [from an adult]. How could he be expected to know the peril of the undertaking? He was a mere youth without experience and not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and, doubtless, entered upon the exception of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing which, in its very nature, was perilous, and which any man of ordinary sagacity would know to be so." In *Lynch v. Murdin*, 41 E. C. L. 29 (422), it appeared that the defendant's servant left a horse and cart unhitched on the street. The plaintiff, with other children, was playing with the horse and climbing onto the buggy, when the plaintiff was hurt by the horse moving away. To an action for damages, the defendant said that the plaintiff brought the injury upon himself. Denman, C. J., after discussing the conduct of the defendant's servant in leaving the horse unhitched, said: "But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent that he merely indulged the instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care. The child acting without prudence or thought has, however, shown these qualities in as great degree as he could be expected to possess them." In *Iron Co. v. Green* (Tenn.) 65 S. W. 399 the same defense was made that the plaintiff's wrongful employment of the child was not the proximate cause of the injury. Beard, J., said: "Defendant had no right to employ this minor. While in its employment, on its premises, and foolishly playing with panels, the property of the company, too heavy for his strength to hold, yet with boyish heedlessness disregarding this fact, this injury is inflicted upon him. Had he not been employed by this defendant, there is no reason to suppose that he would have been on its premises when the temptation occurred to him to prank with these panels to his serious hurt. In each of the propositions presented by the

respective parties to the suit, we think there is causal connection between the employment and the injury." The doctrine is thus stated by Bailey, in his work on *Personal Injuries* (1291): "When the negligent act of the defendant naturally induced or offered opportunity for the subsequent act of a child, being of a character common to youthful indiscretion, and which, concurring with the defendant's earlier wrongful act, produced the injuries complained of, the defendant will in general be held liable. Children, wherever they go, must be expected to act upon childish instincts and impulses, a fact which all persons who are *sui juris* must consider and take precautions accordingly. A person who places in the hands of a child an article of a dangerous character, and one likely to do an injury to the child itself or to others, is liable in damages for injury resulting, which is a natural result of the original wrong, though there may be an intervening agency between the defendant's act and the injury." For this statement of the law the author cites a number of cases, among others, *Lynch v. Murdin*, supra, which Mr. Beach says is the leading English case on the subject and has been generally followed in this country, both in the federal and many of the state courts. *Cont. Neg.* §§ 137-140; *Railroad v. Stout*, 2 Dill. 294, Fed. Cas. No. 13,504; s. c. 84 U. S. 667, 21 L. Ed. 745. This was one of the series known as the "The Turntable Cases" (75 Mo. 653, 42 Am. Rep. 418). The case was tried by Judge Dillon, and on appeal Mr. Justice Hunt said: "The evidence is not strong, and the negligence is slight; but we are not able to say that there is not evidence sufficient to justify the verdict. * * * The charge was in all respects sound and judicious." In *Queen v. Dayton Coal Co.*, supra, it is said: "Of course, we do not hold that if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable, simply on account of the employment in violation of the statute."

The learned counsel for defendant cite us to a number of cases more or less in conflict with the line of authorities which we have noted. In a few cases it is held that the statute prohibiting the employment of young children does not change the rule in respect to negligence, and that in such actions the rules and principles governing prior to the passage of the statute prevail. They are clearly out of harmony with the best considered and, we think, sound view. Several of them, upon the peculiar facts in the record, hold as matter of law that the violation of the statute was not the proximate cause of the injury. In other cases the alleged negligence was in the failure of defendant to box, or otherwise protect machinery in the manner required by statutes wherein it is held that plaintiff's recovery for injury sustained is barred by working with such machines in the presence

of obvious danger, etc. The distinction between such cases and ours is pointed out in *Am. C. & F. Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 706: "The distinction is that in those cases the employment of the servant was lawful. Here the employment was unlawful. The injury resulted from the unlawful employment, and while appellee was engaged in doing the precise thing that appellant directed him to do."

Defendant relies upon the decision of this court in *Hendrix v. Cotton Mills*, 138 N. C. 169, 50 S. E. 561. There the plaintiff was a boy of 12 years of age, hence not within the protection of the statute. The plaintiff, at the time of the injury, was, at the request of another boy, doing something entirely out of his line of employment. He was accustomed to the elevator. It must be conceded that expressions are to be found in the opinion tending to sustain the defendant's contention, but we think the cases may be distinguished. Plaintiff says: "After cutting lumps I then was a sweeper on the floor. I cleaned up about machines and round the floor. That evening at 4 o'clock we got out of the factory. The weigh boy went down the house to wash his hands. The man that ran that machine went down the house to clean up another machine. I was cleaning up that one I worked at. The weigh boy ran up and threw a piece of cut tobacco in the machine. I reached my hand in there to take it out. He pulled the lever and ran. * * * It was not after quitting time that I got hurt. If it was, all hands had not gotten out of the factory. No one told me to clean up the machine. I saw others cleaning up the machine, and I did so." There is much in this testimony from which a jury may reasonably have drawn the inference that the child was acting in the line of his employment. It may be that we do not correctly interpret his testimony, but it impresses us, with our knowledge of the alertness and desire of children to be useful, as this child by seeking employment showed himself to be, that he thought it was his duty to take the piece of tobacco out of the machine. Certainly it is not a necessary, or even a fair, interpretation of his conduct that he was wanton and reckless. Is it not rather the conduct of a boy seeking to discharge his duty to his employer? It was for the jury to draw such inferences from his testimony as are reasonable. *Railroad v. Stout*, supra.

We think a reasonable construction of his conduct in taking the tobacco out of the machine is that he was, or reasonably supposed that he was, discharging his duty. He was, it seems, required to clean up the machine. We should hesitate to conclude that the other boy willfully and therefore wickedly threw the lever deliberately intending to crush the plaintiff's hand. It is more in accordance with childish impulse that he did it to frighten the plaintiff and see him jerk his hand back. While it was a reckless and wanton act, it was one of the freaks and pranks which might not unreasonably be

anticipated from leaving boys together in a mill, surrounded by dangerous machinery. It was for that reason, among others, that the Legislature prohibited the employment of children in such places. The fact that the statute was enacted, as we know, after several ineffectual efforts, puts an employer upon notice that in the eye of the law, based upon experience, it was dangerous to life and limb of children to be so employed and exposed to the very kind of danger by which the plaintiff was injured. To permit the defendant to escape liability for violating the statute, by saying that it did not anticipate this particular condition, with its disastrous results, would be to nullify the law. Of course, it did not anticipate this particular condition or result. If it had done so, the employment would have been not negligent, but criminal. Neither did the servant who left the horse unhitched, in *Merbin's Case*, anticipate that children would play with and frighten the horse and cause the plaintiff to suffer injury; but the court held that he ought to have done so—so in the *Turntable Cases* the same defense was made. If the plaintiff be required to show that, in every negligent act, the particular result was in fact anticipated, it would be difficult to maintain any action for injury sustained by the negligence of another. *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528. The law leaves the decision of the question of proximate cause to the jury, except when upon the facts but one inference could be drawn, as in the *Turntable Cases* and many others in the reports. The state says to employers that they must not take the children under 12 years of age into their mills and factories; that to do so endangers their lives and limbs, dwarfs them mentally, morally, and physically; that it is upon the children that the permanent power and welfare of the state depend. They must not, below the tender and immature age fixed by the statute, be brought into contact with iron and steel machinery propelled by the powerful agencies of steam or electricity. Considered from any point of view, the right of the child to have the opportunity to grow to at least the age named in the statute in a pure atmosphere, without danger of mutilation of body, dwarfing of mind, and to attend the schools provided by the state, the legislation is founded upon a wise and humane policy. Its violation followed by injury gives a cause of action to the child upon the elementary principle that: "Whenever the common law or a statute imposes on one a duty, if of a sort affecting the public within the principle of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered especially therefrom; or, if the matter of the law involves only the interest of individuals, any one who has received harm from another's disobedience may have his suit against him for the damage." *Bishop, Noncontract Law*, § 132; *Comyn's Dig.* 453; *Greenlee v. Railroad*, 122 N. C. 977, 30 S. E.

115, 41 L. R. A. 399, 65 Am. St. Rep. 734; *Troxler v. Railroad*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580. The defendant says, whatever its breach of duty may have been, the plaintiff was negligent, and by such negligence contributed to his injury. The authorities cited by the learned counsel, applied to the conduct of an adult or one not within the protection of the statute, fully sustain their contention.

But when we come to measure the duty of the child in regard to the exercise of care for his safety, an entirely different principle controls. Within certain ages, courts hold children incapable of contributory negligence. We do not find any case, nor do we think it sound doctrine to say that a child of 12 years comes within that class. Adopting the standard of the law in respect to criminal liability, we think that a child under 12 years of age is presumed to be incapable of so understanding and appreciating danger from the negligent act, or conditions produced by others, as to make him guilty of contributory negligence. Mr. Labatt says: "The essential and controlling conception by which a minor's right of action is determined, with reference to the existence or absence of contributing fault, is the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to danger. For the exercise of such measure of capacity and discretion as he possesses he is responsible." *Master & Servant*, § 348. It is in such cases a question for the jury. 4 *Thompson, Neg.* § 4587; *Beach, Cont. Neg.* § 136. "Whether he could be guilty of contributory negligence or not was a question of fact to be determined by the jury, dependent upon the other fact whether it had been shown that the deceased had capacity to be guilty of contributory negligence. Between seven and fourteen a child is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity." *T. C. & O. Co. v. Enslin*, 129 Ala. 336, 30 South. 600; *Glover v. Gray*, 9 Ill. App. 329. In several cases it is held that, when a statute is violated and results in the injury of the child, the defense of contributory negligence is not open to the defendant. *Am. C. & F. Co. v. Armentrout*, supra. The better view seems to be otherwise. The Tennessee court, after discussing the question, concludes: "It is hardly necessary to add that contributory negligence on the part of the minor is to be measured by his age and his ability to discern and appreciate circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. "As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, when the child is not wholly irresponsible, a ques-

tion of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and, if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary care in a person of full age and capacity." 7 *Am. & Eng. Enc.* 409; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645.

His honor erroneously sustained the demurrer to the evidence. In the light of the testimony, he should have submitted the case to the jury, instructing them that, if they found the facts as testified to, the defendant was guilty of negligence in employing the plaintiff, either knowing his age, or failing to have the certificate of his parents as provided by the statute; that, if they found that such negligence was the proximate cause of the injury, they should answer the first issue "Yes." In regard to the alleged contributory negligence of the plaintiff, he should have instructed the jury in accordance with the principles announced by the authorities herein cited. The jury could take into consideration the age, intelligence, and knowledge of the plaintiff in regard to the machine and his capacity to know and appreciate the danger. We have given to the questions presented upon this appeal a careful examination. It is the first time that we have had occasion to construe the statute, and it is conceded that the courts of other states are no uniform in the construction given similar statutes. It is a matter of importance to employers of labor in mills and factories to know the standard of their rights and liabilities. The industrial life and development of the state are not only consistent with, but promoted by, the exclusion of young children from mills and factories. The child, educated and developed before beginning work of this kind, becomes not only more useful and efficient, but in all respects a better citizen.

While not necessary to the decision of this appeal, we note that the first section of chapter 473, p. 819, Laws 1903, is omitted from the Revisal. The statute, as incorporated in section 3362-3364, Revisal 1905, makes the prohibition dependent upon "knowingly and willfully" employing a child. The original act, in declaring the prohibition, did not contain these words. Section 3, making the employment of the child a misdemeanor, properly required the act to be done "knowingly and willfully." The omission of section 1 was doubtless an oversight. It may be of importance in the trial of actions, such as this, for injuries sustained, in regard to the burden of proof. We simply note this change to the end that, if the General Assembly should desire, they may restore section 1, which, under the language of the enacting and repealing clauses of the Revisal, would seem to be repealed.

There must be a new trial.

(33 W. Va. 335)

SPIES v. BUTTS et al.

(Supreme Court of Appeals of West Virginia.
April 10, 1906.)

1. RECEIVER—APPOINTMENT—DISCRETION OF COURT.

The application for the appointment of a receiver is addressed to the sound discretion of the court. The appointment is not a matter of right. The power is a discretionary one, to be exercised with great circumspection. The discretion is not arbitrary or absolute, but sound and judicial, not to be too strictly limited, or lightly used.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 14.]

2. SAME—GROUNDS FOR APPOINTMENT.

Where, under an executory contract of sale of many tracts of land and standing timber, a cash payment is made, and the purchaser agrees to give notes for the deferred monthly payments, and takes possession of the subject of his purchase, and proceeds to cut and manufacture into lumber and remove therefrom the timber and market the same as provided in the contract, but refuses to make any further payments on the purchase money or to make the notes therefor, as required by the contract, because of defect of grantor's title tendered to the purchaser, the timber being the chief value of the land, and, unless operated, the title to much of the timber would fail because of the limited time in which it could be removed under the contracts by which it was held by the vendor, held sufficient ground for the appointment of a receiver on the application of the vendor.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 24.]

3. VENDOR AND PURCHASER—DEFAULT IN PAYMENTS—STANDING TIMBER—LIEN.

Where the purchaser under such contract has continued in possession, cutting, manufacturing into lumber, and removing the timber, refusing to pay anything on account of the purchase money, and refusing to make the notes for the monthly payments of the purchase money, as required by the contract, equity will give the vendor a right to hold the manufactured product remaining on the premises liable to the purchase money past due him.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 399.]

4. SAME—TAXES—LIABILITY OF PURCHASER.

A purchaser, in possession of land under an executory contract of sale, is liable, as between himself and the vendor, for all taxes assessed on the land after the commencement of his possession, in the absence of a stipulation to the contrary.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 409, 411.]

(Syllabus by the Court.)

Appeal from Circuit Court, Upshur County, Bill by Henry Spies against Ida M. Butts and others. Decree for plaintiff, and defendants appeal. Affirmed, and remanded for further proceedings.

W. W. Brannon, Davis & Davis, and V. B. Archer, for appellants. W. C. Bennett, C. Wood Dalley, E. H. Morton, and G. M. Fleming, for appellee.

MCWHORTER, P. On the 28th day of January, 1904, Henry Spies, of the county of Randolph, entered into a contract with Ida M. Butts, James McCormick, and Harry T.

Wilson to sell to the said parties of the second part all the real estate and personal property owned by him in the counties of Randolph, Upshur, and Webster, as follows: "(a) All of the several tracts of land, coal, and standing timber lying and being in the said counties of Randolph, Upshur, and Webster, in the said state, on the waters of the Little Kanawha, Buckhannon, and Holly rivers and their tributaries, which are shown upon the schedule and blue print map hereto attached and made a part of this contract, together with all other tracts of land, town lots, coal, or standing timber owned by the said party of the first part in the several counties aforesaid, or any of them, whether shown upon said schedule and map or not, the whole aggregating 10,899.25 acres of land, 16,059.02 acres of standing timber, and 14,867.34 acres of coal. (b) All of the personal property owned by the party of the first part in the counties aforesaid, or either of them, consisting of manufactured lumber, fallen timber, or logs, tools, machinery, store goods, and other personalty, whether of the character so designated or not, save and except the following: 4,000 feet of figured maple lumber, 2,800 feet of bird's eye poplar, 1,500 feet of quartered oak, two secondhand boilers, one riding horse, one cow, one typewriter, books, book accounts, moneys, stocks, securities, and choses in action, and household goods. (c) All of the capital stock of the Pickens & Hackers Valley Railroad Company. It being the intent and purpose of this contract to sell unto the parties of the second part all of the estate of the party of the first part, both real, personal, and mixed, in the counties aforesaid, or either or any of them, save and except only those items of personal property hereinbefore excepted and reserved. It is further understood that the acreage of said realty is estimated by surface and not horizontal measurement, and that the acreage of land, coal, and timber are not exclusive each of the other, but that the same tract may, and in many instances does, constitute a part of the aggregate total given under one or more of such descriptions." The parties of the second part agreed to pay the sum of \$400,000, as follows: \$62,500 in cash upon the signing of the agreement and \$37,500 in six months thereafter, for which the parties made their notes of the date of said agreement, which notes were to be further secured by the deposit with the said Spies as collateral security of one-tenth of the total capital stock to be issued by the parties of the second part upon the formation of a corporation to which they proposed to convey the property, and which corporation was to be immediately organized by them. The residue of the purchase price, \$300,000, was "to be secured or evidenced by the notes of said proposed corporation, to be indorsed by the parties of the second part and to be due and payable," the sum of \$2,500 on or before the 1st day of May, 1904, the second a like sum on the 1st day of June, 1904, "and the residue

to be divided into 59 notes for the sum of \$5,000 each, and due and payable on or before the 1st day of each month thereafter, all to bear interest at the rate of 5 per centum per annum from and after the 1st of November, 1904"; and as further security it was provided that in his deed to be thereafter made for the property Spies should retain his vendor's lien on all the said real estate, and a deed of trust was to be executed by the said Pickens & Hackers Valley Railroad Company upon all its real estate, rights of way, rolling stock, equipment, rights, and franchises to secure the payment of the same, the execution of which deed of trust was to be contemporaneous with the transfer to the parties of the second part of the capital stock of the said corporation; the party of the first part agreed to make, execute, and deliver to the parties of the second part, or to such person, persons, or corporation as they might designate, as soon as might be after the execution of the contract, and not later than the 1st day of July, 1904, a good and sufficient deed for all said real estate, with covenant of general warranty and free from all incumbrances, together with such bill or bills of sale for the personal property as the parties of the second part might request or desire. The parties of the second part were to have full and complete possession of all said personalty and title thereto immediately upon the payment of the said sum of \$62,500 and the execution of the notes for the \$37,500, together with the right to enter in and upon the real estate and to cut and remove the timber therefrom, or the coal thereunder, and to operate, use, and control the said railroad, and to receive and collect the revenues arising therefrom; and in the event of the said Spies not being able to deliver to the parties of the second part the total acreage of land, coal, or standing timber described, in that event there should be abated from the purchase price therein agreed upon the sum of \$3 per acre for each acre of surface so conveyed, \$7 per acre for each acre of coal, and \$19 per acre for each acre of standing timber, or an aggregate sum of \$29 per acre for each acre of land containing both coal, standing timber, and surface, or, if the title should fall as to any portion so conveyed, a like abatement and no more should be made upon such failure. It was further understood and agreed that if said Spies should be unable, by the 1st day of July, 1904, or at the time of the delivery of the deed mentioned, to make good title to any of the tracts of the land, coal, and standing timber intended to be conveyed by said agreement, the same might be conveyed by him to the parties of the second part at any time before the final settlement should be made of the purchase price therein agreed upon, upon the perfecting of his title thereto, and no abatement should be made of said purchase price by reason of any such tracts so conveyed before final settlement. The said Spies further covenanted that there were no

liens or incumbrances upon any of the personal property, and that the description of the same should be taken and held to include the locomotive engine then lately ordered on behalf of said railroad company and not yet then delivered to it.

On the 4th day of August, 1905, Henry Spies filed his bill of complaint in the circuit court of Upshur county against Ida M. Butts, James McCormick, and Harry T. Wilson, as individuals in their own right, and as partners trading under the firm name of the Butts, McCormick & Wilson Company, the Pickens & Hackers Valley Railroad Company, a corporation, the Butts, McCormick & Wilson Company, a corporation, the Ohio River Lumber Company, a corporation, and the Oak Lumber Company, a corporation, alleging: That for many years prior to the date of said agreement plaintiff was extensively engaged in the lumber business in the counties of Randolph, Webster, and Upshur, and that while so engaged he became the owner of a large amount of property, both real and personal, the real consisting mainly of coal, timber, and timber lands in said counties. That the personal property consisted largely of manufactured lumber, fallen timber or logs, tools, machinery, and store goods. That for the purpose of successfully carrying on his said business it had become necessary for him to construct the said railroad, and for the more efficient management thereof he formed the corporation called the Pickens & Hackers Valley Railroad Company, in which he owned all the capital stock, except 13 shares, of which plaintiff's wife owned 10 shares and G. M. Fleming, A. I. Boreman, and E. F. Kummer owned each 1 share. That shortly before the 28th day of January, 1904, the said Butts, McCormick, and Wilson entered into negotiations with him for the purchase of his entire holdings, with the exceptions specified in the agreement, which negotiations were consummated on the 28th day of January, 1904, when the said agreement was entered into. That the consideration of said agreement was the sum of \$400,000 made up as follows: "Personal property of the value of forty-one thousand eight hundred and ninety-six dollars (\$41,896.00); the Pickens and Hackers Valley Railroad of the value of sixty thousand dollars (\$60,000.00); the equipment of said road of the value of fourteen thousand and three hundred and eighty-seven dollars (\$14,387.00); land, exclusive of coal and timber, of the value of thirty-two thousand and ninety-seven dollars (\$32,097.00); coal land of the value of one hundred and four thousand and seventy-six dollars (\$104,076.00); timber on lands, of the value of one hundred and forty-five thousand seven hundred and ninety-four dollars (\$145,794.00); the residence and lot and storehouse of the plaintiff in the town of Pickens, of the value of seventeen hundred and fifty dollars

(\$1,750.00) amounting in the aggregate to the said sum of four hundred thousand dollars (\$400,000.00)." The bill alleged that the provision in the contract in regard to abatement for failure to deliver the total acreage was inserted in said contract by reason of a mutual mistake of calculation; that it was not intended that the abatement for standing timber should be \$19 per acre, but only \$9.02, the latter being the price per acre for timber; that the defendants took possession immediately of all the property, except the house in Pickens, which the plaintiff was willing to deliver whenever the defendants complied with the contract; that the defendants had paid the sum of \$62,500, and had paid the note for \$37,500, and had also paid a note for \$2,500 due May 1, 1904, and \$900 on the note for \$2,500 due June 1, 1904, but that, except the sums named, the entire purchase money remained unpaid, although the sum of \$71,600, with interest from November, 1904, was past due; that the defendants had failed and refused to execute the 59 notes for \$5,000 each, and had failed in good faith to form the corporation provided for by the contract; that within the last few days he had learned that the defendants, by deed dated June 20, 1905, had conveyed all the personal and real estate to a corporation, stated in the deed to have been organized under the laws of the state of South Dakota, but denied that the said corporation had complied with the laws of West Virginia, which would enable it to carry on business, and alleged that such action was taken as a mere pretense of compliance with the provisions of the contract, and for the purpose of hindering, delaying, and defrauding the plaintiff in the protection of his rights. It alleged that the defendants were manufacturing and selling the lumber from the said property, and using the money collected in carrying on other enterprises, instead of paying the plaintiff; that the defendants were so conducting their operations as to work irreparable damages and loss to the plaintiff; that the defendants knew, when they entered into the contract, that a very considerable part of the timber sold had a time limit within which it was to be removed, and that, instead of removing the time-limit timber, they were removing timber on land which he owned and on which there was no time limit, and by so doing would permit the time to expire, with the idea of purchasing the same after the limit had expired at a much less price; that they had manufactured lumber of the market value of \$120,000; that the defendants were using the portable mills and tools sold them in the manufacture of lumber on tracts adjacent to the land purchased of the plaintiff. It alleged that the mills and tools should be used in the manufacture of lumber on the tracts of lands purchased of him, and the money should be used in the payment of the purchase money due him;

that the defendants were concerned in other corporations engaged in the manufacture of lumber on adjacent tracts of land, and that said corporations were formed for the purpose of hindering, delaying, and defrauding the plaintiff in the assertion of his rights. It alleged that the defendants were inexperienced in the lumber business, and that the business was being carried on at a loss; that the defendants had not caused the railroad company to execute a deed of trust on its property, and that he was ready to transfer all the stock in the said company to the defendants; that the plaintiff had executed and tendered to the defendants a good and sufficient deed for all the real estate sold by him to them, and that defendants had refused to accept the same; that when the said deed was presented to them they assigned a number of reasons for not accepting the same, that the deed did not comply with the requirements of the contract. It alleged that it was true that of the real estate, amounting to 2,943.81 acres, the plaintiff only owned an undivided half, but that the defendants knew this when they entered into the contract, and that in estimating the acreage only one-half of this tract was taken; that it was true that in some cases he owned only certain marked trees, and that in one tract of 670 acres he only owned one-half of the coal, but that this was known to the defendants before making the contract. It alleged that such objections were not made in good faith, but only for the purpose of hindering and delaying the day of accounting, that the defendants might further despoil the property of the plaintiff; that since the tender of the said deed, and the refusal by the defendants to accept it, the defendants had continued to cut and manufacture and remove the timber, by reason of which the defendants were estopped from denying their obligation to accept the said deed; that since the formation of the South Dakota corporation he was unable to say whether the operations had been carried on by the defendants as the firm or as the corporation, but that there had been no apparent change in the management of the business, and that the plaintiff did not believe that there had in fact been a change in ownership, but that the whole proceeding had been taken for the purpose of hindering, delaying, and defrauding the plaintiff; that no one had set up any adverse title or claim to any of the property embraced in his sale, but that it was true that as to one or two small tracts he had only the equitable title, but that he could and would obtain the legal title to such tracts, and that, even should the plaintiff fail to get good title to such tracts, such failure should not interfere with the closing of the contract, and would only entitle the defendants to refuse to take so much of the property as the plaintiff could not make good title for; that in making out the bill of

sale of the personal property there had been omitted therefrom credits to the amount of \$1,075, mentioning the items thereof. It alleged a purpose on the part of the defendants to exhaust the personal property conveyed to them, to sell and convert to their own use the standing timber conveyed to them without paying to the plaintiff anything further than they had already done, and that, if permitted to longer mismanage the business, the plaintiff would be deprived of a large part of the security for his debt and would not be able to enforce his lien on said property; that the defendants had refused to pay taxes for the year 1904 on the real estate conveyed to them by plaintiff, and that, unless redeemed, the same would be sold by the state; that in order to prevent such sale he had been compelled to pay a part of the taxes thereon, and that the defendants refused to refund to him the amount so paid; that the land sold was rough and not suited for agricultural purposes, and that the timber thereon constituted the chief value; that the coal lands had depreciated in value; and that when the land was denuded of its timber it would be wholly insufficient to satisfy the purchase-money lien of the plaintiff. It alleged that the defendants were insolvent. It prayed that the said contract of January 28, 1904, be corrected, so as to express the true meaning and intent of the parties; that the plaintiff have a decree for the amount due him; that his lien be enforced; that a receiver of the said property be appointed; that said receiver be authorized to carry on the business of manufacturing into lumber the standing timber and the timber then down; that an injunction be granted enjoining and restraining the said defendants, both individually and as a firm, from cutting the timber or removing any part of it that had been already cut, or to sell any that had been manufactured; and that they be enjoined from interfering in any way with the receiver in the operation of the business. The plaintiff gave notice of motion for the appointment of a receiver and the defendants gave notice of their motion to dissolve the injunction.

The defendants Butts, McCormick, Willson, and Butts, McCormick & Willson Company filed their joint and several answer on the 26 day of August, to which plaintiff replied generally. The answer averred that the contract as set out in the plaintiff's bill was correct; that there was no separate valuation of the different items, but that it was a sale in gross for the consideration of \$400,000, denying the allegation in regard to the abatement of \$9.02 for standing timber, but that it was intended to be abated \$19, as set out in the contract, and denying that the fixing of \$19 as the abatement was a mutual mistake; that the plaintiff had refused to deliver to them possession of the house at Pickens and that, after the execution of the contract,

plaintiff fraudulently sold and disposed of certain lumber covered by the contract, falsely pretending to have sold the same prior to the execution of the said contract; that the defendants had paid the plaintiff \$105,525.07, and had put improvements on the property to the amount of about \$70,000, and denying that they owed the plaintiff \$71,600, but that they had paid already more than was due; that they had formed the corporation in South Dakota and had conveyed the said property to the corporation, and that the formation of the corporation was in pursuance of the terms of the contract and was organized in good faith; that it was true that the defendants had refused to execute the 59 notes of \$5,000 each, but that their failure was due to the failure of the plaintiff to tender them a deed in compliance with the contract, denying that they were applying the proceeds of the property sold to them by the plaintiff to other enterprises with the intention of defrauding the claim of the plaintiff. It denied that it was required of them to remove the timber off the time-limit tract rather than off the other tracts, but that they could cut timber where most convenient, and that, on account of the location, it would be impossible to cut and manufacture all the timber within the time on which there was a time limit; that the plaintiff never requested them to cut the timber from the time-limit tracts rather than that on which there was no time limit. It denied that they were inexperienced in the lumber business, and claimed that their net profits since commencing business amounted to \$82,000; that they had never executed a deed of trust to Spies for the railroad, because Spies was the holder of all the corporate stock of the railroad; that plaintiff had tendered the deed to them, but that they had refused to accept it and filed with the plaintiff a list of objections to the same and assigned a number of reasons for not accepting the deed; that they knew at the time of the contract that plaintiff only owned a half undivided interest in a tract of 2,943.81 acres, but did not know of other deficiencies of title and incumbrances, and that they relied solely on the contract of plaintiff to convey to them with general warranty. It denied the insolvency of the defendants but on the contrary that the assets exceeded the liabilities by the sum of \$157,316.66, and denied that the security of the plaintiff for his purchase money was being removed, but averred that instead they had increased the value of the real estate \$39,660.85. It denied that any purchase money was due plaintiff, but that, after deducting the abatements and credits for improvements, the defendants would be credited with additional purchase money. It alleged that they had always been willing to comply in all things with the terms of the contract. It prayed for the specific performance of the contract, and asked that a commissioner be appointed to ascertain and report the total

number of acres of land, coal, and timber which the plaintiff is able to convey in accordance with the said contract and the condition of the title of plaintiff to the several tracts.

On the 9th day of September, 1905, the cause came on to be heard upon the bill and exhibits, the answers and exhibits, and replication to the answer, upon the motions to appoint a receiver and to dissolve the injunction, upon the several affidavits filed in support of the plaintiff's motion for receiver and in opposition to the motion to dissolve the injunction, and the affidavits filed by defendants in support of their motion to dissolve the injunction, and in opposition to the motion to appoint a receiver, when the court was of opinion that the case was one proper for the appointment of a receiver, and proceeded to appoint Clarence D. Howard receiver of all and singular the real estate in the bill and exhibits mentioned, and the assets, both real and personal, of the said railroad; the stock of manufactured lumber on the premises in controversy, or so much thereof as had been manufactured by defendants from the timber cut on the lands purported to be sold by plaintiff to defendants, or from the standing timber sold by him to them, together with any such timber severed from the land and not manufactured into lumber; and it was decreed that upon giving bond as required, in the penalty of \$50,000, said receiver should forthwith take into custody the said property, to sell and dispose of the said stock of manufactured lumber, retaining the proceeds thereof until the further order of the court, to operate and conduct the business of the railroad in question and all tram roads constructed by the parties hereto upon the lands in controversy, to employ such agents, clerks, and servants as he might deem necessary therefor, and to go forthwith upon the premises and investigate and report to the court all matters touching the propriety or necessity of cutting any or all of the standing timber in controversy, the probable cost thereof, and the advisability of such operation under the order of the court. "It is further ordered that the receiver shall from time to time report what he shall do hereunder, and not less often than twice during each year of his said receivership. And the court is further of opinion and doth overrule the motion of the defendants for the dissolution of the injunction hereinbefore awarded, in so far as the same enjoins the defendants from selling or otherwise incumbering the real estate described in the bill herein, or from removing, selling, or shipping any lumber manufactured from any of the timber sold by the plaintiff to the defendants, but doth dissolve said injunction so far as the same restrains the defendants from selling or incumbering any part of the personal property in the bill mentioned, and covered by the contract of sale between the plaintiff and defendants; but it is ordered that the plaintiff do enter into fur-

ther bond within 10 days from this date in the penalty of \$2,000, conditioned upon the payment of all costs and damages as may be incurred by any party hereto in the event the said injunction shall be hereafter dissolved. And the defendants now desiring to set aside so much of this order as appoints said receiver and refuses to dissolve said injunction by the giving of an appropriate bond as hereinafter provided, it is ordered that upon the defendants, or some one for them, entering into bond with approved security, either individual or corporate, before the clerk of this court, within 14 days from this date, in the penalty of \$150,000 conditioned upon the payment to the plaintiff of such moneys as may be found due to him upon future decree in this cause, said receivership be thereby vacated and that the injunction herein do stand dissolved. And it is further ordered that the said receiver heretofore appointed do not take possession of any of the said property within the said period of 14 days limited for the giving of such bond." From which decree the defendants Ida M. Butts, James McCormick, Harry T. Wilson, and Butts, McCormick & Wilson Company appealed, and claim that the court below erred in appointing a receiver; that the court erred in holding that the plaintiff had a lien upon the manufactured lumber on the premises and in appointing a receiver therefor, and in directing the receiver to sell the same; that the court erred in overruling the motion to dissolve said injunction, and erred in fixing the amount of the bond to be given by the defendants at \$150,000, the same being unreasonable and excessive in amount.

Did the court err in appointing a special receiver in case at bar in view of all the circumstances of the case? Section 28, c. 133, Code 1899, makes provision for such appointment by a court of equity in any proper case pending therein in which the property of a corporation, firm, or person is involved and there is danger of the loss or misappropriation of the same, or a material part thereof. Section 6823, 5 Thomp. Corp., says: "Unless there is a statute giving the right to a receiver in a given state of facts, no one can demand the appointment of a receiver *ex debito justitiæ*; but the question whether or not a receiver will be appointed in a given case is addressed to the sound discretion of the chancellor, under all the circumstances. The discretionary power possessed by courts of equity of appointing receivers or refusing applications for such appointment will not be interfered with on appeal except in cases where the discretion has been manifestly abused; this being the general rule as to the appellate review of discretionary action." And Alderson on Receivers, p. 75: "The application for the appointment of a receiver is always addressed to the sound discretion of the court. The appointment is not a matter of right. The power to appoint a receiver is a discretionary one to be exercised with great

circumspection. The discretion is not arbitrary or absolute, but sound and judicial. It is not to be too strictly limited or lightly used"—citing many cases in support of the principle. In *Crane v. McCoy*, 1 Bond, 422, Fed. Cas. No. 3,354, it is held: "The application for the appointment of a receiver is always addressed to the sound discretion of the court to which it is made. As a general rule such appointment will be made in all cases where the interests of parties seem to require it." In *Cameron v. Improvement Company*, 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 28, it is held: "The appointment of a receiver pendente lite is a matter committed to the sound discretion of the judge before whom the proceeding is pending." And it is there further held: "The appointment of a receiver will not be disturbed on appeal, unless it appears affirmatively to have been unwarranted; and to show this there must be a great preponderance of evidence against the propriety of the appointment, as the appellate court will not undertake to weigh the testimony where there is substantial conflict in it." In a note to said case, at page 96 of 72 Am. St. Rep., it is said that the appointment of a receiver is proper where it is sought to enforce a vendor's lien and there is danger of loss by the purchaser's insolvency or otherwise, citing *Hughes v. Hatchett*, 55 Ala. 631. In *McCaslin v. State*, 44 Ind. 151, it is held: "Where a purchaser takes possession of and claims real estate by virtue of his purchase, and is in possession at the commencement of an action for the recovery of the purchase money and for the appointment of a receiver to take charge and possession of the real estate pending litigation, because of waste committed and threatened by the purchaser, the appointment of a receiver is not such a change of possession as to estop the vendor from enforcing his remedy." See, also, 4 Pom. Eq. Juris. § 1334. Plaintiff had been many years carrying on a heavy business in the lumber trade, and had accumulated a large number of tracts of land and of standing timber in the three counties of Randolph, Upshur, and Webster, and had in connection with his business built a railroad of some 13 or 14 miles in length, from the town of Pickens into his timber lands, at a cost, with its equipment, of some \$74,000, for the purpose of carrying his manufactured product to market. The defendants Butts, McCormick, and Wilson contracted for the purchase of the whole property of the plaintiff, real and personal, including the railroad and its equipment, and at once took possession and began cutting, manufacturing into lumber the timber, and marketing the same. It was evidently the intention of the plaintiff in making the sale, and presumably that of the purchasers, from the provisions made in the contract for payments of \$5,000 every month, that the timber should be paid for about as fast as it was removed. The timber constituted the chief value of the larg-

er part of the land purchased, and at the price the defendants claim they were to have an abatement for the failure of title to the standing timber, and which claim is supported by the written contract as it is written, and in case it shall hereafter be found there was no mutual mistake as charged by plaintiff in fixing the amount to be abated therefor, at \$19 per acre of standing timber, such standing timber being 18,059 acres, at the said price alone would represent over \$305,000, or more than three-fourths of the sum to be paid by the defendants for the whole purchase. The defendants prosecuted vigorously the cutting and removal of the timber for some 18 months without paying a dollar on the monthly payments of \$5,000 each, agreed by them to be paid, insisting that they could not be required to pay any of the deferred payments of the purchase money until a perfect deed of general warranty for all the property was made to them by the plaintiff and free from incumbrance, and cite many authorities to support their contention. And their position in cases where the contract has been completed by giving the notes for the deferred payments so as to entitle the vendor to his lien that he may proceed, if necessary, to enforce payment, is the correct position and supported by their cited authorities; but it will not hold good in a case where the vendee has taken possession, and, while refusing to carry out his contract by giving his notes and paying no part of the deferred payments of the purchase money long past due, is taking off and appropriating wholly to his own use that element of the real estate which constitutes its chief value, and, as to a large part of the real estate in controversy here, the standing timber seems to constitute almost the sole value. In *Gates v. McLean*, 70 Cal. 42, 11 Pac. 489, it is held that where the contract provides for the vendee taking possession, his remedy, in case the title of the vendor fails or he is unable to make a conveyance as stipulated, is to rescind or offer to rescind and restore the possession, in which event he may recover the purchase money advanced, with interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably be worth; but if he chooses not to rescind, but to retain possession under the contract, he can do so only on condition that he pay the purchase money and interest according to the contract. In the latter case it is considered that he is willing to receive such title as the vendor is able to give and is content with the personal responsibility of the vendor upon his covenants. And in *Rhorer v. Billa*, 83 Cal. 51 (Syl., point 1) 23 Pac. 274: "A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the stipulated purchase price. He must surrender possession or show an eviction before he can defend a suit for the purchase money, or show a failure of consideration, or counterclaim to the purchase

money, or damages for delay in performance of the contract by the vendor. So long as he retains possession he waives all objections, whether of defect of title or of delay in completing it, and is bound to accept title according to the terms of the contract, if offered while he still retains possession." In *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735: "A vendee cannot resist payment of purchase money on ground of defect of title in the vendor, while he retains the title bond and continues in the possession of the land." In *Worley v. Nethercott*, 91 Cal. 512, 27 Pac. 767, 25 Am. St. Rep. 209, it is held: "If after a contract is made for the sale of real property, it is ascertained that the title of the vendor is not perfect, the vendee must either rescind the contract and restore possession, or accept the title as it is and pay the purchase price. He cannot, while declining to pay such price on account of the defect in the title, hold possession of the property until the title shall be perfected." This principle is well settled. *Stave Co. v. Smith*, 116 Ala. 416, 22 South. 275, 67 Am. St. Rep. 140; *Gates v. McLean*, 70 Cal. 42, 11 Pac. 489; *Rhorer v. Billa*, 83 Cal. 51, 23 Pac. 274; 3 Pom. Eq. Juris. § 1260; *Giles v. Williams*, 8 Ala. 316, 37 Am. Dec. 692; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Vall v. Nelson*, 4 Rand. (Va.) 478; *Johnston v. Jarret*, 14 W. Va. 230; *Rader v. Neal*, 13 W. Va. 373; *Goddin v. Vaughn's Ex'r*, 14 Grat. (Va.) 126.

Counsel for appellants in their brief say: "The title of Henry Spies to the real estate sought to be conveyed is so defective and covered with liens and incumbrances that a court of equity will not compel the defendants to accept and pay for it." While the plaintiff in his bill says that he is advised that he is entitled to have specific performance on the contract of January 28, 1904, and that, if he be mistaken in that, then that the said contract should be rescinded and the parties placed in statu quo; that the defendants might not refuse to carry out the contract and yet reap all the benefits thereof and refuse to pay for them. If the deed tendered by plaintiff to the defendants for the property sold them by him is liable to all the criticisms and objections raised against it by the defendants, and this could be made to appear to the satisfaction of a court of equity, they would have little trouble in this cause to have a rescission of the contract; but they seem neither to desire a rescission nor to perform their part of the contract by making the notes or paying anything on account of the purchase money. As to the liens upon the lands constituting a part of the objections of defendants to the deed tendered them by plaintiff, and which plaintiff testifies do not amount in all to more than from \$15,000 to \$20,000, the defendants have a right to compel the application of the purchase money due from them to the payment of such liens and have credit therefor upon the purchase money. *Douglass v. Ruth-*

erford, 25 W. Va. 708; *Curry v. Hale*, 15 W. Va. 867. It appears from the affidavits filed that all the timber has already been removed by appellants from some of the tracts and a large portion from others, and that the timber constitutes the chief value of the land, and that when the timber is removed from the land a large part of it would be almost worthless; affiants stating that the property was constantly being depreciated in value. Many affiants state that in their opinion the whole property would not sell for \$300,000. There is some evidence tending to prove the insolvency of appellants, defendants in their answer make a general denial of the allegation of insolvency, but it is not made to appear affirmatively that they have assets to any considerable amount other than that purchased from plaintiff, while indebtedness is shown, besides the \$300,000 of purchase money to plaintiff, of at least \$19,500; that on contracts for services for which cash was to be paid the parties who were entitled to cash were put off for long time with the notes of appellants who said they could not pay cash. There is much evidence in the affidavits filed in the case of the mismanagement of the business and want of experience therein, not only general statements of the fact, but giving specific acts of mismanagement resulting in waste.

Defendants rely principally, to overcome the effect of these affidavits, upon their denial in the answer to the allegations of plaintiff's bill touching the bad management of the business and the incompetency of the managers. The answer is not taken as proof, even when sworn to, the general replication to the answer puts the defendants on proof of the allegations thereof. *Knight v. Nease*, 53 W. Va. 50, 44 S. E. 414; Code 1899, c. 125, § 88. Defendants claim "that they have placed on the said land and railroad in the shape of permanent improvements about seventy thousand dollars." They extended the railroad some 3 or 3½ miles, at a cost, as they claim, of about \$31,000, as a part of such "permanent improvements." Alex W. Ewing, a civil engineer, who assisted as such engineer in the construction of the 13 or 14 miles of said railroad constructed by plaintiff at a cost (as claimed) of \$74,000, states that the same was all, or principally, over mountains and hills, through mountain gorges, along side hills which were, many of them, very steep, and altogether a very rough route over which to construct a railroad; that, on the other hand, the part of the road constructed by Butts, McCormick, and Wilson was through bottom lands and over an easy and cheap route of construction, and states that he "believes the cost of constructing the roadbed made by said Spies is per mile four times as great as that per mile constructed by Butts, McCormick, and Wilson." If this statement be true, the outlay of defendants for the construction of the extension of the railroad of 3 or 3½ miles was

at an unnecessarily extravagant cost. Appellants' counsel further say: "Abatements are now due from the plaintiff to the defendants to a larger amount than the unpaid purchase money"—the words "now due" in said statement meaning as of the date of the decree. The contract contains the following provision: "It is understood and agreed, however, that if the said party of the first part shall be unable by the said 1st day of July, 1904, or at the time of the delivery of the deed hereinbefore mentioned, to make good title to any of the tracts of land, coal and standing timber intending to be conveyed by this agreement, the same may be conveyed by him to the parties of the second part at any time before final settlement shall be made of the purchase price aforesaid, upon the perfecting of his title thereto, and no abatement shall be made of said purchase price by reason of any such tracts so conveyed before such final settlement." Abatements under this provision of the contract are matter for future adjudication. Appellants cite *Wilson v. Maddox*, 46 W. Va. 641, 33 S. E. 775, where it is held in syllabus (point 3): "When the equities of the bill are fully and fairly denied by answer, unless the plaintiff overcome such denial by other testimony, the question should no longer be regarded as one addressed to the discretion of the court, but it is error to appoint a receiver when the charges of the bill are so denied." And also cite *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5, *High on Receivers*, par. 24, and 1 *Bart. Chy. Prac.* § 146, as conclusive against the appointment of the receiver in this case; defendants having answered, denying the allegations of the bill. Said section 146, *Bart. Chy. Prac.*, says: "The evidence necessary to overcome the effect of an answer may be introduced by affidavits, which may be filed both before and after the answer comes in; and it is enough that the plaintiff by his bill and affidavits makes out a prima facie case, for the court in passing upon the application in no manner anticipates the ultimate judgment upon the rights of the parties on the merits of the case. Indeed, so little does the court consider the merits of the case that on such an application (for a receiver) it will not even regard an objection that the bill is multifarious, or that it is faulty for misjoinder of parties"—citing *High on Receivers*, §§ 84-86, 88, 89, 738. And it is there further said: "The evidence introduced when the application is before decree must be in support of the allegations of the bill, and the answer of the defendant is to be regarded merely as his affidavit."

As a further reason for the appointment of a receiver the plaintiff makes the following allegation: "That the defendants James McCormick, Ida M. Butts, and Harry T. Wilson have refused to pay taxes for the year 1904, on the real estate conveyed to them by the plaintiff, and some of the same

has been returned delinquent, and, unless redeemed, the same will be sold by the state for the nonpayment thereof. In order to prevent the returning of some of the said land delinquent, the plaintiff has been compelled to pay a part of the taxes thereon, and the defendants, James McCormick, Ida M. Butts, and Harry T. Wilson, refuse to refund the amount so paid by him." This allegation seems to have been ignored by the defendants, both in their answer and in the briefs of counsel, except a general denial in the answer, where they "deny each and all the allegations of said bill not herein specifically admitted to be true, and call for full proof thereof." In *Darusmont v. Patton*, 4 Lea (Tenn.) 597: "It is a good ground for the appointment of a receiver of land in a suit pending in this court, where the decree below declares the applicant to have a lien on the land for the payment of debt, that there are taxes due and unpaid which are about to be enforced by a sale of the land, unless the party in possession will pay the taxes in a reasonable time." See note to *Cameron v. Improvement Company*, 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep., at page 95. "As between the parties the one in possession—whether vendor or vendee—is liable for taxes, unless it is otherwise stipulated; and, if the one not in possession is compelled to pay them, he has a remedy over against the other. A vendor who has thus been forced to pay taxes may withhold conveyance until reimbursed." 28 A. & E. E. L. (1st Ed.) 125; *Hall v. Denckla*, 28 Ark. 506. In *Crelgh's Adm'r v. Boggs*, 19 W. Va. 240, Syl. Pt. 5, it is held: "Where a written contract for land has been made, and the vendee dies, and the vendor of the land is compelled to pay taxes incurred after the death of the vendee to prevent the sheriff selling it for delinquent taxes, the heirs and not the administrator of the vendee are bound to refund to the vendor the taxes so paid; and he is not bound to deliver them a deed for the land till they have done so, though the administrator may have paid him the whole of the purchase money." In *Farber v. Purdy*, 69 Mo. 601, it is held: "A vendee of real estate in possession under a contract of sale is liable, as between himself and the vendor, for all taxes assessed after the commencement of his possession, and the fact that by the contract the vendor is bound to make him a warranty deed upon payment of the purchase money does not change this rule." When the plaintiff sold these lands to the defendants, in his contract of sale it was provided: "As a further security for the payment of said sum of \$300,000.00 a vendor's lien shall be retained by the party of the first part upon all the real estate above described, and a deed of trust shall be executed by the said Pickens & Hackers Valley Railroad Company upon all and singular its real estate, rights of way, rolling stock, equipment, rights, and franchises to

secure the payment of the same, the execution of which said deed of trust shall be contemporaneous with the transfer to the parties of the second part of the capital stock of said corporation." And, in a suit to enforce his rights against the real estate under his contract, if it appear that the property is being wasted or depreciating in value the court should appoint a receiver. The vendor had a right to look to the land and its timber for security, and if the property is in danger of loss or misappropriation he is entitled to the aid of a court of equity to protect his interest by taking charge of and preserving the property. In *Core v. Bell*, 20 W. Va. 169 (Syl., point 1), it is held: "An injunction to stay waste ought to be granted a vendor against a vendee, to whom he has sold a tract of land in fee simple retaining the title as a security for the purchase money, who brings his suit to subject the land to the payment of the purchase money, and the bill charges the defendant with cutting timber on the land in a manner calculated to render it an incompetent security for the payment of the purchase money. In such a bill it is not necessary to allege the insolvency of the defendant." At page 174 in the last-mentioned case it is said in the opinion: "In a bill for such a purpose it is not necessary to allege the insolvency of the defendant. The vendor has retained the title as security for the purchase money, and he has a right to look to the land for payment thereof, and is not under any circumstances during the life of the vendor compelled to look elsewhere for payment." In *Ogden v. Chalfant*, 32 W. Va. 559, 9 S. E. 879 (Syl., point 2), it is held: "A receiver may be appointed in such case whenever it is shown in any proper manner that the debtor is insolvent, or that the lands are likely to prove insufficient to satisfy the undisputed or ascertained liens thereon."

It is contended by counsel for appellants that plaintiff had no lien on the timber after it was severed, that while standing it was realty, and the moment it was severed it became personalty and the absolute property of the vendees. Plaintiff had no occasion up to this time for his vendor's lien upon the land, as he had sold it by an executory contract, and had withheld the legal title to the whole property as security for the purchase money until by the completion of the contract by the making of the notes of \$5,000 each, to be paid monthly by the defendants, and the execution by plaintiff of a deed for the property, his vendor's lien would be effective. It is true he had no vendor's lien upon the timber either before or after it was severed, for such lien was not yet acquired; but he held the legal title as his security. 2 Jones on Liens, § 1107, says: "A lien by contract is not a vendor's lien. The interest of a vendor who has given an ordinary contract or bond for the sale of land, but retains the title to the land in himself, is often

spoken of in the cases as a vendor's lien; but it is conceived that this is a misuse of terms, which should be avoided as leading to confusion. There is a fundamental distinction between a vendor's security in such case and the lien implied by law, and properly known as the vendor's lien. When the legal title remains in the vendor, the vendee has merely an equity of redemption in the land, and no act of his can possibly affect the vendor's title; while, in case of a mere lien in the vendor, the fee is in the purchaser, who may at any time discharge the lien by conveying the land to a bona fide purchaser for value. In the one case the vendor has a lien without any title, and in the other he has the title without any occasion for a lien. His title, by the terms of the contract, is his security; and he cannot in any way be divested of his title, except the vendee fulfils his contract, and by that means becomes entitled to a conveyance." In treating of liens arising from express contracts (section 1235, in his third volume), Mr. Pomeroy says: "The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property." See cases there cited. Plaintiff and defendants had entered into this contract of January 28, 1904, intending that the whole property should remain as security for the purchase money of the realty, and it appears from the contract itself that the cash payment was to pay for the personal property purchased and for such timber as might be cut and removed within the first few months and until the contract might be completed by the execution of the deed on the part of the plaintiff and the making of the 59 \$5,000 notes for the residue of the purchase money. The defendants elected to take possession under the contract and continue to cut and remove the timber while refusing to accept the deed tendered them. While they had entered lawfully into possession, they were cutting and removing the timber in violation of the contract from the time they refused to make the notes required by the contract. A part of the timber cut and manufactured has not been removed from the premises to which plaintiff still has the title, and it is shown that the defendants are removing the timber and re-

fusing to make the notes as required by the contract, or to apply any of the proceeds of their product from the land to the payment of the purchase money due from them to the plaintiff. "A vendee in possession must do nothing to diminish the security of his vendor, either by committing waste or removing annexations of a permanent character." 28 A. & E. E. L. (1st Ed.) 122. If defendants' contention is correct, they could, if they chose, sever all the timber on the land and convert it into personal property, of which they would be the absolute owners, and so deprive the plaintiff of his lien or right to look to the timber so severed for his purchase money, and they could transfer their interest or good title in or to the same to an innocent purchaser without notice of their fraud, thus depriving the plaintiff of any remedy as against the timber. In section 1260, 3 Pom. Eq. Juris., it is said: "There is a plain distinction between the lien of the grantor after a conveyance and the interest of the vendor before conveyance. The former is not a legal estate, but is a mere equitable charge on the land. It is not even, in strictness, an equitable lien until declared and established by judicial decree. In the latter, although possession may have been delivered to the vendee, and although under the doctrine of conversion the vendee may have acquired an equitable estate, yet the vendor retains the legal title, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure, namely, by paying the price according to the terms of the contract." The defendants have remained in possession of the land after their contract required them to give the 59 notes of \$5,000 each for the deferred payments of purchase money, cutting and removing the timber therefrom, refusing to pay anything on the purchase money, and refusing to make said notes as required by the contract, and equity will give the vendor a right to hold the manufactured product remaining on the premises liable to the purchase money past due to him.

Appellants say the court erred in fixing the penalty of bond to be given by them on their motion in order to set aside so much of the decree as appointed a receiver and refused to dissolve the injunction, claiming that a penalty of \$150,000 required by the court was excessive. There is nothing offered in the petition or briefs of appellants to sustain this assignment of error, except the assertion that it is exorbitant and excessive. We see nothing in the record to satisfy this court of their contention, or that would warrant the appellate court in holding that the court erred in this regard.

For the reasons herein given, the court is of opinion there is no error in the decree of the circuit court, and the same is affirmed,

and the cause remanded to the circuit court of Upshur county for further proceedings to be had therein according to the rules governing courts of equity.

(59 W. Va. 638)

COMER v. RITTER LUMBER CO.

(Supreme Court of Appeals of West Virginia.
April 24, 1906.)

1. APPEAL—OBJECTIONS WAIVED.

One who resists a motion made by a party introducing improper evidence to exclude it from the jury cannot complain, on appeal, of its introduction.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3597.]

2. DAMAGES—INJURIES TO INFANT.

An infant cannot recover damages for loss of service during minority arising from personal injury.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County.

Action by Arthur G. Comer, who sued by his next friend, against the Ritter Lumber Co. Judgment for plaintiff. Defendant brings error. Reversed.

J. J. Divine and Rucker, Anderson & Hughes, for plaintiff in error. E. C. Marshall, for defendant in error.

BRANNON, J. Arthur G. Comer, a boy between 13 and 14 years of age, while in the employ of W. M. Ritter Lumber Company, at a sawmill, was injured by a fragment of the cylinder head of a steam sawmill striking his foot, so injuring three of the toes that a part of his foot had to be amputated. The claim of the plaintiff for recovery is that the piston rod which carried the log carriage to and fro, owing to a loose bracket, was in bad condition, which caused it to break and drive out the head of the cylinder, breaking it into fragments, which were scattered around by the force of the steam, one piece striking Comer. It is also alleged that there should have been a barrier to protect the workmen against injury from the blowing out of the cylinder head. Comer, by his father and next friend, brought an action against the company and recovered \$1,200 damages by verdict and judgment, and the company brings the case to this court.

One question in the case is this. The plaintiff gave evidence over objection to prove that the company had not given instruction to Comer for his safety under the law which requires such instruction in the case of an infant employé. After this evidence was given the plaintiff moved the court to exclude the question and the answer, but the defendant objected to their exclusion. We are of the opinion that this point is untenable. "The appellant must be consistent, and if he asks the court below to make a specific ruling, or to proceed in a certain manner, he cannot complain in an appellate

court that the ruling or action is erroneous. He has invited the error and must accept its results, and the appellate court will not reverse a judgment at his instance on account of it." 2 Ency. Pl. & Prac. 519.

Another point is that several witnesses were allowed to express their opinions to the effect that the operation of that mill or cylinder head, piston rod and bracket was dangerous without protection, meaning some barrier erected to prevent the cylinder head, in case of its blowing out, from flying out and injuring the workmen. The point of this objection is that this was a subject upon which mere opinion evidence could not be given, but was provable by evidence of facts. In response to this it may be said that the construction and operation of machinery involves technical matters. The witnesses giving this evidence were experienced in the construction and operation of mills, had helped to construct them and operate them, had helped construct this one, and knew much of this mill from personal experience. We think their evidence was admissible. They also stated facts in connection with their opinions touching this mill.

Another point of objection is that it was incumbent on the plaintiff to prove that the injury was due to the defective condition of the steam feed as a matter of fact, and that the defendant knew or could have known such defect, by reasonable care, and did not provide a safe place for its employes to work in. This is clearly the duty of the plaintiff. He must show negligence in this respect. He must show that the plaintiff's injury proceeded from failure and neglect of duty imposed by law upon the defendant. He must show that the mill machinery was defective and dangerous. Whether he has done so, we do not say. That is left for the decision of a jury upon a new trial. Whether the plaintiff was where he should not have been is a question for the jury.

Defendant complains of an instruction given by the court that, "the plaintiff in his action is entitled to recovery, he may recover the value of his time lost during his cure and a fair compensation for his physical and mental suffering caused by the injury, as well as any permanent reduction of his power to earn money." We think this instruction plainly erroneous. It gave the plaintiff recovery of damages from the time of the boy's injury for more than seven years of his minority for loss of service. As appears in *Halliday v. Miller*, 29 W. Va. 431, 1 S. E. 821, 6 Am. St. Rep. 653, and *Trappel v. Conklyn*, 37 W. Va. 253, 16 S. E. 570, 38 Am. St. Rep. 30, the father is entitled to the son's services until his majority. All the books say so. *Thompson on Neg.* § 7310; 8 Am. & Eng. Ency. Law (2d Ed.) 851, states that the minor cannot recover as an element of damages for the

loss of time during minority. Clearly so, because the father owns the service of the child. Action for loss of service up to majority must be in the name of the father. Counsel for the plaintiff does not deny this legal proposition, but he would meet it by saying that as the father brought this suit as next friend he is estopped from himself bringing another suit to recover damages for loss of service of his son during minority. We think that the Ency. Pl. & Prac. vol. 14, 909, will not sustain this position. True, the case of *Barker v. Flint*, 91 Mich. 298, 51 N. W. 897, 16 L. R. A. 154, 30 Am. St. Rep. 471, mentioned in the Encyclopedia might seem, only seem, to support that view. It says that when a father sues as next friend for his son, and recovers damages, a suit in his own name to recover for loss of service would be barred. That is plainly so, because he obtains a recovery in the name of his child, and is estopped from suing in his own name to get a double recovery. That may well be so; but it does not thence follow that because the father is barred that transfers or assigns the right of action to the son. The question is whether the son can recover for loss of service during his minority. That is our question. We say he cannot recover for want of legal title—for want of right of action. The instruction was erroneous in this matter. We cannot say, as we are asked to say, that the amount of damages recovered would be justified as compensation for damages after the boy's majority. The instruction allowed a recovery for all time after the injury, and we cannot guess whether the jury did or did not exclude loss of service during the boy's minority. Indeed, we will presume the jury did not do so, because the instruction would forbid it. We will add that the instruction also allowed damages for the permanent reduction of the boy's power to earn money, when there was no evidence touching that matter, further than the fact of injury. We may say that the loss of one-third of his foot would necessarily diminish the boy's capacity to earn money; but no evidence was given to enable the jury to measure the damages. We do not mean to say that in such case it is possible to give evidence constituting certain data or standard for exact measurement; still it seems that there ought to be some evidence forming a basis for approximate estimate. *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894. Instructions should not be given upon a matter on which there is no evidence, to which the instruction could be applied. *Parker v. Bldg. & Loan*, 55 W. Va. 134, 46 S. E. 811; *Oliver v. Ohio River R. Co.*, 42 W. Va. 708, 26 S. E. 444.

It follows that we must reverse the judgment, and set aside the verdict, and grant a new trial.

(60 W. Va. 42)

THOMPSON v. MURPHY et al.

(Supreme Court of Appeals of West Virginia.
Jan. 30, 1906. Rehearing Denied June
2, 1906.)

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—NOTICE.

On the trial of an issue as to whether an act done by an agent was within the scope of his actual, or, within the meaning of the law, apparent, authority, notice to the agent of facts relating to, or growing out of, the act in question, is not notice to the principal. If the act is beyond the agent's authority, the relation of principal and agent does not exist as to it, and the rules applicable to such relationship do not apply.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 670, 680-684.]

2. SAME—LOAN TO AGENT—EVIDENCE.

Proof of a loan made to an agent on behalf of his principal is not evidence of the reception of the money by the principal, if the agent had no authority to borrow money on behalf of his principal. Nor is the agent's admission or representation as to the purpose for which he borrowed the money evidence against his principal.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 416-419, 572, 573.]

3. SAME—RATIFICATION.

Failure on the part of a principal to dissent from or repudiate an unauthorized act of his agent, within a reasonable time, dependent upon the nature of the transaction and the situation and surroundings of the parties concerned, is evidence of ratification of the unauthorized act.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 638-642, 659.]

4. SAME—KNOWLEDGE OF PRINCIPAL.

Lack of knowledge, on the part of a principal, of any of the material facts connected with an unauthorized act of his agent, done on his behalf, will prevent the silence of the principal, or his failure to repudiate the act, from amounting to a ratification thereof.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 627.]

5. SAME—EVIDENCE OF AUTHORITY.

Mere rumor or common belief that an agent has power to do a particular act on behalf of his principal is not of itself evidence of such authority.

(Syllabus by the Court.)

Error to Circuit Court, Tucker County.

Action by A. Thompson against P. H. Murphy and others. Judgment for plaintiff, and defendant the Laboringman's Mercantile & Manufacturing Company brings error. Reversed.

C. O. Strieby, for plaintiff in error. Cunningham & Stallings, for defendant in error.

POFFENBARGER, J. The Laboringman's Mercantile & Manufacturing Company seeks the reversal of a judgment against it in favor of A. Thompson for the sum of \$407.44, rendered by the circuit court of Tucker county, in an action of debt on a promissory note. This action is similar in some respects to that of Third National Bank v.

Laboringman's Mercantile & Manufacturing Co., decided by this court, and reported in 49 S. E. 544. Some of the principles announced in that case are applicable and controlling here. The note, bearing date January 24, 1901, is for the sum of \$382.39, was payable 30 days after date at the office of the Blackwater Lumber Company in Davis, W. Va., and was signed "Laboringmans Mer. & Mfg. Co. P. M. Murphy, Pres." The parol evidence introduced is in substance as follows: A. Thompson says Murphy approached him on the day of the date of the note and requested a loan, representing that the defendant company had a note due at the bank which it was unable to meet by a few hundred dollars, and also that there was an account due from it to the Blackwater Lumber Company, a corporation of which the said Thompson was practically the owner, which the defendant desired to pay. Thereupon Thompson prepared a note, and after obtaining the signature thereto gave his check for \$200, the difference between the amount due the Blackwater Lumber Company and the face of the note. Being asked, on cross-examination, whether the amount thus deducted was due from the defendant company or from the Davis Poultry Company, with which also Murphy was connected, he said he did not know, but had relied upon the information given him by Murphy, who had said "our company owed the Blackwater Lumber Company." Whether the check was deposited to the credit of the defendant company in bank, and the amount thereof checked out in payment of its debts or otherwise applied by it, does not appear. After the note became due, it was protested, and notice thereof sent to the defendant company. Some time thereafter, Thompson presented the note to the manager of the company at its office, and later, to John F. Getty, supposing him to be one of the directors of the defendant company, but Getty seems not to have been a director until April 20, 1901. These demands were made probably in March or April, 1901. George B. Thompson testifies that very soon afterwards he called upon W. E. Patterson, secretary and director of the company, concerning the note, and was told by Patterson that he knew nothing regarding it, but would consult Murphy about it, and send him down to see about it. John F. Thompson testified that he had presented the note in August or September, 1901, to W. W. Gollightly, manager of the company, and demanded payment thereof, and was informed that the directors would have to take action upon it before it could be paid. Having been informed that the directors would meet in a day or two, he went back the next week and was told that they had decided that they had no right to act on matters of that kind, the meeting having been a special meeting, but that a regular meeting would be held soon, at which action upon it

could be taken. After the regular meeting he went back and was informed that nothing had been done about the note. The book in which the directors recorded their proceedings shows two entries made on the 5th day of September, 1901, which are, respectively, as follows: "On motion of Mr. Marks, seconded by Mr. Pressau, it was ordered that the demand of Mr. A. Thompson for the payment of the note of \$382.39, contracted by P. M. Murphy be laid on the table. On motion of Mr. Marks, seconded by Mr. Pressau, it was ordered that the demand of Mr. A. Thompson, for the payment of the note of \$382.39, contracted by P. M. Murphy, without the knowledge and consent of the directors, be laid on the table."

As tending to show acts from which the public might infer the authority of Murphy to borrow money for his company and execute its obligations therefor, it was shown that he had borrowed of George B. Thompson, January 15, 1901, \$200, and, on February 2, 1901, \$500, for which, on the last-named date, he had given the defendant company's check, postdating it. When due, it was presented for payment and protested. Later, it was re-presented, upon information from Murphy that it would be paid, and was accordingly paid, but whether the money was deposited for that purpose by the company itself, or by Murphy, does not appear. On the 21st day of February, 1901, Murphy gave to F. A. Cruickshank the note of the company for \$200 for money loaned by him, which note was afterwards paid in currency by P. M. Murphy. The evidence further discloses that at about the time the check, given to George B. Thompson, was protested, Murphy, with the knowledge and authority of the directors, was at Piedmont, W. Va., attempting to raise money for the company on its note for \$2,000. The question of liability was withdrawn from the jury by a demurrer to the evidence, which the court overruled, and rendered judgment for the amount due as ascertained by the verdict. It is not pretended that Murphy had any inherent authority or power as president to borrow money, and execute the company's note therefor. That such authority is not possessed by the president of a corporation, in the absence of an express delegation thereof, has been determined by this court. *Bank v. Kimberland*, 16 W. Va. 579; *Third National Bank v. Laboringman's, etc., Co.* (W. Va.) 49 S. E. 544. Nor is it pretended that he had any antecedent express authority from the board of directors to so bind the corporation.

The judgment rests upon two propositions, the first of which is that there is evidence which would justify a finding that the defendant, with full knowledge, allowed Murphy to so act and deal, in respect to its business, as to constitute a representation to the public of authority in him to borrow money on its account. The facts relied upon to sustain this proposition are of the same

character as those set up in *Third National Bank v. Laboringman's, etc., Co.*, and, in that case, they were deemed and held wholly insufficient for that purpose. They were almost contemporaneous in date with the transaction with Thompson. It does not appear that he had any knowledge of but one such transaction, namely, the first one had with George B. Thompson. Nothing in the testimony indicates that the directors of the corporation had any knowledge of this transaction subsequently had with George B. Thompson, or the one had with W. W. Gollightly. In the absence of any knowledge of these facts on the part of the board of directors, there is no foundation for saying the corporation held Murphy out to the public as an agent authorized to borrow money for use in its business. A verdict of a jury, predicated upon such testimony, could not be sustained, and therefore the evidence is clearly insufficient upon a demurrer thereto.

The other view is that of ratification of the unauthorized act of the president. There is no claim of an express ratification. The contention is that it is a ratification by acquiescence and retention of benefits. As noted in the statement of the evidence, it does not appear that the account which was set off against the note at the time of its execution was due from the defendant company. Mr. Thompson's evidence goes no further than to say it was so represented to him by Murphy, and he acted upon that information. Whether the company received the benefit of the check given for the balance of the note does not in any way appear from the evidence. The alleged reception of benefits stands wholly upon the representations made to Mr. Thompson by Murphy. The check is not produced, so as to show whether it was payable to Murphy individually or to the defendant, nor if payable to the defendant, whether it was deposited to its credit or cashed by Murphy and the money used by him. Starting with the admitted fact that the act of Murphy in borrowing this money was outside of, and beyond, his authority, it would be contrary to legal principles to say that his representations or acts, relating thereto, are binding upon the company. What he said as well as what he did was beyond the scope of his authority, and it is well settled that, only such acts and declarations of an agent are binding upon his principal as were done and made within the scope of his authority. Had said sum of \$200 been a debt due the defendant, it may be that it could have been rightfully paid to its president. This we do not decide. But it was borrowed money. The acquisition of it was an unauthorized act, and the custody of it was, therefore, necessarily not on behalf of the principal. Hence, the agent's possession of it raises no presumption, and lays no foundation for an inference, that the principal received the benefit of it. It constituted no notice to the principal.

"The rule, that notice to an agent of facts arising from and growing out of the subject-matter of his agency, is constructive notice to his principal, has no application to the case where the question is, whether the act relied on to bind the principal, was done within the limit and scope of the agent's authority or not." *Express Co. v. Trego*, 35 Md. 47. Notice to an agent is only constructive notice to his principal, wherefore it is operative only as to matters within the scope of the agent's authority. *Story's Agency*, § 140b; *Bank of United States v. Davis*, 2 Hill (N. Y.) 451; *Bank v. Aymar*, 3 Hill (N. Y.) 262. It will be hereinafter shown that a principal is not bound by an act of his agent beyond the extent of his authority, except by a ratification, after full knowledge of the material facts. This rule of itself negatives the view that the knowledge of the agent is notice to his principal. If it were, proof of knowledge would be unnecessary. As to such acts, there is no relation of principal and agent. The acts are not within the agency. This doctrine is not in conflict with the principles applied in *Lytle v. Cozad*, 21 W. Va. 183. In that case, the act done was within the apparent authority of the agent. He merely violated secret instructions, not binding on strangers, having no knowledge of them. This clearly appears from the language of Judge Green's conclusion. He said: "The sureties by intrusting the bond to the principal in such a case make him their agent to deliver the bond to the obligee, for this is the ordinary mode of conducting such transactions. And having given the principal instructions, that he must get other securities on the bond before he delivers it to the obligee, they, by giving the bond in a perfect form, trust him to carry out such instructions; and if he fails to do so but delivers the bond to the obligee in such perfect form, it must be obligatory on them, for it is their fault that injury has resulted; and the loss thus resulting they cannot shift to the obligee by proving such private instructions given by them to the principal obligor, except where the obligee is guilty either of fraud or rashness in accepting such bond." This case is quite unlike that of *Bank v. Laboringman's, etc., Co.* There, the evidence disclosed application of the borrowed money to the payment of the debts of the defendant. Its reception of the benefits of the unauthorized act was beyond question.

This may not, however, be conclusive of the case. A principal may ratify the unauthorized act of his agent without having received the benefit thereof. It may be that the defendant did receive the money notwithstanding the lack of evidence here to show that fact. The authorities do not seem to hold the reception of benefits to be an essential element of ratification. Nor is any reason perceived why it should be. It is necessary, therefore, to consider the other evidence relied upon to show ratification.

This consists of the silence of the defendant from March or April, 1901, when, it is claimed, the note was brought to the attention of the general manager and one or more of the directors, until the 5th of September, 1901, a period of probably five or six months. "Where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act." *Story on Agency*, § 256. The authorities almost uniformly say that acquiescence after knowledge of an unauthorized act is evidence of ratification, and such acquiescence need not be for any considerable length of time. What length of time will depend upon the nature of the transaction and the situation of the parties affected or interested. "Silence of the alleged principal, when fully advised of what has been done in his behalf by one who attempts to act as his agent without authority, may be sufficient from which to infer a ratification of the unauthorized act." *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Union M. Co. v. Bank*, 2 Colo. 248; *Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397. "Where the relation of principal and agent exists, but in the particular transaction the agent has exceeded his authority, an intention to ratify will be presumed from the silence of the principal beyond a reasonable time after having knowledge of the transaction, if he has an opportunity to express his dissent." *McGeoch v. Hooker*, 11 Ill. App. 649. "It is a salutary rule, in relation to agencies, that when the principal is informed of what has been done, he must dissent, and give notice in a reasonable time, or otherwise, his assent to what has been done shall be presumed." *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300. To the same effect, see *Bredin v. Dubarry*, 14 Serg. & R. (Pa.) 30; *Fuel Co. v. Lee*, 102 Wis. 426, 78 N. W. 584; *McLaren v. Bank*, 76 Wis. 259, 45 N. W. 223; *Hoosac M. & M. Co. v. Donat*, 10 Colo. 529, 16 Pac. 157; *Breed v. Bank*, 4 Colo. 481; *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800; *Sheldon, etc., Co. v. Eickemeyer, etc., Co.*, 90 N. Y. 607; *Alexander v. Cauldwell*, 83 N. Y. 480; *Phillips v. Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Bank v. Railway Co.*, 117 Cal. 332, 49 Pac. 197; 4 *Thomp. Corp.* §§ 5286, 5288.

Occasionally a case is found which seems to conflict with the proposition just stated. Thus, in *Railway Co. v. Jay*, 65 Ala. 113, the court seems to have inclined to the view that silence and acquiescence, after knowledge received, is not evidence of ratification, and that no duty rests upon the principal to disavow the unauthorized act of his agent, unless the party dealing with the agent would be misled to his injury by failure to repudiate the act properly or the act is in reference to a matter as to which, by the usage of trade, a prompt reply is demanded when notice is given. For this proposition, *Smith v. Shee-*

ley, 12 Wall. 358, 20 L. Ed. 430, and 2 Greenl. Ev. § 66, are cited. 2 Greenleaf on Evidence, § 67, seems to assert two propositions, the first of which is that mere silence after notice of an unauthorized act, with full knowledge of the circumstances, is evidence of ratification, but not conclusive; and the second, that if the silence of the principal is contrary to his duty, or has a tendency to mislead the other party to the transaction, it is conclusive. As an instance of this, the rule governing transactions among merchants, under which an act is deemed to be assented to, after the lapse of a reasonable time when notice thereof has been given is mentioned. This is a species of estoppel, rather than an instance of ratification by acquiescence, and it seems to be the principle which rules the case of *Smith v. Sheeley*. This distinction is marked in other cases. See *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *Breed v. Bank*, 4 Colo. 431. That acquiescence, with full knowledge of the material facts attending an unauthorized act is evidence from which a ratification may be inferred, when no element of estoppel is involved, is made plain by a number of decisions. Where the president of a corporation, without authority of the board of directors, sold all of its personal property and the purchase money was garnished in the hands of the vendee, by a creditor of the corporation, and no steps were taken by the debtor corporation either to affirm or repudiate the act of its president, the silence of the corporation was held to be sufficient evidence of ratification of the unauthorized sale. *Fuel Co. v. Lee*, 102 Wis. 426, 78 N. W. 584. Where officers of a corporation, without authority, have given liens upon its property by mortgage, third parties, such as unsecured creditors, cannot impugn the transaction on the sole ground of want of authority in the officers. *Moller v. Fiber Co.*, 187 Pa. 553, 41 Atl. 478; *Cooper v. Potts*, 185 Pa. 115, 39 Atl. 824; *Ragland v. McFall*, 137 Ill. 81, 27 N. E. 75. In these cases, the only evidence of ratification is the mere silence and acquiescence of the principal.

These authorities may justify the position of counsel for the appellee in saying that acquiescence alone is evidence of ratification. The books assert the proposition over and over and contain numerous illustrations of it. But there is one element which enters into it that must not be lost sight of. When the circumstances are such as to call for the application of the law of estoppel, rather than the mere law of ratification, it may be that the principal can bind himself without full knowledge of all the material facts. The situation may be such as to make it his duty to know. The means of knowledge may be at hand or within easy reach, and his relation to the third party such as to estop him from saying he is without knowledge. But, in the ab-

sence of such circumstances, the authorities are unanimous in holding that there can be no ratification by acquiescence, unless the principal has full and complete knowledge of all the material facts attending the unauthorized act. "Any ratification of an unauthorized act, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were made known to him." *Mechem on Agency*, § 129. "A ratification of the unauthorized acts of an attorney in fact, without a full knowledge of all the facts connected with those acts, is not binding on the principals. No doctrine is better settled on principle and authority, than this, that the ratification of the act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud." *Owings v. Hull*, 9 Pet. (U. S.) 607, 9 L. Ed. 246. Want of such knowledge prevents the possibility of ratification by silence, and it invalidates an express ratification, as will be clearly disclosed by an examination of the following decisions: *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,867; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 827; *Meyer, Wels & Co. v. Baldwin*, 52 Miss. 263; *Ferrestier v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945; *Bank v. Bank*, 13 Bush (Ky.) 523, 26 Am. Rep. 211; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Bennecke v. Insurance Co.*, 105 U. S. 355, 28 L. Ed. 990; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Bell v. Cunningham*, 3 Pet. (U. S.) 69, 7 L. Ed. 606; *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385; *Navigation Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; *Combs v. Scott*, 12 Allen (Mass.) 495; *Bank v. Jones*, 18 Tex. 811; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Bannon v. Wardfield*, 42 Md. 23; *Bohart v. Oberne*, 36 Kan. 234, 18 Pac. 388; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *McCants v. Bee*, 1 McCord, Eq. (S. C.) 383, 16 Am. Dec. 610; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235.

From the review of the evidence herein given and conclusions stated, respecting the same, it is plain that full knowledge of the material facts, relating to the transaction between *Murphy* and *Thompson* is not shown to have been in the possession of the defendant corporation at any time before the institution of this action. Mr. *Thompson* does not testify to any statement, on his part, to the general manager or Mr. *Getty*, as to what the consideration of the note was. Nor is there anything in the testimony of John F. *Thompson*

or George B. Thompson, tending to show that they revealed to any director the circumstances which constituted the ground for executing the note. No notice was given of the satisfaction of the Blackwater Lumber Company account out of the note, or that the residue of it was represented by a check payable to the corporation. Nothing in the evidence shows that any record in the bank in which the corporation kept its deposits, or on the books of the corporation itself, discloses the receipt of the money, or its appropriation to the use of the defendant company. This failure to bring home to the defendant knowledge of the material facts, in connection with its silence, makes a fatal defect in the case, and, therefore, the court should have sustained the demurrer to the evidence.

Although no cross-assignment or error is made by the appellee, respecting the rulings of the court upon the evidence offered and rejected, it may be prudent to say whether the court erred in refusing to permit certain evidence to be introduced. The offers will be stated in the language of the record. On the examination of A. Thompson, his attorney made the following offer: "The plaintiff proposed to prove by this witness that P. M. Murphy was held out to the public generally as the financial agent of the Laboringman's Mercantile & Manufacturing Company, and it was understood by the public generally that the said Murphy was the chief financial agent of the said mercantile company, with the right to execute its notes and other paper, to secure loans for said defendant company and so forth, to which offering the defendant objected, which objection was sustained, to which the plaintiff excepted, by asking the following questions: Q. Do you know the general reputation that Mr. Murphy has in Davis, with respect to this company, the connection that he had with it, as to having charge of the finances and financial affairs of the Laboringman's Mercantile & Manufacturing Company? Q. Did you, at the time you loaned this money, understand, or have information that Mr. Murphy was the financial agent of this company? Q. You may state who it was that seemed to have charge of the financial affairs of the defendant mercantile company. Q. You may state, if you know, how Murphy was held out to the general public with respect to transacting the financial affairs and business of the mercantile company, this defendant?" Upon the examination of witnesses George B. Thompson and F. A. Cruickshank, similar offers were made.

The testimony thus sought to be introduced related merely to reputation and common notoriety. Such evidence would not, of itself, be sufficient to prove the authority of the agent. "The existence of the relation of principal and agent cannot be shown by proof of mere general reputation, unless it is fur-

ther shown that there was knowledge and acquiescence on the part of the alleged principal." Clark & Skyles on Agency, § 68. Evidence to prove a copartnership is governed by the same principles, and 2 Greenleaf on Evidence, § 483, says: "But evidence of general reputation or common report of the existence of the partnership is not admissible, except in corroboration of previous testimony; unless it be to prove the fact that the partnership, otherwise shown to exist, was known to the plaintiff." It would be at least necessary to show, in this connection, that the directors had knowledge of the common report as to the extent of the agency, and had failed to contradict it. *Campbell v. Hastings*, 29 Ark. 512. There is no suggestion in the offer of evidence of any intention to bring home to the defendant knowledge of the matters to which the witness proposed to testify. To prove a course of dealing, it is necessary to show a series of specific acts of which the principal had knowledge and in which he acquiesced. 3 Elliott on Ev. §§ 1633, 1634. The mode of proving agency by this kind of evidence is well illustrated by the following, taken from the opinion in *Eisenberg v. Matthews*, 84 Minn. 76, 86 N. W. 870: "Now, if the defendant had acted as plaintiff's agent in loaning money for him for some years prior to the time in question, such fact, and the number and character of the loans, and the course of dealing between the parties with reference thereto, would tend in a material degree to show that such agency still existed when the loan in question was made." "The accepted acts of an agent or officer of a corporation are always evidence to show the extent of his powers." *Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552. It is not necessary, in order to constitute a general agent, that he should have before done an act the same in specie with that in question. If he has usually done things of the same general character and effect with the assent of his principal, that is enough. *Bank v. Norton*, 1 Hill (N. Y.) 501. These authorities sufficiently indicate the necessity of proving specific acts, done with the knowledge, consent, and approval of the principal, in order to make out a case of agency or authority in the agent to do a particular act. Mere rumor as to the existence or extent of an agency, without proof or knowledge thereof, and acquiescence therein of the principal, of itself, constitutes no evidence of such fact.

As the demurrer to the evidence should have been sustained, and no error has been shown in the action of the court in excluding evidence offered, the judgment must be reversed, the demurrer sustained, and judgment rendered here for the defendant, with its costs in the court below, as well as costs in this court.

(60 W. Va. 121)

PERKINS et al. v. PFALZGRAFF et al.
(Supreme Court of Appeals of West Virginia.
April 10, 1906. Rehearing Denied
June 2, 1906.)

1. LIS PENDENS—FINAL DECREE—REVERSAL OF JUDGMENT—EFFECT—BONA FIDE PURCHASERS.

H. J. F. made his will, devising all his real estate to C. E. H. and L. F. C., trustees, and providing that one-fourth should go to H. F., one-fourth to the lawful children of P., one-fourth to the children of H., and the remaining fourth to the children of C. By codicil the testator afterwards revoked the devise to the children of H. and the children of C., and died intestate as to said two-fourths. H. J. F., Jr., son and only heir at law of the decedent, instituted suit in the circuit court of the United States to set aside the will, and on the 21st day of January, 1885, a decree was entered by said court annulling and setting aside the will and directing the trustees named in the will to convey all the real estate of which H. J. F. died seised to the plaintiff H. J. F., Jr., which they did on the 10th day of February, 1885, by deed of that date. On the 24th day of July, 1885, H. J. F., Jr., and his wife, conveyed 300 acres of the said real estate to L. P., who entered into possession of and held the same, farming it, putting improvements upon it, and paying the taxes thereon. On the 11th day of June, 1890, the children of P., three of whom were infants the other two having then recently reached their majority, filed their bill of review and caused the decree of January 21, 1885, to be reversed and annulled. *Held*, the title of L. P., being a purchase for value without notice, is not affected by such reversal.

2. ADVERSE POSSESSION—BONA FIDE PURCHASER.

L. P., being a purchaser for value without notice, held possession adversely, and was not a co-tenant with the claimants under the will of H. J. F.

3. APPEAL—REVERSAL—EFFECT—RIGHTS OF THIRD PERSONS.

Rights acquired bona fide by a third party under a final decree rendered by a court of competent jurisdiction are not affected by a subsequent reversal thereof.

4. LIS PENDENS—EFFECT OF BILL OF REVIEW.

The decree being final, the bill of review is a new suit, having for its object the correction of the final decree in the former suit.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 1065.]

5. JUDGMENT—FOUNDATION IN PLEADING.

A decree, to be valid, must be based upon proper pleadings, without which it is void.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 34.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Suit by Elma Perkins and others against Lewis Pfalzgraff and others. From a decree for plaintiff, defendants appeal. Reversed.

Camden & Peterkin, for appellant. Dave D. Johnson, for appellees.

McWHORTER, P. Henry J. Fisher died in 1883, leaving a will devising and bequeathing his whole estate, real, personal, and mixed, wherever situated, to Charles E. Hogg and L. F. Campbell in trust for the uses and purposes named in the will, providing therein for a small support for his son, Henry J.

Fisher, who was his only heir at law. The third clause of his will is as follows: "Third. And in case my said son shall die without lawful issue, I desire that his widow be comfortably supported out of my estate, during widowhood, and the residue of my estate, that is not required for a comfortable support of my son's widow, during her widowhood as aforesaid, I desire to be disposed of as follows: One-fourth thereof to Mrs. Henrietta Fowler, my natural daughter; one-fourth thereof to the lawful children of Nicholas Perkins, by his present wife; one-fourth thereof to the children of John Heisner, deceased, of Gallipolis, Ohio; and the remaining one-fourth to the children of my sister, Sophia Choen." He added to the will a codicil on the 25th of January, 1883, as follows: "I hereby revoke the bequests made by me to the children of John Heisner, deceased, of Gallipolis, Ohio, and also the bequests made by me to the children of my sister, Sophia Choen, contained in my will dated January the 20th, 1879." In April, 1884, Henry J. Fisher, Jr., instituted a suit in chancery in the United States Circuit Court for the District of West Virginia, under the title of "Henry J. Fisher, Jr., v. Eliza S. Fisher, Widow of Henry J. Fisher, Sr., Deceased, Charles E. Hogg, L. F. Campbell, Executors of the Will and Trustees of the Estate of the Testator, Henrietta Blackburn, Nicholas Perkins and Susan Perkins, His Wife, Elma Perkins, Shelby Perkins, Lila Perkins, Mary Perkins, and Eugene Perkins," for the purpose of having the will of his father declared null and void, for the reason, as alleged by him, that it created a perpetuity. Such proceedings were had in said cause that on the 21st day of January, 1885, a decree was rendered therein, setting aside and holding for naught the said will, and directing the said Charles E. Hogg and L. F. Campbell to convey by proper deed of conveyance all the real estate of which the testator died seised to the plaintiff, Henry J. Fisher, and that they transfer and deliver to him all the other property, and inhibiting and restraining said Hogg and Campbell from exercising any office or power or doing any act as such trustees except in making and conveying and transferring the said real estate and other property, and decreed that the said Hogg and Campbell, executors of the said last will and testament, pay the costs of the suit out of the goods and chattels in their hands unadministered. On the 10th day of February, 1885, the said trustees, under and by virtue of said decree, conveyed to the said Henry J. Fisher, by deed of that date, all the real estate which came to them by virtue of the said will. On the 24th day of July, 1885, Henry J. Fisher and his wife, Maria P. Fisher, conveyed to Lewis Pfalzgraff a tract of 300 acres of land in Wood county, part of the land of which his father had died seised, and which was conveyed to said Henry J. Fisher by said trustees. Said Pfalzgraff at

once took possession of said tract of land under his purchase from Fisher and wife, and continued in the possession thereof ever after. On the 11th day of June, 1890, more than five years after the final decree had been entered annulling and setting aside the will of the senior Fisher, a bill of review was filed by Elma Perkins, Shelby Perkins, Lila Perkins, Mary Perkins, and Eugene Perkins, the last three being infants suing by their next friend, Nicholas Perkins, seeking to review the final decree entered by the United States Circuit Court on the 21st day of January, 1885. A demurrer to the bill of review was interposed by the defendant Lewis Pfalzgraff and others of the defendants, which demurrer was sustained. An appeal was taken by the plaintiffs in the bill of review from the decree sustaining the demurrer thereto. On the 16th day of March, 1894, the decree of the lower court was reversed by the Circuit Court of Appeals of the United States, and the cause remanded. While the case was pending on a bill of review, Maria P. Fisher, widow of Henry J. Fisher, Jr., filed her petition praying that she might be allowed a comfortable support out of the estate if the will should be decreed to be valid. When the case on the bill of review was remanded to the court below, Maria P. Fisher suggested the death of Henry J. Fisher, the plaintiff in the original bill, and on her motion the same was revived in her name as sole devisee of Henry J. Fisher, deceased; and the causes were further heard together, and upon the petition of Maria P. Fisher and upon her motion by counsel, and upon motion of the Ohio River Railroad Company by its attorneys, the cause was referred to John T. Harris to take, state, and report to the court an account showing the real estate of which the senior Fisher died seised, and who claimed to be the present owners of such estate and under what title they claimed, and the fair rental value of each tract of land, or house and lot, of which the said senior Fisher died seised, and what had been the yearly rental value of each of said tracts or lots for each year since his death, the annual rental value of each of said tracts of land or houses and lots at the time of taking the account, the value of the improvements made upon said land or lots or any of them since the death of said senior Fisher, by whom made and what increase in rental value had resulted from such improvements, and the present pro rata rental value of such improvements, and the age of the widow of Henry J. Fisher, Jr., and what would be the sum necessary to her comfortable support during her widowhood, and what personal estate, if any, came to the hands of the executors and trustees, Hogg and Campbell, and what disposition was made of the personal estate. The commissioner filed his report, showing the real estate of which the senior Fisher died seised, among which was a tract of 300 or 322 acres so con-

veyed to defendant, Pfalzgraff, and that said Pfalzgraff claimed title to said tract under the said deed from Henry J. Fisher and wife; that the rental value of that tract was \$150 a year, and that the average rental value for every year since the elder Fisher's death had been \$125; that Pfalzgraff's improvements on said tract were of the value of \$1,500, and that he had paid on the tract during the time in taxes \$468.51. On the 20th of February, 1897, a decree was entered in the original suit and upon the bill of review of the Perkinses, based upon the report of the commissioner, ascertaining the amount necessary for the support of Maria P. Fisher, widow, to be \$700, the proportion of which assessed against the Pfalzgraff tract being \$45.85 a year, and charged the several parcels of land the amounts decreed against them to be paid as an annual charge from June 18, 1887, the date of the death of the husband, and fixed the 1st day of January in each year, beginning with the 1st day of January, 1888, as the time of payment; and decreed the plaintiffs, the Perkins children, to be the owners in fee simple of the undivided fourth interest in all of said lands, and likewise the said Henrietta Blackburn (formerly Fowler), the like interest of one undivided fourth, charging each of said fourth interests with the proper proportion of rents, improvements, and taxes, an annual compensation to the widow, Maria P. Fisher, and reserving to the said Perkinses and Blackburn, the owners of the undivided two-fourths, to apply to the court for relief in obtaining partition and possession of their said several interests in said real estate, "or they must have leave to apply to the proper court of the several counties wherein said real estate is situated for said relief in obtaining partition and possession according as they may be advised; and leave is likewise reserved to any of the parties in interest to litigate any question of title or ownership that may have arisen pending this suit." This decree was appealed from to the United States Circuit Court of Appeals by the defendant Lewis Pfalzgraff and the Ohio River Railroad Company and Maria P. Fisher, who had filed a petition in the cause, which Court of Appeals, on the 8th day of May, 1902, rendered its decision, and ordered "that so much of the petition of Mrs. Maria P. Fisher as relates to the appellant, the Ohio River Railroad Company and Lewis Pfalzgraff be dismissed, and that in all other respects the decree of the court below be affirmed." See 115 Fed. 929, 53 C. C. A. 411.

At the July rules, 1899, Elma Perkins and others, as owners of the one undivided fourth in said lands, filed their bill in equity in the circuit court of Wood county against Lewis Pfalzgraff, C. B. Hogg, and L. F. Campbell, executors and trustees under the will of the senior Fisher, Maria P. Fisher and Henrietta Blackburn as defendants,

praying for partition of the said tract of 300 acres of land, giving to plaintiffs one-fourth, to the defendant Henrietta Blackburn one-fourth; or, with the consent of Blackburn, that one-half of said land be set off to plaintiffs and Blackburn jointly, and the remaining half to Pfalzgraff; and praying that Pfalzgraff be required to account for and pay to them one-fourth part of all the rents and profits realized by him, and that the account for the rents, profits, and income from said property be fully settled and adjusted so as to give to plaintiffs one-fourth of the net proceeds and to Blackburn one-fourth. Pfalzgraff filed his answer, denying that plaintiffs and Blackburn were joint owners in fee simple with himself in said tract of land, and alleging that the final decree entered of January 21, 1885, set aside the said will, and that by deed of July 14, 1885, upon the conveyance of said tract to him by Fisher and wife he immediately took possession under said deed and had had undisputed, continuous, adverse possession thereof to the present time, claiming title adverse to the world under said deed, and had paid all taxes charged and chargeable thereon since 1885, and that the land had not been entered on the landbooks of Wood county or elsewhere in the name of any other person or persons, or in the name of the estate of Henry J. Fisher, Sr., or any one for him, since the year 1885, and that no one had paid any taxes thereon since that year except himself; that more than five years after said final decree the Perkinses, defendants in the original suit, filed their bill of review in said cause in the United States Circuit Court, making Maria P. Fisher and Henrietta Blackburn and respondent, among others, parties defendant thereto, praying the reversal of the said decree; averring that he was an innocent purchaser of said land for value; that he had no actual notice, and was not charged with constructive notice, of any intention to file a bill of review; that he became a complete purchaser for value and without notice of any such intention after said final decree was rendered in the original cause, and the rights of the plaintiffs and the defendant Blackburn against him had been lost to them by their failure and delay for more than the period prescribed by law to file a bill of review or to appeal from said decree, and that their right and title to any part of said land was *res adjudicata* upon which forfeiture for nonentry on the landbooks and charged with the taxes for the past 14 years; and relying upon his open, notorious, exclusive, adverse possession of the land, claiming title to the whole under his deed from the year 1885, which was a bar by the statute of limitation. Upon the filing of said answer plaintiffs filed their amended bill, alleging that, by virtue of the proceedings had in the

United States Circuit Court in the original case and upon their bill of review, plaintiffs' right and title to said land had been fully adjudicated and established, as was also the title of Blackburn; that plaintiffs and Blackburn were parties to the original suit and afterwards filed their bill of review therein; that when the bill of review was filed in the Circuit Court of the United States plaintiffs were minors under 21 years, and by reason of their minority were not barred to file their said bill of review; that Pfalzgraff was interpleaded in said bill and that he appeared and filed demurrer to the same, which was sustained. Plaintiffs appealed, and the decree was reversed in the United States Circuit Court of Appeals, and plaintiffs set up the decree of the 20th of February by the Circuit Court of the United States after the cause was remanded, and exhibited a copy thereof with their amended bill; that Pfalzgraff, being a party defendant, was bound by the decree and estopped from denying either the title of plaintiffs or of Blackburn, and whether or not said bill of review was properly allowed and heard in the United States court and whether said Blackburn had any legal standing in said court in said bill of review were matters *res adjudicata*, and could not be inquired into here; that Pfalzgraff was not an innocent purchaser, but had full knowledge and advice of the title and full knowledge of the action of the United States Circuit Court; that said conveyance by Fisher operated only to convey to Pfalzgraff an undivided half interest in said land; that the statutes of limitation did not run against them; that they and Blackburn, by virtue of the will, had been tenants in common as to said tracts of land, both with Fisher, Jr., and his grantee, Pfalzgraff, and that Pfalzgraff had no valid or legal title to the land, except as to the one undivided half; and plaintiffs and Blackburn had never been ousted of their title and rights therein; and prayed that the rights of plaintiffs and Blackburn be fully settled and adjusted, and that the relief prayed for in their original bill be accorded them. Pfalzgraff filed an answer, denying all the material allegations of the amended bill, and averring that the decision of the lower court referred to in the amended bill was a decision rendered upon a demurrer to the bill of review filed by the plaintiffs, and that the effect of said decision was to determine simply that the will of the senior Fisher was a good and valid will, and to determine, further, as a mere abstract proposition of law, without the facts relating to the title of respondent being before the court by answer or otherwise, that, under the terms of said will, plaintiffs were entitled to one-fourth of the estate of Fisher, deceased, and Blackburn to one-fourth; that when the case was remanded for further proceedings, said cause

was referred to a commissioner upon a motion of Maria P. Fisher, for the purposes hereinbefore set forth; that prior to June 29, 1896, while the case was still pending before the commissioner, several parties whose interests were identical with the interests of respondent, and who were purchasers of parts of the real estate after the final decree had been rendered and the cause dismissed, filed answers in same cause, setting up the facts in regard to their purchases and showing that they were innocent purchasers for value of said land after said decree was rendered and before an appeal from or bill of review to said final decree was taken or filed, and on the 15th day of January, 1897, the plaintiffs in the bill of review moved the court to strike out the several answers, on the ground that the United States court had no jurisdiction to determine the issue arising thereon because, as to said respondents and said plaintiffs, they were matters arising between citizens of the same state, which motion remained unheard and undetermined until the 27th day of June, 1899; then respondent referred to the decree of February 20, 1887, wherein it was adjudged, in conformity with the mandate of the United States Circuit Court of Appeals, that the complainants were jointly seised and declared to be owners in fee simple of one undivided fourth part of the real estate of the senior Fisher, and that Henrietta Blackburn was entitled to a like interest as owner in fee; and that, by the terms of said decree, leave was expressly reserved to any of the parties in interest to litigate any question of title or ownership that might have arisen pending said suit; that on the 29th day of June, 1898, respondent filed his answer in said cause, alleging that he was an innocent purchaser for value of the land claimed by him after said final decree and before any appeal from or bill of review to said final decree, and stating what he claimed to be other good and lawful defenses to the claim of plaintiffs and Blackburn; and on the 27th of June, 1899, plaintiffs in the bill of review renewed their motion to strike out the several answers thereto, when the court, without passing upon the question of jurisdiction, was of opinion to and did relegate said matters in deference to the state courts without prejudice to the rights of the several respondents, and the answers were stricken out and it was expressly provided that nothing in said order, nor in the order formerly entered, should prejudice the rights of respondents in said several answers as to any relief they might seek in said state court in reference to title acquired subsequent to the title vested and conferred by the will of the senior Fisher, or to the other interests acquired since the institution of the original suit in that court, and denied that plaintiffs' and Blackburn's right and title to the real estate were fully adjudicated and establish-

ed by any decree of the United States court as against respondent, but that the court refused to take jurisdiction of the question, and on motion of plaintiffs the pleadings raising the said issue were stricken out of the cause pending in said court and the question was especially relegated to the state courts, and all rights of respondents were reserved without prejudice to him; and denying that Blackburn filed, either jointly or separately, a bill of review to the final decree of the United States court annulling the will of Fisher as alleged in the amended bill; alleged that there was no record of any such answer and craved oyer of said record, and averred a fatal variance in that respect between the record and the said amended bill.

This cause was heard on January 16, 1903, upon the original and amended bills and the several answers and the agreement that the printed record of the proceedings in the United States court should be considered. It was decreed that said plaintiffs had good and valid title to an undivided fourth interest in the 300 acres of land conveyed by Fisher and wife to Pfalzgraff, and that Blackburn had good and valid title to a like undivided fourth therein, and that Pfalzgraff had a valid title to the remaining undivided half; that the plaintiffs and Blackburn were entitled to have partition of the said land and their interests set apart to them, and commissioners of partition were appointed and the cause was referred to a commissioner to take, state, and report the rents and profits received by Pfalzgraff out of the farm since the same was conveyed to him by Fisher and wife, including a reasonable charge for annual rent value thereof to said Pfalzgraff to be charged in lieu of rent, an account of all taxes paid on said land by Pfalzgraff, and of the permanent improvements made thereon by him and the value thereof. From this decree Pfalzgraff appealed to this court, assigning as error that he was not held to be an innocent purchaser for value of the whole estate of land in question after final decree had been entered in the United States court in the original cause setting aside the will; and because the evidence showed that he had been in uninterrupted, exclusive, adverse possession of the land from July, 1885, down to the institution of this suit in 1899, and that it should have been so held that the title of the senior Fisher, deceased, under whom the plaintiffs and Blackburns claim, was forfeited to the state of West Virginia for nonentry on the landbooks for five successive years since 1863. Several other alleged errors are assigned, but these, if well taken, settle the principles of the case, and give appellant good title to the tract of 300 acres of land in controversy. Whether appellant was a pendente lite purchaser of the said tract of land, or whether he was a bona fide purchaser for value without notice, is the crucial question to be decided in this case, and, if

he was such bona fide purchaser, the other errors assigned become immaterial. There are two conflicting lines of decisions in the courts of the states of this country touching the doctrine of *lis pendens*, some holding that a suit or action at final judgment or decree in the court of original jurisdiction is the end of that litigation so far as the subject matter of the litigation is concerned, and that a writ of error and supersedeas, or an appeal and supersedeas, is a new action or suit, a new litigation; while, on the other hand, others hold that the writ of error or appeal is a continuation of the same suit. Among the many authorities holding the last-mentioned doctrine are those of Kentucky and Texas and some others which it is not necessary to here cite, as the weight of authority, at least with us, especially since recent decisions of this court, is the other way; this court taking the more equitable view of the matter in the construction of our statutes relating to appeal. Why should a purchaser in good faith be held to be a *pendente lite* purchaser after final decree and after those having a right to appeal have declared by their acts their acquiescence in and full purpose to abide by the decree, while others having a contingent interest therein and whose interests were overthrown by the decree took no steps by way of appeal, bill of review, or otherwise within a reasonable time to assert their rights and correct the error, if any there was?

By the will of Henry J. Fisher, Sr., Chas. H. Hogg and L. F. Campbell were made executors of the will, and trustees of all the estate of the testate decedent; that after the final decree of January 21, 1885, rendered by the Circuit Court of the United States, and in pursuance thereof, the said trustees, on the 10th day of February, 1885, conveyed by deed duly executed all the real estate which came to their hands as such trustees by virtue of the said will, to the plaintiff in said original suit to set aside the will. In this act on the part of the trustees in executing the mandate of the decree notice was given that it was not their purpose to appeal from said decree, but that they regarded the same as final and binding on all parties thereto. These trustees represented all parties in interest and were the proper parties to appeal in case they deemed themselves or those whom they represented aggrieved by the decree; they not only failed to appeal or file a bill of review, but accepted and acquiesced in the decree as final, and declared their purpose not to contest the validity of the decree by carrying out its provisions as far as it required action on their part by conveying to the plaintiff Fisher all the real estate over which, by the will, they were given control. Section 8, c. 132, Code 1889, provides that: "If a sale of property be made under a decree or order of a court, and such sale be confirmed, though such decree or or-

der be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled." While the conveyance in this case was not after a judicial sale, yet the conveyance was made by the trustees, Hogg and Campbell, in obedience to a decree of a court having jurisdiction. By this act the trustees estopped themselves from contesting the decree by appeal or bill of review, and their act was notice to purchasers from Fisher that it was not the purpose to appeal from said decree. *Elwell v. Fosdick*, 134 U. S. 500, 10 Sup. Ct. 598, 33 L. Ed. 998, was a case in which the holder of \$14,500 out of \$955,000 of railroad bonds secured by mortgage appealed from the Circuit Court of Appeals to the Supreme Court of the United States in the name of the trustee in the mortgage and from a decree which, it was claimed, affected the interest of such holder. It appeared that some time before the appeal was taken the trustee had executed a release of his right to appeal and of errors in the decree, and that the court had, in the decree, found that there was no proof showing that the trustee had not acted in good faith. It was held: "That the release bound all the bondholders represented by the trustee; * * * that the appeal was the appeal of the trustee; and that, on the motion of the appellee, it must be dismissed." In the case at bar, there is no appearance or even intimation of bad faith on the part of the trustees. Indeed, their personal interests were not conserved by the final decree, but would have been by its reversal. Pfalzgraff purchased from Fisher and wife after final decree and after the conveyance to Fisher thereunder by the trustees, Hogg and Campbell, of the land in controversy, and entered immediately into possession thereof under his said deed and purchase from Fisher, and continued in uninterrupted, exclusive possession thereof paying taxes thereon. In *Wingfield v. Neal* (decided at the present term of this court), 54 S. E. 47, it is held (Syl., point 2): "Under our statute, an appeal from a circuit court to the Supreme Court of Appeals is the beginning of a new, and not a continuation of an old, suit." And point 3, same syllabus: "One who, after final decree and termination of the suit, and before an appeal is obtained, purchases in good faith, property which is the subject of litigation, will be protected in such purchase." And point 4: "In determining the question as to whether or not a purchase is made *pendente lite*, the test is: Was there, at the time of the purchase, a suit pending, involving the rule, *lis pendens*. If so, the purchase is *pendente lite*. It is otherwise if there is no such suit pending." And in *Dumfee v. Childs*, 53 S. E. 209, also decided at the present term, point 9 in the syllabus, it is held: "A suit as a *lis pendens* ends with

final decree. A bill of review or appeal to reverse such decree is a new *lis pendens* as regards purchasers claiming title under the decree, and it is not a mere continuation of the original suit." It would seem that these late decisions of our own court would be sufficient on this question of *lis pendens* without going farther. In 3 Cyc. 462, it is said: "Rights acquired bona fide by a third person under a judgment, order, or decree rendered by a court of competent jurisdiction are not affected by the subsequent setting aside thereof." Citing, as authority therefor, cases from Florida, Illinois, Louisiana, New Hampshire, New York, and the United States Supreme Court. See, also, for much authority on this point, 3 Cent. Dig. § 4631. In *Claytor v. Anthony*, 15 Grat. (Va.) 518, Judge Lee, in delivering the opinion of the court at page 526, referring to the case of *Creasy v. Anthony*, heard with the case first mentioned, says: "A bill of review forms no part of the proceedings in the original cause; it is allowed only after the suit is completely ended. Judge Cabell, in *Laidley v. Merrifield*, 7 Leigh (Va.) 346, at page 354, says: 'The decree being final, the bill of review is not regarded as a part of the cause of which the decree was rendered, but as a new suit, having for its object the correction of the decree in the former suit.'" In *Keck v. Allender*, 37 W. Va. 201, at page 210, 16 S. E. 520, at page 523, it is said: "A bill of review forms no part of the proceedings in the original cause, but is offered after the suit is completely ended." In *American Bible Society v. Hollister Ex'rs*, 54 N. C. 10, Judge Pearson, at page 13, says: "To call a bill of review an incident of a former suit requires some latitude of expression." *Ellzey v. Lane's Ex'rs*, 2 Hen. & M. (Va.) 589: "A bill of review cannot be brought until the decree sought to be reviewed and reversed is final and the parties out of the court." See, also, *Rector v. Fitzgerald*, 59 Fed. 808, 8 C. C. A. 277; 2 Cyc. 510; *Taylor's Lessee v. Boyd*, 3 Ohio, 337, 17 Am. Dec. 603. In 115 Fed., in the case of *Ohio River Railroad Company v. Fisher*, at page 934 (53 C. C. A. 416), where the same matter was involved as to *Lewis Pfalzgraff* as in the case at bar, Judge Simonton, in rendering the opinion of the court, uses the following words: "The conclusion we have reached in this case renders unnecessary a discussion in detail of the first of these assignments of error. The Ohio River Railroad Company and *Lewis Pfalzgraff* are bona fide purchasers for valuable consideration, without notice, from H. J. Fisher, Jr., after final decree declaring his father's will invalid and recognizing his right as heir at law, and after a decree directing the trustees and executors named in the will to convey to him the realty and deliver to him the personalty. This decree, filed January 21, 1885, invested H. J. Fisher, Jr., with all the evidence of an

absolute title. Then these appellants purchased, paid their money, entered into, and remained in possession of the realty thus acquired. 'No equity can be stronger than that a purchaser who had put himself in peril by purchasing for valuable consideration without notice of any defect in the title.' *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. Ed. 388. How are they affected, as respects the rights of Mrs. Maria P. Fisher, by the bill of review filed in 1890, several years after their purchase? In *Rector v. Fitzgerald*, 8 C. C. A. 277, 59 Fed. 808, we find this: A bill of complaint had been filed by R., and a final decree had been entered May 2, 1881, dismissing the bill. R. appealed from the decree, but failed to prosecute the appeal, and it was dismissed December 6, 1881. On February 29, 1884, one F. took a mortgage on lands, the subject-matter of the litigation, from one who had purchased from successful party. On April 29th, thereafter, R. filed his bill of review, to which he made F., the mortgagee, and his mortgagor, parties. He sought to reverse the former decree for error appearing on the record. F. pleaded his equity as a bona fide purchaser without notice. After a full and elaborate discussion, the court held that the purchaser without notice bona fide, after a final decree in favor of his grantor, had a title which could not be affected by a decree rendered on a bill of review subsequently filed; that a bill of review will not be regarded as a continuation of the original suit, so as to affect a person purchasing the property in controversy in good faith from the successful party, after a final decree and without notice of any intention to file a bill of review. This case cites *Ludlow's Heirs v. Kidd's Ex'rs*, 3 Ohio, 541. Certain infants filed a bill to obtain the legal title to certain lands. The bill was dismissed on final hearing. The defendants, who were in possession of the land and had an apparent legal title, sold the same to third persons, strangers to the suit. A statute of Ohio allowed infants five years after attaining majority to bring a bill of review in cases of this character. The complainants availed themselves of this statutory right after becoming of full age, and prayed a reversal of the original decree. It was held, after a careful scrutiny of the authorities, that the intermediate purchasers were not affected by the decree of reversal."

It is contended by appellees that the decree of the United States Circuit Court of February 20, 1897, is final, adjusting the rights of the plaintiffs in the bill of review and *Henrietta Blackburn*, and that the same was binding on defendant, *Pfalzgraff*. When *Pfalzgraff* and other defendants filed their answers to the amended bill of review asserting their rights as against the allegations of the said bill, plaintiffs moved to strike out said answers, which the court did on the 27th of June, 1899, being of opinion that

there might be a question as to whether the court had jurisdiction of the matters and things alleged in said several answers; and without passing upon the question of such jurisdiction, the court was of opinion to relegate said matters in difference to the state courts which had jurisdiction thereof, "and without prejudice to the rights of the several respondents, it is ordered that the said answers be stricken out, but nothing in this order, nor in the orders formerly entered herein, shall prejudice the rights of the respondents in said several answers as to any relief they may seek in said state courts with reference to title acquired subsequent to the title vested and conferred by the will of Henry J. Fisher, Sr., or as to other interests acquired since the institution of the original suit in this court." The decree of February 20, 1897, also reserved to any of the parties in interest the right to litigate any question of title or ownership that might have arisen pending the suit, thus leaving open the questions to be litigated between the plaintiffs and Pfalzgraff and the other defendants occupying like positions. The Circuit Court of Appeals, in its opinion in *O. R. R. Co. v. Fisher*, holds that the decree of February 20, 1897, was not a final decree, and it does not appear from the record that the suit in the United States Circuit Court was ever prosecuted to final decree. The decree annulling the will was reversed, and the court proceeded to state where the property would go under the provisions of the will, but it could not be an adjudication of the rights of the plaintiffs and Blackburn and Pfalzgraff as between themselves, as the matter had never come to an issue between them. There being no pleadings, especially between Blackburn and Pfalzgraff, there could be no decree. "A decree not supported by any pleading in writing is void." *Lilly v. Claypool* (decided at the present term of this court) 53 S. E. 22, and see authorities there cited. The plaintiffs claimed that defendant Pfalzgraff could not be heard by answer for want of jurisdiction in that court, and the court, without passing on that question, struck out the answers and distinctly and definitely relegated any issue that might be made to the state courts, leaving no issue to try in the United States court as between plaintiffs and Blackburn and Pfalzgraff, and it does not appear from the record that Blackburn ever either appealed from the original decree of January 21, 1886, or filed a bill of review to correct the same.

For the reasons herein stated, the decree of the circuit court of Wood county must be reversed and plaintiff's bill dismissed.

BRANNON, J. (concurring). It will not do to say that Pfalzgraff is a pendente lite purchaser. He bought after decree and before bill of review. When he purchased

there had been final decree, and not yet a bill of review. "During the interval between final judgment and commencement of proceedings in error, there is no suit pending, and a purchaser in good faith does not take title pendente lite." *Cheever v. Minton* (Colo. Sup.) 21 Pac. 710, 18 Am. St. Rep. 258. The bill of review must have its own notice. It does not relate back. 2 Cyc. 510; *Bennett on Lis Pendens*, §§ 40, 70; 21 Am. & Eng. Ency. L. (2d Ed.) 618; *Barton's Ch. Prac.* 381; *Rector v. Fitzgerald*, 59 Fed. 808, 8 C. C. A. 277; *Taylor v. Boyd*, 17 Am. Dec. 608; 9 Am. & Eng. Dec. in Eq. 14. There are a few cases contra, but such is the great weight of authority. See *Dunfee v. Childs* (decided this term, where many cases are discussed) 53 S. E. 209.

Pfalzgraff a Purchaser for Value.

If Pfalzgraff's title be considered as emanating from or resting on the decree setting aside the will of the elder Fisher, and I think it is to be so considered, then I hold that his title cannot be affected by reversal of that decree, for another view—that is, because he has the defense of a bona fide purchaser. With that decree setting aside the will standing, Fisher's title, coming from the elder Fisher, would be good; with that decree reversed, it would not be good. It stands on that decree. As a purchaser for valuable consideration without notice, it is old equity law that equity will not do anything against him, because two persons equally unfortunate, equally meritorious, are praying to it, and its hand touches neither, but it leaves them as they came, interfering not at all. A purchaser under a decree afterwards reversed, if he is not a party, is protected from reversal. Code 1899, c. 132, § 8. Why, on this same principle, should not a purchaser from him be protected? A bona fide purchaser from a fraudulent grantee has always been protected, though the title acquired by such purchaser was tainted with fraud, and a bad title in the hands of its first owner. I assert that the true rule is that one who purchases from a party who held under a decree afterwards reversed is not affected by such reversal, if he is a complete purchaser. 3 Cyc. 462; *Bank v. Bank*, 6 Pet. (U. S.) 8, 8 L. Ed. 299; *Galpin v. Page*, 18 Wall. (U. S.) 375, 21 L. Ed. 959; *Rorer on Jud. Sales*, § 1142; *McJilton v. Love*, 18 Ill. 486, 54 Am. Dec. 449; *Read v. Howe*, 39 Iowa, 554, point 7, and page 561; *Lovett v. German Church*, 12 Barb. (N. Y.), 67; *Dater v. Troy*, etc., R. Co., 2 Hill (N. Y.), 629; *Vogler v. Montgomery*, 54 Mo. 577; *Davis v. Watson*, 54 Miss. 679; *Guiteau v. Wisely*, 47 Ill. 433. Such protection to one purchasing from a party to the suit is not only in cases where there is a judicial sale, but it is also where it is the decree that gives title to the party who, before its reversal, conveys to a bona fide purchaser.

A decree gave a wife title to land held by her husband, because he held in trust for her, and intermediately between the decree and its reversal, she conveyed to a third party, and it was held that the reversal of the decree did not affect her grantee's title. *Hannas v. Hannas*, 110 Ill. 53. "Where, after a decree quieting title to real estate in a party, he conveys to a bona fide purchaser, no appeal bond having been filed, a subsequent reversal of such decree will not affect the purchaser." *Parker v. Courtney* (Neb.) 44 N. W. 863, 26 Am. St. Rep. 360. There is much authority for this position. *Taylor's Lessee v. Boyd*, 3 Ohio, 337, 17 Am. Dec. 603, a well-considered case, holds that: "The party thus invested [by decree] with title and possession conveyed to a third person, who stands before the court as an innocent purchaser for valuable consideration, without notice. Can his right be divested by a reversal of the decree on which his title was originally founded? We are of the opinion that he cannot be so divested." *Boyd* sued *Taylor* for a deed for land, and obtained a decree. *Taylor* then brought a writ of error. *Boyd* conveyed to another person after the writ of error, but before citation in it. The title of the purchaser was held good against reversal. The court also said that the writ of error was a new suit, and the purchaser did not purchase pendente lite. Other cases so hold. *McCormick v. McClure*, 39 Am. Dec. 441. In *McAusland v. Pundt*, 93 Am. Dec. 358, the court referred to the rule that a derivative title is not better generally than that from which it is derived, and said that the rule was subject to many exceptions; one exception being that an innocent purchaser is protected from a reversal of a decree. See note on *Little v. Bunce*, 28 Am. Dec. 371. The other view is stated in *Singly v. Warren* (Wash.) 51 Pac. 1066, 63 Am. St. Rep. 896. I regard *Wadhams v. Gay*, 73 Ill. 415, strong authority in this case. A will was thought to give *Flagler* a fee, and a decree so held. *Flagler* sold and conveyed while the decree stood. Later the decree was reversed, and it was held that *Flagler* had only a life estate. In a suit about the title, the Supreme Court of Illinois held that the reversal did not affect *Flagler's* grantees, as they were purchasers for value. Though there are some Kentucky and Texas cases otherwise, they are against the current of authority.

Pfalzgraff Is Not a Pendente Lite Purchaser.

We can safely say, with Judges Lee and English in *Claytor v. Anthony*, 15 Grat. (Va.) 526, and *Keck v. Allender*, 37 W. Va. 210, 16 S. E. 523, that "a bill of review forms no part of the proceedings in the original cause. It is a new suit," said Judge Cabell in *Laidley v. Merrifield*, 7 Leigh (Va.) 353. This is because the old suit had ended by final decree. *Lynch v. Andrews*, 25 W. Va. 751, does not show *Pfalzgraff* a pendente

lite purchaser. The decrees were not final, as the court held them expressly to be interlocutory, as appears in *Camden v. Haymond*, 9 W. Va. 680, and *Haymond v. Camden*, 22 W. Va. 184, 188.

Pfalzgraff's Title Good by Decree.

Another matter: The decree of the Circuit Court of Appeals is said to settle that the plaintiffs have right to half of *Pfalzgraff's* land, and that his deed from *Henry J. Fisher* gives him but half. The petition of *Mrs. Fisher* sought a support out of this and other lands, on the theory that the elder *Fisher's* will charged the land with her support. The decree charged the land with her support. It also reserved the right to the plaintiffs to ask partition in the state courts; there being some lands, besides that sold to *Pfalzgraff*, to which those claiming under the will would, as between themselves, have right to partition. This did not adjudicate right to partition, and surely did not hold that those claiming under the will had right to partition of the *Pfalzgraff* tract. The decree only reserved any right to partition that might exist. Moreover, the decree contained a saving clause in these words: "And leave is likewise reserved to any of the parties in interest to litigate any question of title or ownership that may have arisen pending the suit." That clause saved *Pfalzgraff*, from the effect of that decree, save only the charge made by it on the land for *Mrs. Fisher's* support. He could contest "title and ownership" unaffected by the decree. On appeal, that decree was reversed so far as it charged *Pfalzgraff's* land for *Mrs. Fisher*, and dismissed her petition, leaving the balance of the decree still firm, including that saving clause. Thus that decree by no means takes *Pfalzgraff's* title from him. But, to the contrary, does not that decree hold *Pfalzgraff's* title superior to the rights of those claiming under the will? If it is not res judicata to establish *Pfalzgraff's* title, the principle of the decision of the Circuit Court of Appeals inevitably leads to that result. *Mrs. Fisher* filed a petition setting up that the will charged the land for her support. Her whole claim rests alone upon that will, just as the plaintiff's title in this partition suit rests alone on that same will. The court took away from her the charge made on the land by the decree, and dismissed her petition as to *Pfalzgraff*. Why did it do so? We find the reason stated in *Ohio River R. Co. v. Fisher*, 115 Fed. 929, 53 C. C. A. 411. "The Ohio River Railroad Company and *Lewis Pfalzgraff* are bona fide purchasers for valuable consideration, without notice, from *H. J. Fisher, Jr.*, as a final decree declaring his father's will invalid, and recognizing his right as heir at law, and after a decree directing the trustees and executors named in the will to convey to him the realty and deliver to him the personalty. This decree,

filed January 21, 1885, invested H. J. Fisher, Jr., with all the evidence of an absolute title. Then these appellants purchased, paid their money, entered into, and remained in possession of, the realty thus acquired. 'No equity can be stronger than that of a purchaser who has put himself in peril by purchasing for valuable consideration without notice of any defect in the title.' *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. Ed. 388. How are they affected, as respects the rights of Mrs. Maria P. Fisher, by the bill of reviews filed in 1890, several years after their purchase? In *Rector v. Fitzgerald*, 8 C. C. A. 277, 59 Fed. 808, we find this: A bill of complaint had been filed by R., and a final decree had been entered May 2, 1881, dismissing the bill. R. appealed from the decree, but failed to prosecute the appeal, and it was dismissed December 6, 1881. On February 29, 1884, one F. took a mortgage on lands, the subject-matter of the litigation, from one who had purchased from successful party. On April 29th, thereafter, R. filed his bill of reviews, to which he made F., the mortgagee, and his mortgagor, parties. He sought to reverse the former decree for errors appearing on the record. F. pleaded his equity as a bona fide purchaser without notice. After a full and elaborate discussion, the court held that the purchaser without notice bona fide, after a final decree in favor of his grantor, had a title which could not be affected by a decree rendered on a bill of review subsequently filed; that the bill of review will not be regarded as a continuation of the original suit, so as to affect a person purchasing the property in controversy in good faith from the successful party, after a final decree and without notice of any intention to file a bill of review. This case cites *Ludlow's Heirs v. Kidd's Ex'rs*, 3 Ohio, 541." The opinion cites other cases to the same effect. The plaintiffs in this suit and Pfalzgraff were parties before the court in that suit. The bill of review made Pfalzgraff a party, and set up his purchase from Henry J. Fisher, and these plaintiffs were parties, and Mrs. Fisher's petition set up her title to support under the will, and the title of the trustees under the will was before the court, and upon the whole record, with all the parties before the court, the Circuit Court of Appeals did decide that Pfalzgraff, by reason of his purchase from young Fisher before the decree annulling the will had been reversed, took good title, and that such reversal did not affect his title, and denied Mrs. Fisher relief against him, stating, as a reason therefor, that he was a bona fide purchaser. Now, if Mrs. Fisher's claim under the will could not be sustained against Pfalzgraff, how can the claim of the plaintiffs to partition be sustained? Her claim was identical in character with that of the plaintiffs. Both her rights and their rights rest on the will. If the reversal of the decree annull-

ling the will did not affect Pfalzgraff's title as to Mrs. Fisher, how could it affect his title as to other devisees? They both stand on the same footing. It is true, Mrs. Fisher had joined in deeds of her husband to purchasers, among them the deed to Pfalzgraff, and it is said that the decree against her went only upon the theory of estoppel against her claim arising from those deeds; but, under our Code, a wife's joining in a deed is no warranty. At any rate, the court gave, as the first reason for denying her relief, the reason that Pfalzgraff was protected because he was a purchaser for valuable consideration. If estoppel was a reason for the decree, so is the fact that Pfalzgraff was an innocent purchaser. Both reasons moved the decree; both reasons were involved in the record; both are included in the decision; both are within the ratio decidendi; both equally bar plaintiffs from hurting Pfalzgraff.

Limitation.

Another matter. I think Pfalzgraff is protected by the statute of limitations. We cannot say that he is denied this defense because of Henry J. Fisher, his grantor, having been co-owner with the plaintiff. Fisher conveyed the entire tract to Pfalzgraff by deed, and Pfalzgraff went into actual possession. This was an ouster of the co-owner, and the statute began at once to run. *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580. But it is said that because the decree availing the will of the elder Fisher was yet standing when Pfalzgraff purchased, that decree prevented the plaintiff from suing, and that the statute would not begin until the decree was rendered, February 7, 1894. Pfalzgraff had done everything he possibly could do, everything the law required him to do, to work an ouster so as to have the benefit of the statute. He held possession actual under a deed conveying legal title, claiming against the world. Shall we hold him responsible, and deny him this plea, because of the misfortune which happened to the plaintiff's title from that erroneous decree? He is not chargeable with it. He was no party to that suit. Its decree could not affect him, a stranger to the record, and yet it is sought to take away from him his land just as if he were a party, to bind him by indirection, when he is not directly bound. A right of entry existed the moment Pfalzgraff took possession, regardless of the impediment to the plaintiffs from that decree. An erroneous decree, when reversed, is considered never to have been the law. 1 Blackstone, 69. Our statute of limitation makes no such exception, and it is familiar law that no exceptions from the statute are allowed but those specified in the statute. The Legislature having made certain exceptions, the courts cannot add others. A landowner, to avoid the statute, pleaded that an act of Congress forbade the survey or marking of land within an

Indian reservation, and the beginning corner of his land was within the Indian country, and no other corner marked, and he was thus forbidden by the law to make a survey. Chief Justice Marshall said: "The claim of the plaintiffs to be excepted from the act is not based on the character of the defendant's possession, but on the impediment to the assertion of their own title." So I say in this case. "It has never been determined that the impossibility of bringing a case to a successful issue from causes of uncertain duration, though created by the Legislature, shall take the case out of the operation of the statute, unless the Legislature shall so declare its will." *McIver v. Ragan*, 2 Wheat. (U. S.) 25, 4 L. Ed. 175; *Angell on Lim. c. 37, § 486*. It has been held that an injunction does not stop the statute, unless it makes that exception, nor absence of the defendant so that he cannot be sued. 1 Rob. Prac. 606, 616; *Wood on Lim. § 243*. *Pfalzgraff* did not bring the suit to nullify the will. That was done and ended by final decree before he had anything to do with the land. He did nothing to obstruct a suit. The decree was simply an event for which he was in no wise responsible, and it ought not to affect him.

(60 W. Va. 113)

DODRILL'S EX'RS v. GREGORY'S ADM'R.

(Supreme Court of Appeals of West Virginia.
March 6, 1906. Rehearing Denied June
2, 1906.)

1. BILLS AND NOTES—PAYMENT—BURDEN OF PROOF.

In an action upon a promissory note, where payment is relied on as a defense, the burden is on the defendant to prove such defense by a preponderance of the testimony.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1695.]

2. SAME—PRESUMPTION OF PAYMENT.

Where an action is brought upon a promissory note, and on the trial it is admitted that the note was found among the papers of the maker after his death, there arises from this admission a presumption that the note was paid, but not such a presumption as changes the burden of proof to show payment; the fact of the note having been so found being a matter which can be given in evidence by the defendant to show payment.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1696, 1697.]

3. TRIAL—INSTRUCTIONS.

An instruction which tells the jury "if they believe," instead of "if they believe from the evidence," they shall find, etc., is not erroneous, if in another part of the instruction, or in other instructions given in the case, the attention of the jury is specifically directed to the evidence by telling them that they shall base their verdict thereon.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 535.]

(Syllabus by the Court.)

Error to Circuit Court, Webster County.

Action by C. Mc. Dodrill's executors against V. S. Gregory's administrator. Judgment for

plaintiffs, and defendant brings error. Affirmed.

Linn, Byrne & Cato, for plaintiff in error.
E. H. Morton, for defendants in error.

SANDERS, J. This is an action of assumpsit, brought in the circuit court of Webster county, by C. Mc. Dodrill against Sherman Gregory, administrator of the estate of V. S. Gregory, deceased. Dodrill having died, the action was revived in the name of his executors. The object of the action is to recover the balance claimed to be due on a note executed by V. S. Gregory, in his lifetime, to C. Mc. Dodrill. The defendant filed two special pleas, which, however, are not copied into the record, and also filed the plea of nonassumpsit. On the trial, which resulted in a judgment in favor of the plaintiffs, it was admitted that the note sued on was found in the papers of V. S. Gregory after his death.

The plaintiffs claim that the note in question was left with Gregory by Dodrill, for the purpose of having Gregory indorse a credit thereon, and that it has not been paid. The jury, after hearing all the evidence, found this fact for the plaintiffs, which was approved by the trial judge, and we cannot disturb this finding, unless the evidence wholly fails to establish the plaintiffs' case. Upon a review and careful consideration of the evidence, we not only conclude that the verdict is justified thereby, but think it is eminently proper.

The defendant complains that the court improperly instructed the jury for the plaintiffs. The first instruction told them that the burden was on the defendant to show, by a preponderance of the testimony, that the note in question had been paid. This proposition is so elementary that it is hardly necessary to refer to it. But it is said that, inasmuch as the note was found among the papers of Gregory after his death, this rule does not obtain. We fail to observe the distinction. From the possession of the note by Gregory, there arises a presumption of payment—not such a presumption, however, as changes the burden of proof as to showing payment, which is always with the defendant. If the note had been held by Dodrill, its introduction in evidence would have made a *prima facie* case. It being found among the papers of Gregory, however, it was necessary to show something more, in order to make such case; that is, that the note was placed in Gregory's hands for a specific purpose. This was shown, and, if the defendant relied upon payment, the burden was upon him to establish his defense by a preponderance of the evidence. But again, in instruction No. 2, the court fully instructed the jury upon this question. They were told that the possession of the note was *prima facie* evidence of its payment, and, in the absence of proof to the contrary, such evidence would create a presumption of payment, and were further told

that, while such presumption would arise from its possession, yet it could be rebutted by proof to the contrary; and in instruction A for the defendant the court instructed the jury that the possession of a note for the payment of money, after it falls due, is presumptive evidence of the payment thereof.

Instruction No. 2 is also criticised because it is said that the jury were not directed to be controlled by the evidence, but that they are told "if they believe," and not that "if they believe from the evidence," that they should find, etc. We do not think this instruction subject to this criticism, because it does not omit to tell the jury that they shall be governed by the evidence, but this fact is especially called to their attention in the beginning of the instruction, wherein the court instructs them that, in arriving at their verdict, only such evidence as was actually introduced, and not any evidence sought to be introduced and excluded by the court, is to be considered by them. And then again, in another part of the instruction, the evidence is referred to. Therefore we think these instructions are free from criticism, and were proper to be given, and, upon the whole, we think the jury were fairly instructed as to the law of the case.

The judgment of the circuit court is therefore affirmed.

(60 W. Va. 239)

WILLIAMS v. VIRGINIA-POCAHONTAS COAL CO.

(Supreme Court of Appeals of West Virginia.
May 1, 1906. Rehearing Denied
June 2, 1906.)

1. FORCIBLE ENTRY AND DETAINER—QUESTIONS FOR JURY—CONTRACT OF SALE—PERFORMANCE—DEFICIENCY IN QUANTITY—WAIVER.

L. by contract in writing agreed to sell and convey to B., "or whomsoever he might designate," his land on which he then resided containing 250 acres more or less at the price of \$25 per acre, the purchaser to have the right to survey the land. B. turned the contract over to V.-P. Coal Co., which caused the land to be surveyed, and by actual survey the same was found to contain 208.03 acres. One line was run "N. 49° 45' W. 931 feet to a stake at or near two spruce pines on the foot of the hill corner to the small mill tract with the lines of the same," etc. L. afterwards ascertained that the call for the mill tract was a mistake, that the two spruce pines marked as corner were over 500 feet short of the corner of the mill tract, which excluded 1.54 acres of land intended to be sold to B. The V.-P. Coal Co. caused a deed to be prepared and presented to L., to be executed to itself for the 208.03 acres, when L. informed the coal company of the mistake, and that the deed did not include all his land by the description it contained. The vendee elected to accept the deed as written which was executed and delivered, and it paid for the 208.03 acres only, but took possession of the whole tract. L. afterwards conveyed to W. the 1.54 acres. W. brought his action of unlawful entry and detainer for the 1.54 acres. Whether the vendee had notice prior to the execution of the deed that the description contained in the deed, made by actual

survey and marked on the ground, excluded the 1.54 acres, and that it accepted such deed with notice of that fact, was a question for the determination of the jury.

2. ESTOPPEL—CONTRACT FOR SALE OF LAND—DEFICIENCY IN QUANTITY—WAIVER.

Where a tract of land has been sold by written contract at a stipulated price per acre, the survey thereof to be made by the purchaser, and the surveyor of the purchaser and the vendor by mistake and by actual survey so run the lines that a part of the tract so sold is excluded from the description contained in the deed, and before deed is executed the vendor discovers the mistake and notifies the vendee thereof, and the vendee elects to and does accept such deed excluding a part of the tract, and pays for the quantity described in the deed according to the courses and distances as marked on the ground by the surveyor and set out in the deed, the vendee will be estopped from claiming that part so excluded.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County.

Action by the Virginia-Pocahontas Coal Company against B. F. Williams. There was judgment for defendant, and plaintiff brings error. Affirmed.

Geo. E. Price and Rucker, Anderson & Hughes, for plaintiff in error. Strother, Taylor & Strother, for defendant in error.

McWHORTER, P. A. D. Beavers and wife owned a tract of 255 acres of land on Clear fork of Tug river, in McDowell county. On the 26th day of March, 1877, they conveyed by deed to Martha J. Barnett the western end of said tract, containing 5 acres, upon which Barnett built a mill, after which the tract so conveyed was known as the "Barnett Mill Tract." On the 20th of August, 1896, by deed of that date Beavers and his wife conveyed the remainder of said tract of 255 acres to T. A. Lambert. On the 29th of November, 1901, T. A. Lambert, by contract in writing agreed to sell the said residue of the tract and to convey the same with covenants of general warranty "to William J. Brown or whomsoever he may designate." In said agreement it was provided: "The titles to the property are to be passed on by the attorney of the purchasers by February 1, 1902, and said purchasers are to have the right to survey the land, which survey is to be completed six months from January 1, 1902, and I am to have the right to have a representative with the surveyor. The said Wm. J. Brown or the purchasers to be designated by him shall have the privilege at any time to anticipate the deferred payments." The said agreement described the land as "containing 250 acres more or less at the price of \$25 per acre and an additional sum of \$500 for the improvements," and then provides for the terms of payment. Under this contract the Virginia-Pocahontas Coal Company, being the party to whom said Brown directed the land to be conveyed, caused the same to be surveyed, and upon such survey the tract was found to contain 208.03 acres. The attorney for the Virginia-Pocahontas Coal Company,

took the description made by the surveyor and prepared a deed to be executed by the said Lambert, which deed was dated the 1st day of October, 1902, and was duly acknowledged by Lambert and his wife on the 13th day of December, 1902. The description contained in this deed did not include the whole of the land agreed by Lambert to be sold to Brown. By mistake or otherwise in making the survey there was a small piece containing 1.54 acres not included within said survey. On the 17th day of April, 1903, T. A. Lambert and Evaline, his wife, conveyed by deed of that date, in consideration of \$3,000, the said 1.54 acres to B. F. Williams. After the conveyance to the Virginia-Pocahontas Coal Company the vendee entered into possession of the said land, including the 1.54 acres, which included part was entered upon by Richard Collins, the tenant of the said Virginia-Pocahontas Coal Company. On the 10th day of August, 1903, the said B. F. Williams sued out of the circuit court of McDowell county his summons in unlawful entry and detainer against the Virginia-Pocahontas Coal Company and Richard Collins to recover the possession of said tract of 1.54 acres of land. On the 17th day of September, 1903, "on motion of the plaintiff by counsel the summons or declaration and notice in this case is docketed," and upon motion of the plaintiff an order of survey was made requiring W. T. Tabor, the surveyor of McDowell county, to go upon the land in controversy and do such surveying as might be desired by any of the parties to the action and make report to the next term of court, giving the parties ten days' notice of the time when he would execute the order. On the 28th of December, 1903, the defendants appeared and entered their plea of not guilty and a jury was impaneled to try the issue. After the plaintiff had introduced all his evidence in chief and rested his case, the defendants moved the court to strike out the evidence and direct the jury to return a verdict in favor of the defendants, of which motion the court took time until a future day of the term to consider. On the 31st day of December the court overruled the motion to strike out the evidence and to direct a verdict for the defendants, and the jury, having heard all the evidence and the argument of counsel, found for the plaintiff the possession of the land in controversy and \$500 damages for the detention thereof. The defendants moved to set aside the verdict and grant them a new trial on the ground that the same was contrary to the law and the evidence, and moved in arrest of judgment, of which motion the court took time to consider. On the 8th of June, 1904, on the hearing of the motion to set aside the verdict and grant a new trial, the plaintiff announced in open court that he waived the damages awarded him by the said verdict, and the court overruled the motion to set aside the verdict and grant a new trial, and rendered judgment upon the said

verdict for the possession of the property and the plaintiff's costs of the action.

In the course of the trial, the defendants took three several bills of exceptions numbered 1, 2, and 3, respectively, which were signed, sealed, and made a part of the record in the case. The defendants obtained from one of the judges of this court a writ of error and supersedeas. The first bill of exceptions certifies and contains all the evidence adduced in the case by both parties. It is conceded that the purpose and intention of the contract of sale made by Lambert to William J. Brown was to sell and convey all the land then owned in said tract by T. A. Lambert, and which was then occupied by said Lambert, but in running the lines of the survey by S. M. Taylor, the surveyor of the defendant, the line "N. 49° 45' W. 931 feet to a stake at or near two spruce pines on the foot of the hill, corner to the mill tract," stopped short of the corner of the mill tract by several hundred feet. It is contended by defendants that the corner of the mill tract, being called for, governs and should be made the point called for notwithstanding the corner marked and designated by the surveyor; in other words, it controls rather than the courses and distances. It is true Lambert was with the surveyor and said that he thought that they had gone far enough to reach the corner of the mill tract. Lambert testifies that before the execution of the deed, which was presented to him by the defendant's attorney to be executed, he gave him notice, and also told Mr. Taylor, the surveyor, that the description made by the surveyor and contained in the deed did not include all the land; that he notified them that the 1.54 acres of land was omitted from their survey and was not contained in the deed, and states that Taylor, the defendant's surveyor, "made a plat, or whatever you may call it, of this 1.53 or whatever it is—fifty-six hundredths—he made a plat of it with the Barnett tract, including it all as the Barnett tract. Including the acre and fifty-six hundredths, or whatever it may be, he included that in the Barnett tract, making the Barnett tract six acres and some one-hundredths." And on cross-examination was asked: "Q. 4. You have further stated that this tract of land is not included in the deed made by you to the Virginia-Pocahontas Coal Company, which deed was made by you in pursuance of this contract between you and Mr. Brown. Now, I will ask you to please explain to the jury why it was that this tract of land was included in the land which you contracted to sell to Mr. Brown, and was not included in the deed made pursuant to that contract? A. Do you want me to explain it? Q. 5. Yes, sir. A. Well, I entered into a contract with Mr. William J. Brown to sell him my land on Clear fork, on which I now reside. I believe the contract says, containing 250 acres more or less. And the title was to be passed on by the 1st day of January after the contract. We entered into the con-

tract about the last of November some time. And the survey shall be completed by the party of the second part within six months from the date of the contract. The party of the second part went on this land and surveyed it, and prepared a deed for me to sign and acknowledge, but before I signed the deed, or acknowledged it, I notified them that this land had been excluded from the deed, and that it hadn't all been run out. They said they would look after that, or something. But it was some time, I believe it was 11 months, after the contract was made until I made them this deed. They brought me a deed, and I signed and acknowledged it, and I considered that that other land was mine. It wasn't included in the deed. They failed to run out all the land I had that was included in that contract, and the contract had expired some four or five months. That is why it wasn't included, and they never offered to run it out, and never tried to ascertain whether it was in it or not. Q. 6. You have stated that you were present when at least a part of the survey of your land was made by Mr. Taylor. State whether you were present when Mr. Taylor ran what you have referred to as the west line of your land, and the line which falls short of the mill tract. A. I don't think I understand the question. (Stenographer read question.) Yes, sir, I was present. Q. 7. Were you present when Mr. Taylor established the extreme western limit of that land—the line farthest down Clear fork? A. Yes, sir; I was present. Q. 8. Please state, if you know, how Mr. Taylor happened to stop there and fix that as the extremity of your land. A. Well, sir, at the time we was running down there I told him when we got down there that we was at the upper end of the Barnett tract. There was five acres sold off of the lower end of my land down there at one time, and I supposed that it contained five acres. I had never saw the papers, and didn't know where this line was. I told him I didn't want to sell anything that didn't belong to me, but I says if there is anything more than five acres down here it belongs to me, and we run across there. And then Mr. Taylor run out this Barnett tract, and when he platted it, it had six acres and something in it, and I told him that there wasn't but five acres in the Barnett tract. But after that I came over here and looked at the records, and found that I run down on that side of the creek. Q. 9. And you further told him that that was the corner of the Barnett tract? A. I didn't know whether it was the corner of the Barnett tract or not. I told him that was where the Barnett tract set in, and I didn't want to sell anything that didn't belong to me, and that in case it was that way, we had better stop there. Afterwards I found that my line extended on that side of the creek, but not on the other side. I told him if there was anything more than five acres of it, it belonged to me, and after

he platted it out he made it 6 ⁵²/₁₀₀, I think, and then I came and examined the records and found that the Barnett tract didn't make that much, and then I notified the company that that land was mine, and that Mr. Taylor hadn't included it in his survey. Q. 10. Do you know whether or not Mr. Taylor ever surveyed your land more than once? A. No, sir; if he ever surveyed it more than once I don't know it. I have no recollection of it. Q. 11. The deed which you executed to the Virginia-Pocahontas Coal Company, filed in this case, calls for this line as running to the small mill tract, and with the lines of the same. Please state to the jury how you claim under that deed that this land which lies between where Mr. Taylor stopped on that line and the Barnett Mill tract—why it is not included in this deed? A. Well, sir, it don't go down; that is, because it don't go down to the lower end of my survey. The creek runs right down through it, and the Barnett tract on the upper end is on one side of the creek and mine is on the other. The Barnett tract don't cross the creek, and we stopped up opposite the Barnett tract, thinking that it took the opposite side of the creek, but when I found out better, I notified the company or Mr. Hurt, and Mr. Taylor, that I had some more land there."

The testimony of Lambert concerning his notifying, before the execution of the deed, the attorney and agent, Mr. Hurt, and Mr. Taylor, the surveyor of the defendant, of the fact that the deed as presented to him did not include the 1.54 acres in controversy, is not unequivocally denied by the parties notified in their testimony; and Aaron Collier, a witness for the defendant and to whom Lambert surrendered possession of the property after the company purchased, on cross-examination admits that he told Hurt that Mr. Taylor told him there was a discrepancy in the land, and he told Taylor to see Hurt and tell him there was a discrepancy in the deed and that Taylor thought it might some day give trouble, that it had better be arranged, and that this was before Lambert executed the deed, strongly tending to corroborate Lambert that he had called attention to the fact that the deed did not include the land in controversy. It appears, and seems to be conceded, that the land at the time of the sale was worth about \$25 per acre, so that, in reply to the statement of counsel Lambert never would have thought of claiming that he had not sold the land in controversy to defendant, "had not the value of the land in controversy mounted from \$25 per acre to \$2,000 per acre in the brief period from October to April, and that he placed enough at stake to justify Lambert in taking long chances on a lawsuit against his vendee," it might with equal propriety be said on the other hand that, the land being of such trifling value as \$25 per acre when defendant was notified that 1½ acres were excluded from the deed, it was not

considered of sufficient importance to take up the matter and correct it before its execution, and defendant was satisfied to accept the deed as prepared by its attorney, and allowed it to be so executed, excluding the small quantity in controversy. This was a purchase by the acre. The surveying was done by the vendee, and by its own survey it included 208.03 acres only, and paid for that number of acres only. It is contended by defendant that the call for the corner of the mill tract controls, and not the course and distance as laid down in the survey, and cites *Fulwood v. Graham*, 1 Rich. Law (S. C.) 491, where it is said: "All the cases maintain that in locating land we are to resort first, to local boundaries; second, to artificial marks; third, to adjacent boundaries; fourth, to courses and distances." And citing *Western Mining and Manufacturing Co. v. Cannel Coal Co.*, 8 W. Va. 406, where the same order of precedence in locating boundary lines was adopted. Ordinarily this may be the correct order of precedence where there are no controlling circumstances and the face of the deed only is to be consulted.

Counsel for defendants contend that the construction of a deed is a question of law for the court, and cite 4 Am. & E. E. L. 809, where it is said: "The meaning of a deed, that is, what it covers, is a question of law for the court. What the boundaries of a given piece are is a question for the court also; where they are is a question of fact for the jury." As above stated, it is true the construction of the deed taken alone is for the court, but where the survey has been made upon the ground, as in the present case, and a line and corner fixed by the surveyor and parties, and a mistake has been made in the location of such line or corner as called for in the survey, and it has become a question of fact as to whether the vendee was notified of the mistake, and whether, being so notified, he elected to adopt the description made by the surveyor and caused the deed to be prepared and executed in accordance with such mistaken call, these are questions of fact for the jury. In *Johnson v. Archibald*, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27, it is held: "The survey as actually made may always be shown by any legal evidence, when in fact the lines were run upon the ground." And "Whenever the evidence is sufficient to induce the belief that the mistake in a survey is in the call for a natural or artificial object, and not in the call for course and distance, the latter will prevail, and the former will be disregarded." And further: "The declaration of the surveyor who made the survey is competent evidence to show that the mistake therein is in the call for a natural object, and not in the call for course and distance." And in *Tenant v. Hambleton*, 3 Har. & J. (Md.) 233, it is held: "To prove the location and survey of a tract of land calling to begin at the end of one of the lines of another

tract, and to run to and intersect other tracts, etc., and that it began at and run to particular places described on the plots, parol evidence of the surveyor, who originally located and surveyed the tract of land, was admitted as legal and competent. If certain tracts of land, called for by a junior survey, were surveyed by course and distance when the junior survey was made, then the grant on such junior survey passed no other land than was included by such survey." In 4 Am. & E. E. L. 786, it is said: "Courses and distances control incidental calls for monuments, except where there is a clear intention shown to make such calls locative; and they also control indefinite and conflicting calls for monuments. They govern where surrounding circumstances show them to be more reliable, or where such is the intention of the parties, or where monuments are called for by conjecture and not by actually running out the lines upon the ground according to rule. Sometimes a fixed and visible monument is controlled by course and distance"—and authorities there cited. And further at page 787, Id.: "Calls for supposed lines or for lines and corners of adjoining surveys which were not in fact established at the date of the deed which calls for them, or at the time that the adjoining or prior survey was made, are controlled by the courses and distances given in the deed." In *Bragg v. Lockhart*, 11 Tex. 160, it is held: "Where lands are partitioned and the lines are actually run and marked on the ground, the courses and distances corresponding with the marked lines will control a call for the corner of another survey, particularly where the corner of such other survey is not well established and marked on the ground; and subsequent purchasers will be bound by the actual survey, particularly where the lines are again run out, at such subsequent purchase."

There is no question in case at bar that a mistake was made in fixing the corner at the two spruce pines and calling for the corner of the mill tract, which corner was unknown at the time, and the actual survey made failed to reach the corner mentioned. It was not known, at the time, by the parties where that corner was. It was a question of fact to be decided by the jury whether the parties intended, at the time the deed from Lambert was executed, to include all the land contracted to be sold by Lambert to Brown. It was obviously the intention, indeed it is conceded that at the time the survey was made it was the intention, to include all of said land, but having failed, in the survey made upon the ground as marked out by the surveyor, to include it all, if the contention of the plaintiff is correct, that the defendant was notified before the execution of the deed that the description contained in the deed did not include all the land contracted to be sold to Brown or his assignees, and as it is shown by actual survey made by the defendant that the tract

as described by him contained only 208.03 acres, and it was a purchase by the acre, and defendant company paid for the exact quantity set out in the survey and deed, the defendant must be held to have adopted the actual survey of the tract as made on the ground and shown in the deed as the quantity of land it intended to purchase and have conveyed to it by said deed. This is really the only question involved in the case. The contract of sale is merged in the deed. It was clearly a sale by the acre, and if the defendant had notice before the deed was executed that it did not contain all the land contracted to be purchased, it elected to accept the survey as made upon the ground, the discrepancy between the contract and the deed being called to its attention. It elected to accept the conveyance of 208.03 acres as set out in the description made by itself, and as to the fact whether it so elected to accept the description made by itself after the mistake was brought to its attention, or whether, in fact, it was brought to its attention before the execution of the deed, was purely a question for the jury. Witness Lambert is positive in his testimony as to notice to defendant before the execution of the deed which was accepted by defendant with full knowledge that it did not contain the land in controversy, and the jury found that the deed was so accepted, notwithstanding the exclusion of the 1.54 acres in controversy.

The first assignment of error is in permitting the deed from Lambert and wife to Williams, dated April 17, 1903, to be read to the jury. This is the title paper under which the plaintiff claims, he had the right to show by this deed what he claimed and the boundaries of his land; defendant by their counsel do not attempt to give any reasons for excluding this deed and we see no reason why it should not go to the jury. It is claimed that the court erred in permitting T. A. Lambert to testify that the 1.54 acres were not included in the deed to the defendant company, and to testify that he notified the defendant company of that fact before it entered into possession under its deed. The contention of the plaintiff in the case was that the corner marked by the surveyor as two spruce pines corner to the mill tract was not in fact the corner of the mill tract, and that the line running to that corner stopped several hundred feet short of the corner of the mill tract, leaving the land here in controversy excluded from the survey then made, of which vendee had notice, and the testimony only amounted to this, if the court construed the deed to properly locate the corner at the spruce pines and not at the true corner of the mill tract then the 1.54 acres were not included in the deed.

It is also claimed that the court erred in overruling defendant's objection to the question in chief propounded to Lambert in which he was asked whether the Virginia-Pocahontas

Coal Company had paid him for the 1.54 acres, his answer being "No, sir." Because it is claimed that the same is wholly immaterial, the question involved being whether or not that land was conveyed in the deed. The question was perhaps immaterial, but I am unable to see in what manner it could prejudice the case of defendant. It was a certainty that it had not been paid for under the deed. The sale was by the acre and the deed called for a fixed amount—208.03 acres. Mr. Hurt, the agent, attorney, and witness of defendant, was asked by the defendant why the company had not paid for the land in controversy and he answered, "Because he wouldn't accept it." This was objected to by plaintiff and objection sustained after the answer was made. It would seem that the ruling of the court was favorable to the defendant rather than to the plaintiff; that the answer of the witness tended to prove the reason the plaintiff had for not accepting the pay for the 1.54 acres, as he was claiming that he had not sold it to defendant, and why counsel for plaintiff should object to the question or answer cannot well be conceived.

It is contended that the court erred in allowing the map and report of W. T. Tabor, surveyor, to be introduced in evidence to the jury. This map and report were made in response to the order of survey made in the case showing the lines and boundaries of the land in question. This is an official report made by a surveyor of the court after giving due notice to the parties, as required by the order of survey, no exception was taken to said report, the introduction of it in evidence was simply objected to by the defendant, and such objection was overruled by the court. No exceptions being taken to the report the court did not err in overruling the objection to its introduction as evidence.

Defendants say that the court erred in permitting witness Tabor, surveyor, who made the report, to testify that the land in controversy was not included in the deed to defendant company. This witness had, under the order of the court in this case, surveyed the land here in controversy and knew where the corner was made by the defendant's surveyor at the two spruce pines, and knew that according to the lines and corners of that survey marked on the ground it was impossible that the 1.54 acres here in controversy could be included in the tract of 208.03 acres conveyed by Lambert to defendant company, and it is not disputed that, if the two spruce pines, called for by the deed, are the true corner and not the corner of the mill tract, the deed for 208.03 acres does not contain the land here in controversy.

It is said the court erred in refusing to strike out the evidence of plaintiff on defendant's motion. When the plaintiff had introduced all his evidence in chief, defend-

ant moved to exclude the plaintiff's evidence from consideration of the jury and instruct the jury to find a verdict in favor of the defendant, which motion was overruled. In the trial of a case, when the evidence of the plaintiff is sufficient to sustain a verdict, if rendered for the plaintiff, the court will not sustain a motion to exclude the plaintiff's evidence from the jury.

It is further contended that the court erred in not permitting defendant's witness Hurt, who was the agent and attorney of defendant company, "to answer the question in chief as to whether the Virginia-Pocahontas Coal Company was ready and willing to pay for the land in controversy in this case according to the terms of the contract between Lambert and Brown." If it was true that the defendant company had accepted the deed with notice of the fact that the description contained in the deed did not include the land in controversy, the answer was immaterial, the minds of the contracting parties had changed, and by so accepting the deed as executed, with notice of the change in the survey, the intention of the parties was to exclude the 1.54 acres, and it had become immaterial whether the defendant was ready and willing to pay for the 1.54 acres or not.

The defendant says that the court erred in refusing to give instructions Nos. 1 and 2 asked for by the defendant. These instructions asked the court to tell the jury that the land described in the deed from Lambert to the Virginia-Pocahontas Coal Company extends to and runs with the lines of the Barnett Mill tract, and if the jury believe from the evidence that the land in controversy was a part of said tract of land then they must find for the defendant. This, of course, asks the court to construe the deed in accordance with the theory of the defendant, but the facts have been shown that the actual survey made by the defendant upon the ground failed by mistake to reach the mill tract, and the surveyor and the vendor Lambert, who was with him, supposing they had reached the mill tract, marked a corner which lacked more than 500 feet of extending to the mill tract. The agent and attorney of the defendant prepared the deed and presented it to Lambert to be executed some time after the surveying was done, and, in the meantime, Lambert had discovered the mistake that had been made and informed the defendant that the description, as contained in the deed, did not include all the land that he owned there and had agreed in his contract with Brown to sell. The defendant chose to accept the deed excluding a small portion of the land and which is that in controversy here, only paying for that which it got under the deed, fixing the corner at the two spruce pines so fixed by its surveyor and Lambert, and, having so accepted the deed with notice of the mistake, it is estopped from claiming lands

which are not included within the boundary marked upon the ground by its surveyor. If there were no circumstances throwing doubt upon the intention of the parties showing that a mistake had been made and that both parties had become cognizant of the fact of such mistake before the execution of the deed, it would have been proper for the court to give said instructions; but where a question of fact comes so prominently to the front, raising the question of the mistake and the subsequent action of the parties with the knowledge thereof, the court would not be warranted in construing the deed according to the theory of either party, but the question of fact must be left open for the jury. To make the instructions good there should have been added to them something to this effect: "Unless the jury further believe from the evidence that a mistake was made in fixing the corner of the tract, so conveyed by Lambert to the defendant, at the two spruce pines instead of the corner of the Barnett Mill tract, as called for, thereby excluding the 1.54 acres here in controversy, of which mistake the defendant was notified prior to the execution and delivery of the deed to it, and that it accepted the deed notwithstanding it did not include the land in controversy." Without such modification the court did not err in refusing the instructions.

For the reasons herein given the court did not err in refusing to set aside the verdict of the jury and grant the defendants a new trial, and the judgment of the court must be affirmed.

(50 W. Va. 635)

HARVEY COAL & COKE CO. v. DILLON,
Tax Commissioner, et al.

(Supreme Court of Appeals of West Virginia,
June 16, 1905.)

1. TAXATION—MINING LEASE—CHATTEL REAL
—ASSESSMENT TO LESSEE.

A sealed writing witnesses that "the lessors do demise, let and lease for coal mining and coke manufacturing purposes for a period of thirty years" a tract of land; and that the lessors "do also grant unto the lessee the sole and exclusive right and privilege of mining, shipping and selling the coal from the above leased premises * * * and the right to erect and use all buildings and structures necessary for the purposes of mining, coking and shipping the coal and coke"; and also that "it is expressly agreed between the respective parties to this lease that if at the expiration of the said period of thirty years, all the available merchantable coal which can be profitably mined, and which is hereby let to the lessee for that purpose, has not been mined and removed, then the lessees shall have the privilege of an extension of this lease upon the same terms and conditions as those hereinbefore set forth, for a reasonable additional time until the whole of said coal can be so mined and removed." The writing provided for a rent or royalty to the lessors of ten cents a ton for all coal mined, and also contained a clause of forfeiture for non-compliance by the lessee with the covenants of the writing. *Held*, that this writing created a lease, a chattel real, taxable to the lessee under chapter 85, p. 285, Acts of 1905.

2. SAME—DOUBLE TAXATION.

Chapter 35, p. 285, Acts of 1905, in its taxation of chattels real is not in violation, as double taxation or otherwise, of the state Constitution.

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—TAXATION OF LEASE AS PERSONALTY.

Chapter 35, p. 285, Acts of 1905, is not in violation of amendment 14 of the national Constitution, as wanting due process of law, or denying equal protection of the law.

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County.

Bill by the Harvey Coal & Coke Company against C. W. Dillon, tax commissioner, and others. Decree for defendants and plaintiff appeals. Affirmed.

St. Clair, Walker & Summerfield, Brown, Jackson & Knight, Vinson & Thompson, Rucker, Anderson & Hughes, Sheppard & Goodykoontz, and Jos. H. Gaines, for appellant. C. W. Dillon, Mollohan, McClintic & Mathews, and Geo. C. Baker, for appellees.

BRANNON, P. The Harvey Coal & Coke Company, a corporation, presented to the Honorable W. R. Bennett, judge of the circuit court of Fayette county, a chancery bill setting up that on 20th of May, 1893, it made a contract with Morris Harvey and others for the purchase of all the coal in the Sewell seam in certain land, together with the right to enter upon the surface and use so much of the surface as might be required in mining, for which the company was to pay Harvey and others 10 cents per ton for all coal mined; that it had actually developed the coal mine and was engaged in mining coal and making coke on the land. The bill complains that under certain legislation enacted in 1905 for the taxation of personal property C. W. Dillon, state tax commissioner, had issued such instructions to B. E. Ware and S. T. Carter, assessors of Fayette county, as would require them to assess said mining property under the head of chattels real, and that the assessors would assess it, and praying that said commissioner and assessors be enjoined from making such assessment, on the theory that it was unwarranted by law. The court sustained a demurrer to the bill and dismissed it, and the plaintiff appeals.

The deed from Harvey and others to the plaintiff contains the following language: "That the lessors do demise, let and lease for coal mining and coke manufacturing purposes for a period of thirty years from and after the 1st day of January, 1893, the following tract or body of land lying." And the lessors "do also grant unto the lessee the sole and exclusive right and privilege of mining, shipping and selling the coal from the above-leased premises from the said Sewell seam, and the right to erect and use all buildings and structures necessary for the purposes of mining, coking and shipping the coal and coke therefrom and for all

other purposes connected with or necessary for the free exercise and enjoyment of the privileges above granted or demised." "It is expressly agreed between the respective parties to this lease that if, at the expiration of the period of thirty years, all of the available merchantable coal which can be profitably mined, and which is hereby let to the lessee for that purpose, has not been mined and removed, then the lessee shall have the privilege of an extension of this lease upon the same terms and conditions as those hereinbefore set forth, for a reasonable addition of time until the whole of said coal shall be so mined and removed. And it is further mutually agreed and understood that an abandonment of said premises by said lessee for a period of one year and a failure to pay royalty as hereinbefore provided for that period, then said lessee shall forfeit all right to said premises." The question of equity jurisdiction was waived, and is not considered. This is a very important case. It is vastly important to the state, as it involves large revenue imposed by recent legislation, and the construction and even validity of that legislation. The tax commissioner claims that there is a value of \$200,000,000 in leaseholds in this state, which has never been charged with taxes. That these leaseholds involve great value is not denied. So also it is of great importance to the owners of leaseholds, as it imposes upon them taxation. Able and elaborate oral and printed arguments by distinguished counsel demand that we write a perhaps too lengthy opinion, as well also does the gravity of the case.

As to the state's power of taxation: In *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455, it is asserted that "the power to tax is the strongest, the most pervading, of all the powers of the government, reaching directly or indirectly to all classes of the people." It was said by Chief Justice Marshall, in *McCulloch v. State of Maryland*, 4 Wheat. (U. S.) 431, 4 L. Ed. 579, that "the power to tax is the power to destroy." "The power to impose taxes is one so unlimited in force, so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it." Justice Field said, in *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 319, 21 L. Ed. 179, as follows: "It may touch property in every shape—in its natural condition, in its manufactured form, and in its varied transmutation. * * * It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufacture, in transportation." Cooley on Taxation, 9, says: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property or franchise or privilege or occupation or right. Nothing but special constitutional limitation from

legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the Legislature in its discretion shall select it for revenue purposes; and not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limitation, and may be carried even to the extent of exhaustion, thus becoming in its exercise a power to destroy." In May or June, 1905, the Supreme Court of the United States decided the case known as the "New York Franchise Tax Case," and sustained the constitutionality of an act taxing the franchises of corporations. The case asserts again very wide powers of taxation in the states. See *People v. Tax Commissioners* (U. S.) 25 Sup. Ct. 705, 50 L. Ed. —. I have not the text of the case. In it Justice Brewer delivered the opinion holding that the intangible assets of a corporation are subject to taxation, and that corporations owning franchises must contribute their share to the expense of the government. Justice Brewer said, in delivering the opinion for the court: "We had occasion to review this subject in the *Adams Express Case* versus Ohio, where we said: 'In the complex civilization of today a large proportion of the wealth of a community consists in intangible property, and there in nothing in the nature of things, or in the limitations of the federal Constitution, which restrains the state from taxing at its real value such intangible property. It matters not in what the intangible property consists, whether privilege, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large proportion of the wealth of the country.'"

The Constitution of this state gives the Legislature power, indeed, a mandate, to "tax all property, real and personal." Therefore, the question is material: Does the deed in this case vest what is in law property in the Harvey Coal Company? The very suit in itself is a concession by the company that its right under said deed is property, because that suit is to defend that property against taxes. But, aside from such concessions, it is quite plain that the company's right is a property right. Anything capable of beneficial ownership is property—in this instance a valuable right arising by contract, a right to take coal from the body of land, using the land for that purpose, and convert it into salable coal, a commodity of great commercial value. "Man's rights in respect to things constitutes property." 2 *Minor's Institutes*, 1. The company's right to produce commercial, merchantable coal for market and manufacture coke is a right in respect to the land,

and that mere right, under the contract, is property. The sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the rights of any other, is property. 2 *P. Com.* 2. The right to possess, use, enjoy, and dispose of a thing is property which is in itself valuable. *Jones v. Vanzault*, 4 *McLean*, 603, *Fed. Cas. No. 7,503*; *Bouvier L. Dic.*, word "property." A mining right in government land is property in the miner, and property of value, and may be taxed by the state, and the state may sell it for taxes. *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313. I repeat that plainly the right vested in the coal company, and being actually exercised, is property, and the Legislature has full power to tax it in some manner. Except as restrained by the Constitution, the state may tax without limit as to subject or rate. We need not discuss the power to tax this property, as the Constitution gives it. In what manner shall it be taxed, as real or personal property? The Legislature has enacted that all property, real and personal, shall be taxed. The tax commissioner claims in behalf of the state that this mining right is personal property, and of that kind called by the law "chattels real," and as section 61 of chapter 35, p. 309, Acts of 1895, defines "personal property" as including chattels real, and other sections direct their taxation, his direction to assessors is to tax chattels real, as personalty, and the assessor will charge the said right of the company. The company claims that its right is not a chattel real, not personalty, but real estate, and cannot be charged to it as personal property, but can be charged only as real estate to the owner of the land itself, and that the charge of the tax to the owner covers, includes the right of the company. As the act declares that personal property shall be taxed, if the company's right is a chattel real, which always has been regarded in law as personal property, briefs in the case argue that that is alone a warrant to charge the leasehold; but, if it is a chattel real, we do not have to pass on that question, because the statute, as we hold, expressly taxes chattels real. What, then, is the character of that property conferred upon the defendant by its deed? A "freehold" is an estate for life or in fee; a "chattel real" for a less estate. Volume 22 *Am. & Eng. Enc. Law* (2d Ed.) defines it thus: "An estate in land other than one for life or inheritance." *Tucker's Com.* 2, p. 305, defines chattels real thus: "Chattels real, saith Sir Edward Coke, are such as concern, or savor of the realty: as terms for years in land, wardships in chivalry (while military tenures subsisted), the next presentation to a church, estates by a statute merchant, statutes-staple, elegit, or the like; of all of which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estate; of which they have one quality, viz., immobility,

which denominates them real, but want the other, viz., a sufficient legal, indeterminate duration; and this want it is that constitutes them chattels. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or until such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life." See 7 Cyc. 123. Bouvier's Law Dictionary says: "Real chattels are interests which are annexed to or concern real estate, as a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it, and a reversion or remainder in some person." A "lease" is defined by Bouvier to be: "A species of contract for the possession and profits of lands and tenements either for life or for a term of years or during the pleasure of the parties. A conveyance by way of demise always for a less term than the party conveying has in the premises. One of the essential features is that its duration must be for a shorter period than the duration of the interests of the lessor in the land, for if he disposes of his entire interest it becomes an assignment, and is not a lease. In other words, the granting of a lease always supposes that the grantor reserves in himself a reversion." In 18 Am. & Eng. Enc. of Law (2d Ed.) 597, we find a "lease" defined thus: "A lease is a contract for the possession and profits of lands and tenements on the one side and the recompense or rents on the other, or in other words, a conveyance to a person for life, years or at will, in consideration of a rent, or other recompense."

Try this property or right under these definitions. It is surely a lease, and therefore a chattel real. The fee owner carves out of his fee a particular estate and vests it in another. The coal having been developed, then, if not before, an actual estate vested as to the coal right, an entity, a distinct entity, a separate property from that remaining in the lessor. The instrument of conveyance gave certain title to the coal company, gave it an intangible right; that is, a right to produce personal property, a product of the land. This right savored of the realty, depended on it, was annexed to it, and so far answers the definition of a chattel real, which is personal estate. We say that the estate of the coal company is a lease for years, and, if so, by all authority a chattel real. The parties thought they were making a lease for years, intended to do so, so far as we may judge from legal language, for they used the words of lease signification, "demise, lease and let." The instrument calls itself a lease and calls the parties lessor and lessee. But take the document itself. It leases the tract for "a period of thirty years," not forever. It has a specific term, gives an estate less than the fee of the les-

sors, leaving the whole tract at the end of the term to revert to the lessors disincumbered and freed from the leasehold estate, thus meeting another element in the definition of a chattel real; that is, that it must be of less duration than the estate of the lessor. In this case, all the features of a lease for years are present—leasing language, a term, a rent, forfeiture, and reversion. A grant giving right to mine lead was held to be a lease in *U. S. v. Gratiot*, 14 Pet. (U. S.) 538, 10 L. Ed. 573—pointed in this case. The case holds that: "The legal understanding of a lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent. It is not necessary that the rent should be in money. If reserved in kind, it is rent in contemplation of law." And I notice that the very language of the lease is that it lets the coal. As the court said in *Raynolds v. Hanna* (C. C.) 55 Fed. 783: "In the present case the term is sufficiently definite. Subject to its sooner termination under the forfeiture clause of the contract, it is to continue so long as there is coal that can be practically mined. This constitutes a determinate period." The limit of thirty years gives it a definite period; but the argument is made that the lease says that, if the seam of coal should not be fully taken out within that time, then the lessees should have "the privilege of an extension of the lease." Now, this does not give a forever extension to last as long as the lessor's estate. It is an extension for a reasonable time; that is, only such time as reasonably necessary to remove the coal. The land was not to be under servitude forever. And what seems to me to answer this argument is that the extension is merely an option, on the part of the company, not an extension at all events, not a further estate at all events. This extension clause does not make the estate a freehold, and cannot convert the grant from the character of a lease for years to an enduring estate. There comes a time when the right of the coal company must end, leaving the fee in the lessors relieved of the leasehold, even if there shall be an extension. I repeat that the extension clause does not take from the estate the character of a lease. In *State v. South Penn Oil Company*, 42 W. Va. 102, 24 S. E. 688, this court said: "Nor does the addition to the term of the clause 'and as long as oil or gas may be found in paying quantities' give it such indefinite duration as to make the interest freehold in quantity, for, after the expiration of the term prescribed, the lessee, having the option to continue to pump if he can find oil in paying quantities, becomes a tenant at will, which may become a tenancy from year to year on the terms of the lease; but it is not a freehold, because its extension after the end of the term prescribed depends upon its own act, the exercise of its own will; so, according

to the terms of the instrument, that is as large an interest as the word will bear. Such superadded possibility of extended duration constitutes no part of the term of years prescribed, but is a new interest in the nature of an option to become tenant at will or from year to year by the exercise of its own volition when the fixed term of years shall have expired. It has but a contract with the owner of the land for the possession. It is not seised of any part of the ownership of the land by any title." "A grant of land to mine for coal so long as there was coal to mine, with leave to take under certain conditions all the coal in the land, and also containing covenants and a provision of forfeiture in case of noncompliance, was construed a lease." *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59. A lease for 99 years, renewable forever, by common law is only a chattel. 5 Am. & Eng. Enc. Law. 1024. The grant is only until all the coal be mined—in character like a lease until out of the profits a debt shall be paid, and that is a chattel real by the definitions above given. "It seems to be regarded as essential to a good lease for years that it should be either for a certain period, measured by years, or for a period uncertain only from the circumstance that it may be determined before its natural expiration by some event, or by having a purpose which of itself serves to ascertain the length of time for which the premises are to be held." 1 Washburn, R. P., § 211. The present is a mere lease under this authority.

It is said, however, that, when the coal shall be exhausted, there will be nothing to revert to the landowner, and that this repels the idea that the right of the company is a chattel real, as there must be a reversion or remainder to make a chattel real. The answer is that the grant is not of the very coal. The phrase of the deed is not that. It leases the coal. It lets the tract itself to be used for a special limited purpose. It gives an intangible, incorporeal thing, a right to take actual possession of the tract and use it so far as necessary to take coal and make coke. When the term in this intangible right, savoring of the land, ends, that is at an end, not the mere coal. There are many cases bearing on the subject and somewhat clashing. In this, as in most other cases, there is a wilderness of decisions, and it is impossible in an opinion to attempt to analyze them. The best the court can do in the great volume of conflicting cases is to select those which, in its judgment, best suit the particular case as a basis of decision for that case. An agreement conveying all coal in a tract with the right to remove for 50 years was termed a lease. *Hyatt v. Vincennes*, 113 U. S. 408, 5 Sup. Ct. 573, 28 L. Ed. 1009. "The possession by the citizen of, and his possessory interest in, the public land for mining, agricultural, or other purposes, constitutes a species of property recognized by law, and is a subject of taxation by the

state." *People v. Shearer*, 30 Cal. 645. "An instrument which conveys premises to the grantee for the purpose of mining coal 'so long as there is coal to mine thereon,' and providing for a payment of bank rents therefor, and with a forfeiting clause in case of noncompliance with the terms of the instrument, is a lease." *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59. In *Haywood v. Fulmer*, (Ind. Sup.) 82 N. E. 574, 18 L. R. A. 491, the construction was involved of a writing which acknowledged the receipt of \$175 in payment of a sand bar for the year 1890, and recited that it was for the exclusive right to all gravel and sand for that year, and excluded all other parties from the premises. The question was whether it was a lease, a license, an executory agreement, or an interest in the sand bar. The court said: "A lease may not only confer upon the lessee the right to the occupancy of the leased premises, either generally, or for the land, or for some specific purpose, or in some specific manner, or the right to occupy and cultivate and remove products of cultivation; but it may confer upon him the power to occupy and remove a portion of that which constitutes the land itself. Similar and common examples of such leases are those authorizing a lessee to quarry and remove stone, to open mines and remove ores, mineral, coal, or to sink wells for procuring and removing petroleum and natural gas. The power to execute leases for such purposes, and the fact that the instrument by which such interest in land is granted may be in all essential particulars a lease, will not be questioned. Manifestly there can be no valid reason why a lease may not confer the right to remove a portion of the soil, or of sand and gravel found upon the surface of the land, as well as to remove stone or iron ore or mineral coal found either upon the surface or beneath it. In our opinion, the writing in question contains all the essential elements of a valid lease." In this case, the Indiana court did not think that the fact that a part of the substance of the soil was to be removed gave it any other cast than that of a lease. It likened it to an agricultural lease. I see no reason to discriminate an agricultural lease from this lease, so far as that the one is as much a lease, a mere chattel interest, as the other. In *Raynolds v. Hanna* (C. C.) 55 Fed. 783, it is held as follows: "By an agreement between the executor of an estate and a coal company the executor granted the exclusive right to enter upon, mine, and remove the coal in the premises and the right to occupy and use so much of the surface as would enable the company to conduct mining operations and to make use of so much of the timber as might be necessary in mining. The company agreed to mine the coal for a certain compensation, a royalty, and if the company failed to make payments this lease may, at the option of the first party, be declared forfeited, and it was held that the

agreement was a lease and the royalty was a rental." This is much like this case. A memorandum leasing all the coal in a parcel of land was held to be a lease in *Genet v. Delaware*, 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127. An instrument conveying an interest in land for a certain time with the exclusive right to mine, the grantee paying a rent in ore, was held to be a lease in *Lehigh Zinc Co. v. Bamford*, 150 U. S. 635, 14 Sup. Ct. 219, 87 L. Ed. 1215. In *Blue-stone Coal Co. v. Bell*, 38 W. Va. 297, a right to mine coal was held to be a lease. The court, in *Genet v. Delaware*, 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127, declared that the instrument did not convey the coal itself, and that its subject-matter was mineral product, not land. And in *Bowyer v. Seymour*, 13 W. Va. 12, an instrument reading "Doth lease all the mineral, coal and iron ore underlying the lands," without fixing any term and providing for a royalty rent to the lessor, was held to be a lease, treated only as such. A notable case is that of *State v. Moore*, 12 Cal. 53. The case was decided by Judges Terry, Baldwin, and Field; the last afterwards a justice of the Supreme Court. The case was maturely considered. In California mining claims were the property of the United States, and not subject to taxation. The court, however, hold that the interests of the occupants of the mining claims were a distinct species of property, severable from the mining claim of which it was a part, and that, being so severable, it could be assessed and taxed as the property of the owner. It was claimed that inasmuch as the mining claim, to which the miners' rights were related, was exempt, that the occupants' must also be exempt. The syllabus is as follows: "The interest of the occupant of a mining claim is property, and, under the Constitution, it is in the power of the Legislature to tax such property. The whole course of legislation and decision in this state has recognized a qualified ownership of the mines in private individuals. The terms 'property in lands' is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or mere right of possession. Several persons may have, in the same land, a property which is subject to taxation, and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interests which individuals have acquired in the same property. Exemption from taxation is the privilege of the government, not an incident to the property. There is no force in the supposition that the value of a mining claim, which depends upon the amount of the metals it contains, must necessarily be left to conjecture. The universal standard of value is the amount of money that can be realized by a sale of the property, and this will apply as well to mining claims as to lands. That case also said, as just stated, that the

instrument created a lease, and that "It is not an absolute grant of all the coal in the land." See *Moore v. Miller*, 8 Pa. 283. In Kentucky, assessment of a leasehold estate was held to be valid. In *Wilgus v. Commonwealth*, 9 Bush (Ky.) 556, it is held: "A lease for 99 years, with a provision for perpetual renewal, is personalty, and is not to be listed for taxation as real estate." The Code of Alabama required that each piece of land, and each separate or special interest in it, such as mineral, should be taxed to separate owners. It was held that a lease for years for the purpose of cutting sawlogs was such special interest, which should be taxed. *Freeman v. State*, 115 Ala. 208, 22 South. 560.

Mining leases, and their legal effect, have often been before the courts, and have generally been construed to be leases creating leaseholds, and being for a term of years, and not freeholds, constituting chattels real. 5 Am. & Eng. Enc. of Law (2d Ed.) 1024; U. S. v. Gratiot, 14 Pet. (U. S.) 526, 10 L. Ed. 573; *Consolidated Coal v. Peers*, 150 Ill. 344, 37 N. E. 937; *Pelton v. Minah*, 11 Mont. 281, 28 Pac. 310; *Young v. Ellis*, 91 Va. 297, 21 S. E. 480; *Ganter v. Atkinson*, 35 Wis. 48. Those cases show mere leases, and I hold that, being leases, they are chattels real. But the coal company contests the position that it has a lease taxable as personalty, as chattels real. It says that the deed shows a sale of the coal, and that the coal itself is taxable as real estate to the owner of the fee, and that the charge of the land to the owner of the fee covers and pays taxes also for its coal. I have just cited a California case showing that the lease does not convey the coal. The plaintiff bases its theory that it does not own a chattel real taxable as personalty to it on certain Pennsylvania cases, and cites them with confidence. A leading Pennsylvania case is *Sanderson v. Scranton*, 105 Pa. 469, holding that an agreement leasing "all the coal beneath the surface, with right to remove the same," with no term fixed in the instrument, it saying that "the true meaning of this lease is to be perpetual until all the coal under the tract of land herein described is mined," conveyed an interest in land. The court gave emphasis to this clause, saying that the lease was not for years, life, or will, and therefore held it a conveyance of the very coal. In *Montooth v. Gamble*, 123 Pa. 240, 16 Atl. 594, the deed said: "Sell and convey unto the parties of the second part all the bituminous or stone coal in or under" a tract. So in *Lazarus' Case*, 145 Pa. 1, 23 Atl. 372. Such is not our case. The deed in our case grants the tract for a specific purpose; that is, with the right to mine coal, and make coke, and does not grant even the coal itself; whereas, the Pennsylvania cases show deeds granting, not the land, not the tract, but all the coal. The Court of Appeals of New York, in *Genet v. Delaware Coal*, 136 N. Y. 603, 32 N. E. 1080 (19 L. R. A. 127), referred to

the Pennsylvania cases and said: "Whatever we may think of the general doctrine, one thing about it is quite obvious. It applies to a case, and only to a case, in which by the terms of the agreement and in contemplation of the parties the whole body of the coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it can be identified as land and severed as land from the estate of which it forms a part. Every case upholding the doctrine, which I have been able to examine, has that marked characteristic"—and citing the cases. The court held a deed saying "doth hereby lease all the coal contained in" a tract to be a lease, and that it did not operate as a conveyance of the coal veins or strata.

It seems that the above Pennsylvania cases holding that an oil or coal lease conveys an interest in the land conflicts with other Pennsylvania cases holding them to create a chattel interest salable on execution. In *Brown v. Beecher*, 120 Pa. 590, 15 Atl. 608, we find this point of law decided: "A demise of land for a term of years, 'with the sole and exclusive right and privilege during said period of digging and boring for oil and other minerals, and of gathering and collecting the same therefrom,' conveys an interest in the land, a chattel real, but none the less a chattel." See *Desty on Taxation*, 176. Grant, for argument, that it is the sale of an interest in land; still that Pennsylvania case, which cited others to the same effect in the syllabus, says that it is none the less a chattel real. Thus, even if it conveys an interest in land, it is a chattel interest, and this blasts the inference sought to be made from the Pennsylvania cases that this leasehold passes realty, an interest in the land, and must be taxed as such, and that to the fee owner. We can find plenty of authority that a state may tax land as personality, or leasehold as personality or realty, as its statutes may prescribe. This being a leasehold by common law, and being personal property by common law, is enough; but, in addition, the statute of 1905 declares that it shall be taxed as chattel real. And the Pennsylvania cases, which counsel for the plaintiff cite to show that this lease or document conveys the very coal or an interest in the land, are not consistent with the other Pennsylvania cases. *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, involved a deed which "granted, demised and let, for the sole and only purpose of mining and excavating for petroleum," a tract of land for royalty for 20 years, and the court carefully considered its character and said: "The contract does not purport to be a sale of all the oil under the farm, but a grant of the right to mine and remove oil for a fixed period." If oil should be found, "the contract took

effect as an oil lease, and the lessee had a right to operate the land for the production of petroleum." So in *McNish v. Stone*, cited in *Venture Oil Co. v. Fretts*, 152 Pa. 457, 25 Atl. 732, and reported in a footnote, the deed said, "do lease unto the parties of the second part the exclusive right to bore or mine for Seneca oil or other minerals" on described land for 99 years. The court said that the contract was "not a grant of the mineral in place or under the land," and that if oil was found "the right or interest is an incorporeal one." The court held that it was a lease. See, also, *Funk v. Haldeman*, 53 Pa. 229; *Duffield v. Hue*, 129 Pa. 94, 18 Atl. 566; *Appeal of Thompson*, 101 Pa. 232.

I have already cited numerous cases contrary to the Pennsylvania cases showing that mining contracts like that involved in this case are held to be leases, not sales. The West Virginia cases hold them leases. The case of *Bowyer v. Seymour*, 13 W. Va. 12, already cited, attests this, and also *Bluestone Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493. The last case involved a lease of 99 years. A contract leased all coal under tracts of land with right to go on the land to develop coal and also cut timber for mining use for 10 cents per ton of coal payable to the lessor. It fixed no term. It was treated as a lease, a chattel real, and for that reason right to tax it as realty to the lessee was denied. The company lessee had done nothing under the lease. No estate had vested in it. It was not treated as a sale of the coal, but as a mere lease, and the coal chargeable to the landowner. If it was a sale, why not charge the lessee? It was expressly decided that because it was not a conveyance of a freehold in the coal, but a mere lease, it could not, under the revaluation act of 1891, be charged to the lessee; whereas, if it had been a sale outright of the coal, it would be otherwise. This is strong to show that it was, though no term was fixed, not a sale. It was declared a lease in words. The land could be chargeable only to one holding a freehold for life or in fee. *U. S. Coal Company v. Randolph County*, 38 W. Va. 201, 18 S. E. 566. A lease of a tract for mining coal, for 10 cents per ton royalty, was treated as a lease in *Coaldale Company v. Clark*, 43 W. Va. 84, 27 S. E. 294. Take the case of *State v. South Penn Oil Company*, 42 W. Va. 80, 24 S. E. 688. It holds that a privilege, liberty, or license to search and explore the land for oil or other minerals, coupled with a grant to dig and remove them and convert them to the grantee's use, if in fee or for life, creates an incorporeal freehold right in the real estate which must be assessed to the grantee separately from the land, if minerals be found or produced, "but such privilege, liberty or license, and such interest, if limited to a term of years, are not held and owned as the whole or a part of the freehold ownership, within the meaning of the

act. and should not be separately assessed to the mining lessee on such land books." In *Peterson v. Hall*, 50 S. E. 606, we again said the oil lessee "had no estate in soil or minerals." The act referred to was the revaluation act of 1891. This South Penn Case shows: (1) That a lease of a tract for mineral development, for life, fee, or a term of years is not a sale or conveyance of the land or mineral, but confers an intangible or incorporeal estate in connection with the land, a right issuing out of it; and (2) that, if for life or fee, it was taxable to the grantee of that incorporeal right, because the act of 1891 provided that, if minerals were owned by any one exclusive of the surface, they should be charged separately from the surface to the one owning them. The lessee was by the act held to be owner, but, if the mineral right were less than for life, the mineral should be considered still as part of the land, and, when the land was charged, should be not charged to the lessee; that it was not real estate and could not be charged to the grantee, because land, by our laws, could only be charged to the freehold owner, and this shows that it was not a sale or transfer of the very mineral, but of only a right to use the land to convert the mineral to personalty by severance from the body of the land. The case pointedly says that the coal itself was not sold. The court said: "A lessee, in the proper sense, may, by contract, have right to possession, and the possession, of the coal as part of the thing to which the ownership applies, but no part of the thing owned is vested in him; and the statute contemplates a case in which the other party has become the owner of the mineral or coal and holds it as such owner. And in that common-law sense, adopted by the general assessment law, the ownership to be assessed cannot be divided into parts less in quantity than freehold." The statute charged land only to the freehold owner. Just as I have once said, above, in this case the coal company has right of possession of the coal and of the land to mine that coal, but no title to the very coal or land—only a right to coal in connection with the intangible right to produce coal, to make it personal property for market. These leases, in their plain import, mean that the surface owner owns the whole land and everything in place in it, and that the lessee simply has a usufructuary right in connection with the land, right to use the land for a purpose, a terminable right, which may be long or short in years; that is, a mere chattel real, issuing out of lands, but constituting a distinct estate, a valuable one as property, and which is property, and therefore taxable, if the state see proper to do so. It must be a mere leasehold, a chattel real. Not being a freehold, and being incorporeal, a mere right to use the land for a purpose, what can it be

but a leasehold for years? It must be something in the legal eye. It cannot be non-descript. The court, in the case referred to last, did not say whether or not that chattel real could be taxed as personal property under the statute providing that all personal property should be assessed annually, as that statute was not involved in the case, but only the act of 1891, for the revaluation of land. And note that the court's opinion on page 104, 42 W. Va., page 697, 24 S. E., uses this plain and emphatic language, which we borrow and now announce as law, though it was then obiter, namely: "If the state sees fit to tax this kind of personal property, then it can be distrained and sold like other personal property." As further showing that such a lease is not a sale of the coal itself, but confers a leasehold for years taxable as personalty, I will add that the oil and gas leases used in the state demise a tract of land for the purpose of developing and taking oil and gas for a fraction of the oil as royalty, and for a fixed sum per gas well, to the lessor, for a specific term of years, and as much longer as oil and gas can be produced in paying quantities, and they have always been treated and deemed to be leases, not grants of the mineral in specie. *Bowyer v. Seymour*, 13 W. Va. 12, was a lease for all coal in a tract with no definite term. It was treated as a lease, just as an agricultural lease. What the difference? We have always thought that these instruments, whatever their form, since they only give right to produce mineral out of the fee owner's soil, leaving him to all intents still the owner of the land and all mineral still in the ground, though the land may be leased, were simple leases, conveying chattel interest, and we believe that many cases give that cast and stamp to them, and do not consider them as conveyances of the body of the coal or oil, when not in fee. *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; *Bettman v. Harness*, 42 W. Va. 433, 28 S. E. 271, 36 L. R. A. 566; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Trees v. Eclipse Co.*, 47 W. Va. 107, 34 S. E. 933; *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344; *Lowther v. Miller-Libley Co.*, 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533; *Peterson v. Hall* (W. Va.) 50 S. E. 603. These leases have, even after production, been held to still leave the oil and gas in situ in the ownership of the lessor, and not to be taxed to the lessee as real estate—I say as real estate. This shows that these instruments do not convey the oil and gas. The cases have held that they cannot be taxed as realty, but they do not pass on their taxability as personal property.

Our tax laws long have provided that all personal property shall be taxed, but these leases for coal, oil, and gas have never been taxed on the personal property books in the past and the question of their taxability has never arisen. Until chapter 35, p. 285, Acts 1905, the tax law did not include chattels real as specific subjects of taxation. Various decisions, like *Peterson v. Hall* (W. Va.) 50 S. E. 603, hold that coal, oil, and gas in place were taxable to the surface owner, or rather not separately taxed, not taxable to the lessee, and thence it is urgently pressed in argument that the decisions have excluded all idea of taxation of them either as realty or personalty to the lessee. I repeat that the question of taxation of the leasehold, as such, has never been up under former laws. In *Carter v. County Court*, 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725, a tax charge was made on 90 producing oil wells on the personal property taxbook, and it was held illegal taxation. It was said to be an assessment on future production of oil, and the court regarded it as a tax on oil in its place still in the earth, and, as all cases had held such oil real estate, there was no law to assess it as personalty. Now, this was not an assessment of that intangible chattel real, the leasehold. That case is no authority against this tax act of 1905. Whether the distinction seems refined or not, it is real in legal thought, for a leasehold is not the wheat or corn produced under the right conferred by the lease. The lease is a thing apart from the commodities produced under the right conferred by it. The common law has always recognized chattels real as distinct property, taxable if the Legislature should so direct, and therefore this distinction is not new or unheard of or refined—I mean the discrimination of the leasehold from the fee ownership out of which it issues. The law has always recognized it. A chattel real is a thing of property, in and of itself, known to the law through centuries, and is not the coal, oil, wheat, or corn produced from the soil by virtue of the right arising from it. They are realty while attached to the land, personalty when severed. The leasehold is an entity per se, not an empty shadow or gauze. So, the case of *Carter v. Tyler County*, and other cases holding that oil in place is included in the charge of the land to the owner, and cannot be charged to the lessee of oil right, do not solve the question whether, under the tax law before that of 1905, such a lease was taxable under the general direction of the statute taxing all personal property. Before 1905 the statute did not expressly charge chattels real as personal property, as does the act of 1905. True, Code 1899, c. 13, § 17, cls. 15, 16, says: "The words 'personal estate' or 'personal property' include goods, chattels, real and personal, money credits, investments and the evidence thereof." "The word 'land' or 'lands' and the words 'real estate' or 'real

property' include lands, tenements and hereditaments, and all rights thereto and interests therein except chattel interests." This shows that chattels real were never land, but personal property. From these clauses it may be argued that chattels real were taxable as personal property, especially as chapter 29, § 48, taxed "all personal property." It may be so. We do not say, as we are not passing on the prior law. It may be said against the taxation of chattels real, under the old law, that the clause quoted above making chattels real personal property is only applicable to the construction of statutes in general, and, as the tax chapter does not in terms name chattels real for taxation, those clauses do not apply. The Code before 1905, in chapter 29, § 61, relating to taxes, says that "the words 'personal property' as used in this chapter, shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper land book; all things of value movable and tangible, which are the subject of ownership; and moneys, credits and investments, as defined in the following section." Acts 1904, p. 56, c. 4. Acts 1905, p. 309, c. 35, makes section 61 of chapter 29 of the Code read thus: "The words 'personal property,' used in this chapter, shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper land book; all things of value, movable and tangible, which are the subject of ownership; all chattels, real and personal; all moneys, credits and investments as defined in the following section. The word 'land' or 'lands' and words 'real estate,' or 'real property' include lands, tenements and hereditaments, and all rights thereto and interests therein, except chattel interest and chattels real." It may be argued with force that chattels real, not being "movable and tangible," and not being mentioned for taxation in section 61 of the prior law, were not taxable, as the rule of construction is that, though certain words are given by the Code a general meaning in the construction of statutes, they would not have that meaning in construing a particular chapter or section which itself, for its own purposes, gives it a different or limited meaning. But we do not say as to this. We do say, however, that chattels real are in words made a subject of taxation by the letter of the act of 1905, on which this case turns. We cannot decide the case by decisions resting on a prior different statute.

Recurring to the contention that the deed in this case makes, not a chattel real, but a sale of the very coal itself, which is yet taxable to the surface only as realty, we are reminded of some of our own cases for authority for the proposition. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 202; *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533; *South Penn v. McIntire*, 44 W. Va. 296, 28 S. E. 922; *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 844. Language is used in

them incidentally to the effect that a lease allowing the lessee to remove oil "is in legal effect a sale of a portion of the land." That language began in *Wilson v. Youst* as a borrow from a Pennsylvania case. See page 839 of 43 W. Va., 28 S. E. 781, 39 L. R. A. 292. It is only repeated in the later cases. Chief Justice Marshall long ago said, what has been accepted always since as a rule, that language in a decision must be interpreted with reference to the case in hand. Just whether such a lease was a sale of the very coal as part of the land was not in judgment in those cases, not necessary to the decisions. Standing alone, that language might be construed to mean that the execution of the lease itself at once vested the mineral as part of the body of the land in the lessee; but an examination of these cases shows that this was not the court's decision, but, the cases involving the right of a guardian or committee to lease the land of a ward or insane person, the court simply held that, as under the operation of said leases the mineral would be taken from the land, and a portion of its body thus removed, it decided that such leases so operating to work a sale and severance of part of the land from the ward or insane person, could only be made in the mode authorized by law, that is, under the statute for the sale of land of persons insane or infant. Again, there are so many West Virginia cases in which the very question as to what manner of estate such leases created was directly involved, in which it was held that before finding the mineral no estate whatever passed, and that, even after finding mineral, that mineral itself in the ground, not yet brought to the surface, is vested yet in the owner of the surface. We must say that many of our cases settle that. Then, how can it be said that such leases impart ownership in the very coal in the lessee, if it remains in the surface owner? will you make a distinction between coal and oil? Why? It was not made in *U. S. Mining Co. v. County Court*, 38 W. Va. 201, 18 S. E. 566. It is needless to say *Peterson v. Hall* (W. Va.) 50 S. E. 603, does not touch the question before us. It simply holds, like many cases, that a lessee under an oil lease has no taxable vested estate in the oil in place, but that, if it be conveyed in fee, it is to be taxed separately from the surface. It logically denied the claim that the lease is a sale of the oil itself.

It was argued at bar that land is assessed as a body as land, and not the estate in it; that there may be a life estate, after it another life estate, after it a reversion or remainder, sometimes a contingent estate; and that these are not each separately charged to the owner of each. That is true, and why? Because the statute has long provided that, "as to real property, the person who, by himself or tenant, has the freehold in possession, whether in fee or for life, shall

be deemed the owner for the purpose of taxation." Code 1899, c. 29, § 40. Therefore, the life tenant must pay taxes during his estate, and the remainderman or reversioner only when the particular estate ends. That may be claimed as a good reason why leaseholds in the past could not be assessed; the charge of the corpus representing and paying for all the estate in the land. But suppose the statute had provided for the assessment of the life estate to the life tenant and the fee to the remainderman. Surely the Legislature could have done so. 27 Am. & Eng. Enc. Law, 609. And as reflecting a sedate purpose to tax all leaseholds for minerals, compare the acts, not of tax assessment, but of revaluation of 1891 (page 61, c. 36, § 4), of 1899 (page 83, c. 21, § 4), and of 1904 (page 134, c. 15, §§ 5, 6). The acts of 1891 and 1899 required the commissioner "to ascertain and assess the fair cash value thereof [the tract] and in such assessment minerals, mineral waters, oils, and gases underlying the surface, and the location of the land, shall be considered in ascertaining the value of such land in current money; and when mineral, mineral waters, oil, gas, or coal privileges or interests are held by a party or parties, or any company or association, exclusive of the surface, the same shall be assessed separately to such party or parties, company or association." Under that act of 1891, the same as 1899, this court said that the minerals here meant were only freehold, and the less leasehold was not separately charged, but the land must be charged to its owner. *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688; *U. S. Coal Co. v. County Court*, 38 W. Va. 201, 18 S. E. 566. Remember that those cases were under the acts of 1891 and 1899, not under the assessment act of 1905. So *Carter v. County Court*, 45 W. Va. 811, 32 S. E. 216, 43 L. R. A. 725, and *Peterson v. Hall* (W. Va.) 50 S. E. 603, were upon the same assessment act. They afford no guidance under later and different acts. The revaluation act of 1904 uses different language from the acts of 1891 and 1899. The Legislature, by the revaluation act of 1904, after requiring minerals to be considered in the valuation for taxes, said, in section 6: "In case the whole of or any interest in the minerals, mineral waters, oil, gases, coal, ore or timber, or any other assessable interest in real estate be held by any person other than the owner of the other interest in said real estate, the same shall be assessed separately in the names of the owners thereof." Now, here is a change, and it speaks intent plain. It tells us that no longer can it be said, as held in the cases above cited, that only freehold minerals are taxable separately, but the act says "the whole of or any interest in the minerals * * * or any other assessable interest" shall be taxed to each owner; and a few months later came the act of 1905, taxing chattels real in very words several

times repeated, and taxing them to their owner as personal property. This revaluation act of 1904, in connection with the reassessment act of 1905, makes clear what the Legislature meant by taxing chattels real. Read both acts to get intent. The assessment act of 1904 (page 53, c. 4, § 54) still said that: "As to real property the person who by himself or his tenant has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation." Thence it is argued that still mineral estate must be taxed in the freehold estate, and that leases for minerals for less estate cannot be charged separately. That is true as to minerals in place. They are still included in the valuation of the freehold; they were always, and still are, included in the valuation of the land itself. But as to the distinct chattel real: It is not and never was included in the valuation of real estate. *State v. South Penn.*, 42 W. Va. 99, 24 S. E. 688, says that the reassessment act did not relate to leases, but only to freeholds, and that the section providing that the freeholder should be deemed the owner related only to life or fee estate; and on page 101 of 42 W. Va., page 696 of 24 S. E., we find that leaseholds could not be charged as real estate, because "a lessee, in proper sense, may by contract have right to possession of the coal, as a part of the thing to which ownership applies, but no part of the ownership of the thing is vested in him"; that thing being the corpus and coal in place. The old law did not include leaseholds in the valuation of the land or mineral in place, neither does the new, but the new law charges chattels real as personal property. For the first time, the new law selects them for taxation in words. The real estate valuation act of 1904 required each separate interest to be valued for taxation, leaving it to the Legislature to tax them as it might see fit. The tax assessment act of 1904 did not tax leaseholds separately in words, but the act of 1905 carried out the policy of separate taxation contemplated by the revaluation act of 1904, and directed them to be taxed separately as personalty. It is not now the constitutional or statute policy of this state, as is argued, to assess all that pertains to or grows out of land as land. The Constitution says that both shall be taxed, all property shall, what is land as land, what the law deems personalty as personalty. Constitution and statute taken together say so. The Constitution says all property real and personal shall be taxed. Still, without legislation, nothing can be taxed, but the Legislature has enacted that real and personal property, including chattels real, shall be taxed; that any assessable interest in land shall be taxed to its owner. As above stated, the statute has never in words required chattels real to be separately assessed until the act of 1905. That makes them specific sub-

jects of taxation. Never has there been a time when by common law a chattel real had not legal entity as an estate of value, a property, distinct from the body of land of which it savored, and therefore the state has indisputable power to tax it as such distinct property. By the very act of taxing it the Legislature has given the chattel real, for purposes of taxation, distinct existence, if it had not had it before, and made it a tax subject. No matter how many estates or interests in land there may be, the state can, if it choose, tax each separately. From law cited above, property in any form can be taxed. "The term 'property,' standing unqualified in a Constitution with statutes designating subject of taxation, includes both real and personal property, or estate, intangible, as well as tangible, rights of value." 27 Am. & Eng. Enc. Law, 635; *Carroll v. Perry*, 4 McLean, 25, Fed. Cas. No. 2,456; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Primm v. Belleville*, 59 Ill. 142; *Tallman v. Treasurer*, 12 Iowa, 534; *State v. Savage* (Neb.) 91 N. W. 716. "It is entirely competent to provide for the assessment of any mere possessory right in lands, whether they are owned by the government or by private individuals." *Cooley on Taxation*, 635. Separate estates or interests arising out of the same property may each be taxed. 27 Am. & Eng. Enc. Law, 691. *Desty on Taxation*, 78, says it is to be taxed to the lessee, if the Legislature so enacts.

Another Question.

The plaintiff contends that, even conceding that its estate is a lease for years and a chattel real, the act of 1905 does not in fact tax a chattel real. We think that various parts of chapter 35, p. 285, Acts 1905, amending Code, c. 29, plainly manifest an intent to tax leaseholds. Before that act chattels real were not in words mentioned for taxation; but such estates of vast value and large number, in which persons and corporations have invested hundreds of thousands of dollars of working capital or investment, not before existing, had come into existence, constituting large estates not taxed, and this fact itself tells us what must have been the purpose of the Legislature in its amendment of 1905 of the prior law, as well as of the reassessment act of 1904, and we must in construing the new legislation let that fact, the presence of these large interests, shed light on the intent. But take this new act, let it speak for itself, look at its features. Section 39, c. 29, Code, before 1905, read thus: "Whenever any person becomes the owner of the surface and another or others become the owner of any other freehold estate in coal, oil, gas, or limestone, fireclay, or other minerals or other mineral substances in or under the same, the assessor shall assess such respective estate to the respective owners thereof." So read the assessment act of 1904 (page 45, c. 4). But this section was not satisfactory. The act of 1905

amended it by striking out the word "freehold." It now reads: "Whenever any person becomes the owner of the surface and another or others become the owners of any other estate in coal, oil, gas, or limestone, fireclay," etc. Decisions under the old law held the separate mineral freehold inclusive in taxation to its owner, the surface to its owner, and held the mineral lease for years not taxable to its owners, as real estate, but that the surface assessment to its owner covered the mineral in place; but, as just shown, the act of 1905 amends the section. It omitted the word "freehold." This shows an intention to tax any estate in minerals, freehold, or less than freehold, to its separate owner. If freehold, taxable as realty; if less, taxable as personalty by reason of the new section 61. The old section defined personal property so as not to include chattels, as seen above in its quotation. It did not make personal property, in terms, include chattels real. The new section does, and moreover excludes from the meaning of "land" chattels real. How can it be doubted for a moment that the intent was to tax chattels real, not as land, but as personal property? The new section inserts "chattels real" as coming within the meaning of personal property, and excepts chattels real from land taxation, and new section 63, as also section 12, says that "all personal property" shall be taxed and hence chattels real must be taxed. Was not something meant by this amendment? Section 68 requires the assessor to ascertain "all personal property." Old section 80, providing how capital in trade should be reported by the owner, required the owner to report "(a) the amount and true and actual value of all tangible personal property used in connection with such trade or business, otherwise than such as is regularly kept for sale therein." The new section added to clause (a) the words "including chattels real," thus plainly evincing a purpose to tax chattels real of a firm or individual, and tax them as personalty, which in law they have ever been. Section 108 of the prior law before 1905 prescribed a form of the personal property tax-book, giving columns for different classes of personal property. It had no column for chattels real; but the act of 1905 gives them a separate heading and column in a clause first found in the act of 1905: "(pp) Value of all chattels real of every person, firm or incorporated company." Here the statute prescribes that the final act of assessment, the actual tax-book against the taxpayer, must charge chattels real. How can we fail to see fixed purpose to tax them? The argument that the law provides for a return of delinquent land is without force. Cannot a tax claim be levied on a chattel real and it be sold therefore? A chattel real is personalty and salable under execution. *Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. 94, 28 L. Ed. 141; 8 Enc. Pl. & Pr. 550; *Donahue on Petroleum & Gas*, 176; 17 Cyc. 953.

To sustain the claim that the act of 1905 does not at all tax chattels real, sections 77 and 78 are appealed to. Section 77 requires that corporations, except certain ones, shall make a report to the assessor showing the following items: "(a) The amount of capital authorized to be employed by it; (b) the amount of cash capital paid on each share of stock; (c) the amount of money in hand or on deposit anywhere subject to its check or draft, on the first day of April of the current year; (d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value; (e) the quantity, location and true and actual value of all its real estate, and the magisterial district in which it is located; (f) the kinds, quantity and true value of all its tangible personal property in each magisterial district in which it is located." Section 78 directs how the items shall be entered in the tax-book, and then says: "The property mentioned in items (c), (d), (e) and (f) shall constitute all the property on which any such corporation shall be liable to pay taxes." Upon that provision the plaintiff confidently asserts that it was not the intention of the Legislature to tax chattels real at all to any one. Here we have verbal conflict with plain provisions above given, and we must remember a rule vital in this connection, namely, that we must consider, not sections 77 and 78 alone, but those sections along with all other provisions bearing on the same matter. We would say that the omission of chattels real was due to inadvertence, but for the fact that the bill in the Legislature as passed by the House of Delegates contained the words "including chattels real" in clause (f), but they were stricken out by the Senate and the amendment concurred in by the House. This is held by counsel as conclusive to prove that it was not intended to put chattels real on the tax list at all, and certainly not those owned by corporations. Why, then, did not the Legislature strike out "chattels real" from section 61? Why did it not strike from section 80, cl. a, the words "including chattels real," thus charging individuals and firms not incorporated with them? Why did it, still later in the consideration of the bill, insert in section 108 charging taxes a clause reading, "(pp) the value of all chattels real of every person, firm or incorporated company"? This last most explicit language flatly says that corporations shall be taxed for chattels real. Just here I would emphasize the fact that this clause is a positive command to the assessor to put chattels real of a person, firm, or corporation on the tax-book, as the last act of taxation; whereas, the report under section 77 is simply a report, only a list made by the taxpayer, not binding, not so important as the act of the assessor in performing the final act of taxation. True, the clause of section 78 that no other property than that specified in section 77, taken alone, is strong; but we must get

at the real purpose of the Legislature, and weigh all it has said. It is blundering legislation, but we must glean the real and final purpose. It looks like the Legislature intended not to tax chattels real, at least those of corporations, and later changed its mind, because in section 80 it required individuals and partnerships to be charged with them, and in clause "pp" of section 108 required the assessor to charge the value of all chattels real of every person, firm, or incorporated company. It did not go back to harmonize sections 77 and 78 with the final conclusion, perhaps because it forgot to do so. Inadvertent omission occurs in legislation as well as elsewhere. We must allow for inadvertence when plain. It plainly appears to be inadvertence here. But, aside from that, we must remember another important rule of statutory construction which has forcible application in this instance. We have clash between different provisions of the same act on the same matter. How shall we cut the Gordian knot and resolve the conflict? As held in *Speldel v. Warder*, 49 S. E. 534, 56 W. Va. 602, on authority there cited, we must take the later sections, 80 and 108, as reflecting the real last intent of the law makers. Section 61, including chattels real in the definition of "personal property," gives confirmation to this argument. So much of the statute speaks intent to tax chattels real.

But the plaintiff claims that, even if chattels real are taxable to individuals, sections 77 and 78 must exempt corporations therein specified from taxes on their chattels real. We cannot yield to a construction working such partiality, inequality, and unfairness. Why exempt the property of corporations? We cannot realize that the Legislature so intended. However, if it did so design, no matter how plain its language, such exemption of chattels real of corporations would be baldly unconstitutional under the state Constitution (article 10, § 1), commanding "all property," to be taxed with the limited exceptions therein given. So it was held in *C. & O. R. Co. v. Auditor*, 19 W. Va. 408; *State v. Buchanan*, 24 W. Va. 362. And would it not be repugnant to the fourteenth amendment as denying other taxpayers equality before the law? It would be arbitrary classification, based on no good reason, but against good reason. We should not give a construction to the act making it violate the Constitution. True, though the Constitution does say that all property shall be taxed, it cannot be taxed until the Legislature authorizes it. *Supervisors v. Tallant*, 98 Va., 723, 32 S. E. 479; *Va. & T. R. Co. v. Washington*, 30 Grat. (Va.) 471. This is because the Constitution, in this respect, does not act of its own vigor, without an enabling act; but there is the statute saying that all property shall be taxed, and sections 55, 80, and 108, covering chattels real, authorizing their taxation. "Exemptions can be allowed only when the language is free of doubt, not where

it is doubtful." *Cooley on Taxation*, 356; *Vicksburg v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770.

It is insisted that tax acts must be construed strictly, and, if it is doubtful whether the intent is to levy a tax on a thing, the doubt must be solved in favor of the taxpayer. *Brown v. Commonwealth*, 98 Va. 366, 36 S. E. 485; *Net & Twine Co. v. Worthington*, 141 U. S. 474, 12 Sup. Ct. 55, 35 L. Ed. 821; *Cooley, Taxation*, 266; *Rice v. U. S.*, 53 Fed. 910, 4 C. C. A. 104. As a general rule that is so, but there is another rule here fitting. The Constitution positively commands that all property shall be taxed, and we must construe the statute as meant to obey the Constitution, if its words will at all allow it, and this act has a section taxing all property, and specific language covering chattels real. If there were doubt, we must rather resolve it in favor of taxing leaseholds, and "impute to the General Assembly an intent to obey the constitutional mandate, if its enactments fairly admit of such construction," in the language of the court in *Hart v. Smith*, 159 Ind. 182, 64 N. E. 661, 58 L. R. A. 949, 95 Am. St. Rep. 280. But I see no reason to invoke this presumption, as I cannot see how the statute can, with reason, be held not to tax chattels real, whether of corporations or others. It would be vastly more unpalatable for us to hold them not taxable than taxable. It would defeat an intent that is plain, taking the acts all in all as to this matter.

It is suggested that the statute makes no basis or measure of ascertaining the value of chattels real, and that this argues that it was not intended to tax them. I may not go too far in saying that a court has little or nothing to do with it. Valuation of chattels real is not infeasible—it can be made. For many other subjects of taxation no process of valuation is fixed by the statute. Courts and juries assess damages in much more difficult instances. That the act does not fix the method of valuation does not invalidate it. *Erie v. Penn.*, 21 Wall. (U. S.) 492, 22 L. Ed. 595.

Constitutionality of the Tax.

It is contended that taxing chattels real is contrary to the state Constitution because double taxation. Brief of one of the counsel for the plaintiff does not claim that double taxation is unconstitutional. Considering the vast power of taxation, the weight of authority seems to say that it is not void. "Since the power of the Legislature to tax is limited only by constitutional restrictions, it follows that the courts cannot declare void a statute imposing double taxation, unless it be in contravention of some constitutional restriction." 27 Am. & Eng. Ency. of Law, 607. I suppose that, as our Constitution says that all property shall be taxed, and that the taxation shall be "equal and uniform," double taxation is forbidden.

Bacon v. Board of State Tax Com'rs (Mich.) 85 N. W. 307, 60 L. R. A. 366, 86 Am. St. Rep. 524; *Fulkerson v. Bristol*, 95 Va. 1, 27 S. E. 815. Though some courts hold that even under such clause the capital and shares in it, one the property of the corporation, the other of individuals, may both be taxed. *Bacon v. Board of State Tax Com'rs (Mich.)* 85 N. W. 307, 60 L. R. A. 367, 86 Am. St. Rep. 524; *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821. But there is no double taxation in taxing leaseholds. They are distinct properties. *Bank v. Comp.*, 9 Wall. (U. S.) 353, 19 L. Ed. 701; *Owensboro v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850. There can be several estates or interests, each property, in a tract of land. Especially can there be a chattel real savoring of it issuing out of it. "Several persons may have in one tract of land distinct interests which are the subject of taxation, such as land and mineral rights, or land and growing trees, or land and structures thereon." 27 Am. & Eng. Ency. Law, 640. The chattel is a separate property from the land, taking neither its title nor its soil in itself, vested in a different person, carved out of the fee, a particular estate distinct as a life estate. Always has the common law regarded it as distinct property, and of value as property. Is not the lease in this case a highly valuable asset of the corporation? Has it not a distinct property in it alone? Who can say that a conveyance of coal in fee does not create a separate property, taxable as such? Why is not a long lease vesting the lessee with right to take coal not a valuable separate property? The surface owner has lost dominion over the coal. The lessee has complete dominion. Still, each has a property, taxable distinctly, if the state elects to do so, because they are different properties, and each one ought to pay taxes on his own property. As remarked above, the Legislature has made chattels real separate property for taxation. Many instances of taxation have been held not double, which might be regarded more so than in this case. In *Tennessee v. Whitworth*, 17 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830, the court said: "In corporations four elements of taxable value are sometimes found: (1) Franchises; (2) capital stock in the hands of corporation; (3) corporate property; and (4) shares of the capital stock in the hands of the individual stockholders. Each of these is, under circumstances, an appropriate subject of taxation; and it is no doubt within the power of the state, when not restricted by constitutional limitation, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation." A tax on leasehold is not invalid as double because it is a distinct property from the land. In *People v. Cohen*, 31 Cal. 210, it was held that a tax on a claim to or possession of land was not a tax on the land. In many cases it has been held that the capital stock of a bank, and the

property in which it is invested, and the shares of stock, may all be taxed. *Bacon v. Board of State Tax Com'rs (Mich.)* 85 N. W. 307, 60 L. R. A. 366, 86 Am. St. Rep. 524; *Bradley v. People*, 4 Wall. (U. S.) 459, 18 L. Ed. 433. They are regarded separate property. Do we not tax both the debt secured by a deed of trust and the land, and the vendor's lien debt and the land; one to the creditor, the other to the land owner? "Where two persons hold different interests in the same thing, each may properly be taxed, as they do not hold by the same title." 27 Am. & Eng. Ency. Law, 609; *State v. Moore*, 12 Cal. 56. We may tax a horse to its owner, and the debt for which he was purchased to its owner. Incomes from property are assessed apart from the property producing the income. 1 *Desty on Taxation*, 202; 1 *Cooley on Taxation*, § 30. There is no double taxation here. "By duplicate taxation in this sense is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once." *Cooley on Taxation*, 394. "Where the same property represents distinct values belonging to different persons, the fact that each is taxed on the value, which the property represents in his hands, does not constitute double taxation obnoxious to the organic law of Maryland." *U. S. Co. v. State*, 79 Md. 63, 28 Atl. 768. That suits this case. But suppose we say that the charge of the land to the owner includes the lessee's interest, can the lessee say that he pays doubly? What does he pay doubly? The landowner does not pay doubly, the lessee does not. Of what has the lessee right to complain? He does not pay double tax, he is not hurt by double tax. Double tax is where the same person is twice taxed for the same thing. *Bacon v. Board of State Tax Com'rs (Mich.)* 85 N. W. 307, 60 L. R. A. 366, 86 Am. St. Rep. 524; *Desty on Taxation*, 390.

We have no doubt about the legality of the tax after the year 1905. It may be claimed to be different as to that year. The revaluation acts of 1891 and 1899 required that the minerals be considered in making up the value of lands, and the taxing of lands for 1905 is under the valuation made under the act of 1899, as the revaluation of land made under the act of 1904, excepting chattels real from the valuation of land, does not apply to land taxes until after 1905. Hence the leaseholder may say: "The valuation under the act of 1899 includes minerals; they are charged to the fee owner; and, if my leasehold is charged, that is double taxation." Now, the cases of *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725; *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688; *U. S. Co. v. Randolph County*, 38 W. Va. 201, 18 S. E. 566, only held that minerals in place should be considered in

fixing the value of the land to its owner, and that lessees for years of coal or oil should not be taxed with their holdings as land, and did not decide that the lessee could not be taxed with them as personalty. If the land were under coal lease, the chattel was charged to the surface owner, which is to say that it was excepted out of the valuation because not included. The act of 1904 does in terms except chattels real; but it is only an express direction to the assessor of what already was the law, only declaratory of existing law. Both under the reassessment act of 1899 and 1904 the surface owner is taxed with the coal in the ground because still vested in him. There is no difference between the acts as to this. The Legislature in 1905 simply taxed what never had been taxed in taxing the leaseholds of the lessee. *State v. South Penn.*, 42 W. Va. on page 90, 24 S. E. on page 695, says this: "What, then, is the subject-matter of the act of reassessment of 1891, and does the property [these oil leases] belong to such subject-matter within the meaning of the act? We may expect to find the object, the main general purpose, of the act expressed in the title. The title is "an act to provide for the reassessment of the value of all real estate within this state. By a statutory rule of construction, the word 'land' or 'lands' and the words 'real estate' or 'real property' include lands, tenements and hereditaments, and all rights thereto, and interests therein, except chattel interests, unless a different intent on the part of the Legislature be apparent from the context. See Code, 1890, c. 13, § 17, par. 15. In the assessment law, the term 'property' is used not in the sense of the right of ownership, but of the thing owned, which is listed for taxation opposite the name of the owner. The context shows that oil and gas underlying the surface, and within the location of land, shall be considered in ascertaining the value of such land, and, when oil or gas privileges or interests are held by a party exclusive of the surface, the same shall be assessed separately to such parties—the land to the one, the oil privilege to the other." He decided however, that chattel interests in the land should not be charged to the lessee, and they were not charged separately to the owner. He said that oil leases did not constitute real property within the meaning of the act, but the land was valued without respect to them. Just so under the reassessment of 1904. Thus, we cannot say that the surface owner will pay or be charged with less after 1905 than for that year or any prior year. I repeat that the leaseholds never were included in the valuation to the fee owner.

The point was suggested that article 13 of the state Constitution forfeits lands for omission from the taxbooks for five years, and that an omission of the land in the fee owner's name forfeits the land, and along with it the leasehold. We do not see how this can make the act unconstitutional, or

how it can bear upon that point, this remote contingency. It is not to be contemplated. It is only a risk in the future assumed by the lessee when he takes his lease. May not the state forfeit for failure to pay taxes on the body of the land? The state need not look out for that. That comes from the omission of the parties interested. A mortgage would be likewise lost. It is the duty, not only of the surface owner, but of the owner of the particular estate, to protect his own estate from sale or forfeiture for taxes. We assert the right, and also the duty, of the lessee to have the public officer charge the tract in the owner's name, or his own name, for self-protection. Assessment in the lessee's name would protect from forfeiture. The lessor has made an implied covenant that he will do nothing, either of omission or commission, to forfeit or destroy his tenant's estate, and the lessee can use his, or his own, named for taxation, as an assignee can.

Fourteenth Amendment.

It is said, but does not seem to be urged by one of the plaintiff's attorneys, that the statute taxing chattels real violates the fourteenth amendment. Wherein we are not very clearly told. It cannot be claimed that tax laws are not due process of law. *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214; *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210, 18 L. Ed. 339. Does it deny equal protection of the law? Does not the act treat all persons owning chattels real alike? There surely may be taxes imposed by a state on different subjects. The right to the equal protection of the laws is not denied by a state when the same law or course of proceedings would be applied to other persons under similar circumstances and conditions. *Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91. In many cases, such as tax laws, the Legislature may classify persons and things in the administration of government. It does not follow that, because one man of a class is treated differently from another class, the equality clause of the amendment is violated. "It only requires the same means and methods to be applied impartially to all constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky R. R. Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414. Under *Magoun v. Illinois*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, and other cases, the state may classify subjects of taxation and apply different methods of valuation and taxation. The amendment prescribes no rigid equality, but permits to the discretion and wisdom of the state a wide latitude. With its impolicy the federal power has no concern. It may tax one kind of property in one way and by one process of valuation, another in another, because they do not belong

to the same class. In this case the land and the chattel real are separate. It may tax one class of persons in one trade in one way, another in another. *Bell's Gap Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; *Atchison v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; *Florida Central v. Reynolds*, 188 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283. The last case fully sustains this view in a review of the cases. See *Coulter v. L. & N. R. Co.* (U. S.) 25 Sup. Ct. 344, 49 L. Ed. 615. In this case where is the discrimination? All chattels real are taxed alike, and valued alike. No different process of even valuation prevails as to them from other chattels. The act taxes all personal and real property. The state may tax some, exempt others, if not forbidden by its Constitution. *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214. *Home Insurance Co. v. New York*, 134 U. S. 594, 8 Sup. Ct. 1385, 30 L. Ed. 350 reiterates the great powers of a state in taxation. But this act taxes all persons, all property alike. This illustration is put by counsel. A. owns tracts B. and C., coal land of equal value, each \$250,000. One is leased, the lease worth \$125,000. Counsel says that both must be assessed equally, and he assumed that the owner must be assessed \$250,000 on each, and that this includes the leasehold on one tract, and charging the lessee is double. But he assumes that both must be assessed to the fee owner at equal value. Cannot the value to him of the tract incumbered by the lease be lessened so far as its value is lessened by the incumbrance or servitude created by the lease? In oral argument was put the case of a man owning two tracts. One tract he operates himself for coal, the other over the creek is operated by a lessee. If the lessee is charged with his leasehold, on the right to mine coal, and the other on the fee, not on his coal operation, here is a discrimination. The answer is that one holds a fee and his mining is under no separate right; the other, the lessee, has a separate and distinct taxable property. This statute does not forbid the subtraction in valuing the estate of the owner in the leasehold tract of the incumbrance of the leasehold, if in fact it lessens the value; nor does it forbid the state, if it chose, taxing the owner mining in the tract which he operates. The state may tax a life estate and the reversion or remainder, as regards the amendment. *Billings v. Illinois* (U. S.) 23 Sup. Ct. 272, 47 L. Ed. 400; *Orr v. Gilman*, 183 U. S. 278, 22 Sup. Ct. 213, 46 L. Ed. 196. See *Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514. In this connection I again ask how is there any double taxation to this plaintiff? A single illegal taxation is not double. If the lessee be charged once, how does he pay double. And the lessor owning the fee is not taxed double, and if he were, how can the lessee say that his own pocket was injured? It cannot be said that the amendment is

violated, and for this reason, as also the reason given above, that is, that the leasehold is a separate, independent estate.

A statute is presumed to be constitutional. We must be very, very clear that a state law imposing taxes to support the existence of the state is void because repugnant to the Constitution. The Supreme Court of the nation has always shown a great and commendable reluctance to invalidate such statutes. It has not made the fourteenth amendment a weapon for assailing state power on a subject in which the state power is as wide as that of taxation to support its own existence. We cannot forget, we cannot be blind to, the fact that vast values in coal leases, in which millions and millions of dollars are invested, have in the past contributed nothing to the public treasury. The state claims in this case that the value of leaseholds in minerals in this state rises to the enormous sum of \$200,000,000. These coal operations have, in the main, come to us within the last decade, or largely so. In past years the matter was not of so much consequence. Under the circumstances, the Legislature has chosen to think that this condition of things called for the new legislation involved in this case. We cannot forget that great agitation and discussion before the people of this state has recently prevailed upon the subject of their taxation. It has been widely asserted that they have not helped to bear the burden resting till then on other shoulders. This long and warm agitation is a part of the history of the state. So warm was this agitation that the Legislature appointed a special commission to revise the tax laws. New acts were adopted at an extra session in 1904, and in 1905 a new act for assessing taxes was made to cure, as we have right to say, what were regarded as defects and inequalities under changed conditions in a growing state. The Legislature has plainly expressed its will that these chattels real shall be taxed, and, it being within the taxing power of the state, it ill becomes a court to defeat and frustrate the public and legislative will.

For these reasons we affirm the decree of the circuit judge.

Affirmed.

(50 W. Va. 432)

RUFFNER BROS. v. DUTCHESS INS. CO.
(Supreme Court of Appeals of West Virginia.
April 17, 1906.)

1. INSURANCE—POLICY—IRON-SAFE CLAUSE—INVENTORY.

An inventory of a stock of merchandise, within the meaning of the term "inventory" used in what is known as the "iron-safe clause" of a fire insurance policy, is a list of all the articles of merchandise in the stock, sufficiently itemized to show the kinds and numbers or quantities thereof, together with their values at the time of making the same, as nearly as they can be ascertained.

[Ed. Note.—For cases in point, see vol. 28. Cent. Dig. Insurance, § 853.]

2. SAME.

In the case of a store, opening with an entirely new stock of goods, at or about the date of the issuance of the policy, the invoices of the first lot of goods put into it, giving the quantities thereof by items, with the cost prices, if preserved and kept for production, upon the demand of the insurer, as and for an inventory, will constitute such a list, and the insured will have substantially complied with so much of the policy as requires the taking of an inventory.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 853.]

3. SAME.

In determining what constitutes such an inventory, regard must be had to the purpose for which it is required, and, in seeking this, all parts of the "iron-safe clause" should be read and considered together.

4. SAME—CANCELLATION OF POLICY—WAIVER OF BREACH.

Cancellation of a fire insurance policy, by an agent of the company, having no authority to waive conditions, except by indorsement on the policy or addition thereto, does not imply a waiver of a breach, previously made, of a promissory warranty therein contained, or estop the company from relying upon such breach as matter of defense to an action on the policy, though it be shown that the agents had knowledge of such breach.

5. SAME—INCREASE OF HAZARD—WAIVER.

Violation of a clause of an insurance policy, declaring that it shall become null and void, if the hazard be increased by any means within the control or knowledge of the insured, is not waived by a letter, written at about the date of the fire, which caused destruction of the property, by an agent of the company, having no authority to waive conditions, except by indorsement on the policy or addition thereto, notifying the insured that the policy is canceled, and specifying said violation as the reason for canceling it.

6. APPEAL—REVERSAL—ENTRY OF JUDGMENT.

This court, on reversing a judgment for the plaintiff and setting aside a verdict for insufficiency of evidence and refusal of the trial court to exclude the evidence from the jury and direct a verdict for the defendant, will not remand the case for a new trial, but will render judgment for the defendant, when it does not appear that injustice will be done thereby. Poffenbarger, J., dissenting.

(Syllabus by the Court.)

Error from Circuit Court, Kanawha County.

Action by Ruffner Bros. against the Dutchess Insurance Company. Judgment for plaintiffs, and defendant brings error. Reversed, and judgment rendered for defendant.

Chilton, MacCorkle & Chilton and Murray Briggs, for plaintiff in error. Mollahon, McClintic & Mathews, for defendants in error.

POFFENBARGER, J. The Dutchess Insurance Company complains of a judgment for the sum of \$849.12, rendered against it by the circuit court of Kanawha county, on the 27th day of March, 1905, in favor of Ruffner Bros., assignees of A. Haws and his son, H. H. Haws, who are doing business as the Haws Company. The policy of insurance, under which the loss sustained by the Haws Company occurred, had covered a frame store building, a stock of general merchandise kept therein, and the store and office furniture and fixtures. The stock of goods so in-

sured was entirely new at the time of the issuance of the policy. After the policy had been in force a short time, an addition to the building in which the store was kept was made for the accommodation of a steam gristmill, and the mill installed therein and operated to an extent not clearly indicated before the fire occurred. In the meantime, Haws had attempted to obtain insurance on the mill from the agents from whom he had secured the policy on the store. They had declined it, and he had vainly tried to obtain it from another agency. Some days before the fire occurred, a member of the firm of Lohmeyer & Goshorn, the agents, had informed him they would give him no insurance on the mill, but they would carry his store at a 6 per cent. rate, which was an increase of 4 per cent. over that of the policy he then had. The defenses relied upon by the defendant were two in number: First, noncompliance with that part of the iron-safe clause which required an inventory to be made within 30 days from the issuance of the policy, unless one had been taken within 12 calendar months prior to the date of its issue; and, second, violation of that clause of the policy which declared it would become void if the hazard should be increased by any means within the control or knowledge of the insured, unless permitted or waived by an indorsement on the policy or attached thereto.

As constituting substantial compliance with the requirement of an inventory, the plaintiff relied upon his invoices or bills. He reasonably contended that, it being a new store, the first lot of goods having been placed in it but a few days before the issuance of the policy, these bills constituted a complete list, by items, with the values annexed, of all the goods that had been put into the store. At the date on which the first lot was taken into the store and put upon the shelves, the invoices therefor made up as complete and accurate a list of the goods as if they had been relisted into a book. All goods subsequently put in, for which bills were likewise received and kept, were additions to the stock. The purpose and object of an invoice is not very clearly defined in insurance law. Most of the courts, in dealing with it, simply refer to the legal definition of the term "inventory." This falls far short of indicating what it is intended for, the function it performs between the parties. It seems to me perfectly plain that the requirement is intended to secure, in the interest of the insurance company, and possibly both parties, a basis, or starting point, upon which to found an estimate of the value of the stock in case of a loss. It, of itself, indicates nothing except the quantum and value of the stock at the time of the taking thereof. It does not indicate what they amounted to at any previous or subsequent date, nor the average stock. Having an inventory at a

given date, however, and the invoices for goods subsequently put in, the determination of the aggregate value of all the goods in the store at the date of the inventory, and those subsequently put in, is a mere matter of addition. All insurance policies on merchandise require the production of the invoices as well as the inventory. Another requirement which goes with the inventory and the bills, as an ally, in working out the estimate, is the book in which the account of sales is kept. After ascertaining, from the inventory and the bills for the goods subsequently put in, the aggregate as above stated, the quantities and values of the goods sold out of the store are deducted, and thus a fair and reasonable indication, as to the quantities and value of the goods at the date of the fire, is obtained. The three clauses of the iron-safe provision require the inventory and keeping of the books and their protection by means of the iron safe. In determining what they mean, what more reasonable view could be taken than that they must be all construed together? Some courts exclude the invoices and deny to them the force and effect of an inventory, upon the fanciful ground that they are no index to the value of the goods. What better evidence of the value of the goods could there possibly be than the bills showing what they had cost? They show the value as agreed upon between the owner of the store and a disinterested third party, while an inventory would show the value according to an estimate put upon them by an interested party, knowing that the inventory was made for the purpose of forming the basis of a claim against the insurance company. I am utterly unable to see any force in that contention. Of course, the invoices would not constitute an inventory in the case of a store which had been running for a considerable time. They would not afford any basis upon which to begin the estimate, but in the case of a new store starting simultaneously with the issuance of the policy, or practically so, the first bill constitutes as good a basis for the beginning of the estimate as an inventory could possibly afford. It has been suggested in one or two instances that, if the bills were pinned together and some indorsement made upon them, indicating an intention to treat them as an inventory, they might, on the theory of substantial compliance, be deemed to constitute an inventory. In other words, they constitute an inventory if they are indorsed "inventory," otherwise they do not. This, to my mind, puts more merit into the name of the thing than it is entitled to. It sacrifices substance to mere form and technicality. What is an inventory is to be determined in view of the peculiar circumstances of the case. What would substantially comply with the requirement in one case would not in another, in which the circumstances are wholly different. For these reasons, we are unwilling to follow

Insurance Co. v. Knight (Ga.) 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216, Fire Association v. Masterson, 25 Tex. Civ. App. 518, 61 S. W. 962, and the Mississippi case in which the proposition advanced by the attorneys for the plaintiff in error arose, and we hold that the evidence is sufficient to sustain the finding of the jury in favor of the plaintiff on the first issue.

The violation of the clause against increase of hazard is admitted, but it is insisted that there was a waiver on the part of the defendant. The claim of waiver is predicated upon the knowledge which the agent of the defendant company had, at the time of the issuance of the policy, of the intention of the insured to build the addition to the storehouse and install a grist mill in it, and of the actual consummation of this design before the fire occurred, and upon a letter written by them to the insured, dated the day of the fire, but received on the day after that occurrence. The store was destroyed about 10 o'clock on the night of December 23, and the letter was postmarked 1:30 a. m., December 24th. It reads as follows: "A. Haws, Esq., City—Dear Sir: We again call your attention to policy No. 3379 Dutchess Insurance Company covering on your building, stock and fixtures which has not yet been returned to us for cancellation. We desire now to notify you that the policy is canceled on account of the grist mill exposure and of no effect, if you will return it the return premium will be paid to you. The policy referred to is in the name of 'The Haws Co.' Yours very truly [Signed] Lohmeyer & Goshorn."

The claim of waiver is stated in two ways. One is that cancellation of the policy necessarily implies that the party canceling it deemed it to be, at the date of cancellation, in full force and effect, otherwise there would be a contradiction in terms and an inconsistency in conduct. To "cancel" means to make void, to annul, to destroy, and it is said that that which has no existence or is not valid or of any effect cannot be annulled, made void, or destroyed. The view that a breach of a condition or warranty in an insurance policy does not make it absolutely void, but only voidable, would be a sufficient answer to this contention. Many cases hold that such is the effect. Insurance Co. v. Heiduk (Neb.) 46 N. W. 481, 27 Am. St. Rep. 402. To the same effect are the decisions in Illinois, Missouri, Michigan, and Iowa. If not absolutely void, but only voidable, there would be no inconsistency in the act of cancellation by which it would be utterly destroyed. Moreover, no such implication is recognized by the courts. Deeds, contracts, and other instruments are frequently canceled by courts of equity on the express ground that they are void, for some reason shown, by way of removing cloud from title, or preventing some use of the instrument which might be injurious to the plaintiff. Formerly it

was held that a court of equity would not cancel a deed or other instrument which was void on its face, but the weight of authority now seems to be that such instruments will be canceled. Appeals are entertained by this and other courts from void judgments and decrees, notwithstanding the apparent implication raised by entertaining them that there is a judgment or decree. In order to put the question beyond doubt and dispose of it upon nontechnical grounds, it may be said there is no contradiction or inconsistency in the act of cancellation, and that it does not raise any implication of the continued life of the policy. It is an absolute right conferred upon the insurer by the terms of the policy independently of any cause. It might be exercised at any time, with or without cause. Therefore a cancellation does not imply even that there was any cause of forfeiture, much less the additional fact that such cause was waived. The two things are in no sense connected or interdependent. A cause of forfeiture may be asserted, although no cancellation was ever made or attempted. If there had been no cancellation in this case, the defense could have been set up as fully and unreservedly as it has been. Even if it be admitted that the increase of hazard rendered the policy absolutely void, neither that fact, nor the right to rely upon it as a defense, had any connection whatever with the right of cancellation; and, if we say it rendered it void, the insurer might consistently exercise the right of cancellation in order to preclude the setting up of any claim under the policy, although void. In testing this question, it is proper to look beyond the facts of the particular case and see how the theory advanced would operate under other conditions. Take a case in which the insurer knows nothing of the cause of forfeiture at the time of the cancellation. Could it reasonably be said to have waived that of which it had had no knowledge? The argument advanced here would produce a waiver in the case.

The other theory of waiver is that the letter, although not physically attached to the policy, may be deemed in law to be added thereto, and to constitute a waiver in writing by the agents. That they had authority to execute such a waiver, or to grant permission to do that which would increase the hazard, provided they did it by an indorsement upon the policy or a writing annexed to it, is not denied or questioned. Whether, if a waiver, it might be regarded as annexed to the policy, it is not necessary to say, for this paper does not, in express terms, waive the breach of the condition, nor, viewed in the light of the facts and circumstances, can it be construed to be a waiver. Its terms import the exact contrary of a waiver. The reference in it to the mill, as the reason for cancellation, plainly negatives intent to assume the additional risk. The letter ex-

presses dissatisfaction with the conduct of the insured. On account thereof, he is notified that the policy is canceled. There is not a word in the letter which expresses waiver or any intention to waive. There is no reference to liability or a claim of liability on the policy. As to whether the company is liable, or whether it will forego any right to defend on the ground of violation of warranty or condition, the letter is absolutely silent. No reference whatever is made to the respective rights of the parties under it. Moreover, it bears on its face an implication that there had been a previous demand for the return of the policy. It begins by saying: "We again call your attention to policy No. 3379," etc. In point of fact, there may not have been any such demand, but, whether true or false, it reflects intent on the part of the writers, and tends to negative any intention to waive the violation of conditions. In point of fact, the insured had been plainly informed that the company would not carry his building and store, at the price for which it had issued the policy, and that, in order to obtain a continuation of the protection afforded him by the policy, he would have to pay a premium three times as large. Having given him this notice, the agents might very reasonably have expected him to return the policy and make a new contract. For these reasons, our conclusion is that the letter does not constitute a waiver, and that as the jury predicated its verdict upon the theory of a waiver, as shown by answers to special interrogatories, the court should have set aside the verdict.

The trial court further erred in refusing to exclude the evidence and to instruct the jury to render a verdict for the defendant, for the evidence establishes fully and clearly a violation of the warranty against increase of hazard. The admitted construction of the addition to the storeroom, the installation therein of a gristmill, the operation thereof, and a material increase of hazard. These motions having been overruled, the case went to the jury under instructions, given at the request of both parties. Of the 12 asked for by the defendant, 4 were given and 8 refused, and it excepted. It excepted further to the action of the court in giving one of plaintiff's instructions. In view of the judgment to be rendered here, refusing a new trial, it is unnecessary to examine the instructions.

The reasons which, in the opinion of the majority of the court, justify the rendition of judgment for the defendant here, and impel them to refuse to remand the case, with liberty for a new trial, are set forth in the opinion of Judge Brannon in *Maupin v. Insurance Co.*, 53 W. Va. 557, 45 S. E. 1003, and by Judge Sanders in *Anderson v. Tug River Coal Co.* (decided at this term) 53 S. E. 713. As I wholly dissented in the *Maupin Case*, I expressed no opinion concerning the

propriety of rendering judgment for the defendant. Now, however, having carefully examined the authorities, analyzed them as best I can, and reached the conclusion that this action, on the part of the appellate court, is a violation of well-settled legal principles, as well as a radical departure from the previous practice of this court, I feel called upon to dissent from it and register my protest against it. In those states in which this practice prevails, no distinction is made between cases in which the sufficiency of evidence to sustain the verdict is tested by a motion to exclude, made at the close of the plaintiff's evidence, a motion to direct a verdict at the conclusion of the whole evidence, and a motion to set aside the verdict after the rendition thereof. They apply it generally, simply saying that as they can clearly see that no better case can be made, or that it does not affirmatively appear that it can be done, they therefore refuse to remand. Such is the rule in Illinois, Georgia, Maryland, Michigan, Iowa, Washington, and Missouri. *Senger v. Harvard*, 147 Ill. 304, 35 N. E. 137; *Siddall v. Jansen*, 143 Ill. 543, 32 N. E. 884; *Neer v. Railroad Co.*, 138 Ill. 29, 27 N. E. 705; *Brink v. Morton*, 2 Iowa, 411; *Herring v. Hock*, 1 Mich. 501; *Mudd v. Harper*, 1 Md. 110, 54 Am. Dec. 644; *Emery v. Owings*, 6 Gill (Md.) 191; *Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138; *Dayton v. Fargo*, 45 Mich. 153, 7 N. W. 758; *Rutledge v. Railway Co.*, 123 Mo. 141, 24 S. W. 1063, 27 S. W. 327; *Carroll v. Transit Co.*, 107 Mo. 653, 17 S. W. 889; *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873. In all the above-named states, except Washington, the practice seems to be settled. In that state, however, a later decision (*Edmunds v. Black*, 13 Wash. 490, 43 Pac. 330) enunciates a contrary doctrine, holding that there must be a remand to the lower court when the evidence is insufficient to sustain a verdict. In that case, there was no evidence whatever to sustain it. In the case in 6 Wash., 33 Pac., above cited, the matter seems not to have been discussed; but in the later case it was, and, upon a careful review of the authorities, the court deliberately decided the question. In Arkansas the statute gives to the appellate court the broad power of rendering such judgments as justice may require. Even under that, the court took the view that it was unjust, and therefore violative of law, to refuse to remand a case upon reversing a judgment for insufficiency of evidence, since, for aught the court knows, a better case can be made on a new trial. *Pennington v. Underwood*, 56 Ark. 53, 19 S. W. 108. In some other states, it has been held that, although the court has the power to refuse a new trial, it will only do so when it clearly appears that the plaintiff cannot better his case. This is the law in Wisconsin, but that court remands, when the verdict is unsupported by any evidence what-

ever, because it will not assume that the plaintiff cannot furnish the evidence to sustain his declaration. *Wight v. Rindskopf*, 43 Wis. 844. Such is the rule in Texas also. *Willoughby v. Townsend*, 93 Tex. 80, 53 S. W. 581; *Boettcher v. Prude*, 32 Tex. 472.

The best exposition of the rule in Pennsylvania is found in *Railroad & Coal Co. v. Norton*, 24 Pa. 465, 64 Am. Dec. 672, in which the court said: "The plaintiff's declaration contained a good cause of action, and in such cases, where we reverse, we always award a venire de novo, both because he may, on a second trial, find evidence to support his narr., and because it is necessary to enable the defendant to recover his costs if the plaintiff fail to make out his case in evidence." Some other Pennsylvania cases are cited by the text-writers as being in conflict with this, but they will be found, upon examination, not to be. One of these is *Miller v. Ralston*, 1 Serg. & R. (Pa.) 809. The action was brought before the debt was due, and the court refused a new trial because it appeared that there was no cause of action, nor even a pretense of one. Another is *Griffith v. Eshelman*, 4 Watts (Pa.) 51. There, it appeared from the plaintiff's declaration that he had no cause of action. His declaration was incurably bad. It was not a case of insufficiency of evidence, nor one in which the evidence could be considered at all. One case is cited from New Jersey (*Hinchman v. Clark*, 1 N. J. Law, 340), but it stood upon a special verdict, the facts all ascertained. One is cited from Kentucky (*Broadbudd's Devisees v. Broadbudd's Heirs*, 10 Bush, 299), in which the court say they will remand, except where there is no evidence to sustain the verdict. By what process of reasoning this conclusion was reached is not in any way indicated. Nothing is said about it in the opinion. In South Carolina, the sufficiency of the evidence is tested on the defendant's motion to nonsuit the plaintiff. In *Townes v. Augusta*, 46 S. C. 15, 23 S. E. 984, the Supreme Court of that state, upon mature consideration, announced, the rule as follows: "If the nonsuit was improperly refused, and the nature of the plaintiff's demand was such that no recovery could be lawfully had, this court will grant the motion, and dismiss the plaintiff's complaint. If, however, it was merely a case of insufficiency of proofs adduced at the trial to support the cause of action in itself of a proper and legal nature, this court will not dismiss the complaint upon appeal, but order a new trial, to afford the plaintiff an opportunity to make better proofs." I understand the distinction here stated to be the same as the one made by the Pennsylvania and New York courts, namely, if the declaration sets forth matter which does not, and cannot, constitute a good cause of action, final judgment of dismissal will be rendered by the appellate court, but, if the declara-

tion be good or curable by amendment, the case will be remanded. The procedure in New York is under a statute which authorizes the appellate court to reverse or affirm, wholly or in part, or to modify, the judgment appealed from, and to grant a new trial if necessary or proper, and to grant to either party the judgment which the facts warrant. Under an authority so broad and discretionary as that, the New York court of last resort has solemnly declared over and over that the appellate court cannot properly render final judgment for the appellant, unless the facts are conceded or undisputed, or are established by official record or found by the trial court, or it appears that no possible state of proof applicable to the issues will entitle the respondent to judgment. *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326; *Edmonston v. McLoud*, 16 N. Y. 543; *Hendrickson v. City of New York*, 160 N. Y. 144, 54 N. E. 680; *New v. Village*, 158 N. Y. 41, 52 N. E. 647.

Certain decisions of the Supreme Court of the United States are sometimes cited for the proposition that, on reversing a judgment for insufficiency of evidence, on a motion to set aside, or refusal of a direction to the jury to find for the defendant, it will enter final judgment. This is a misapprehension. Those cases do not assert such a proposition. In all of them the parties waived trial by jury and submitted the matters in difference to the court. That is equivalent to a demurrer to the evidence. By agreement of the parties, the case is withdrawn from the jury. Both parties voluntarily relinquish the right to a jury trial. *Allen v. St. Louis Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573; *Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; *Fort Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56, 28 L. Ed. 636—cited in the *Maupin Case*. In all these cases, it is expressly stated that the trial by jury was waived and the case submitted to the court by a formal written stipulation. When the trial is by a jury and the verdict set aside for want of sufficient evidence, the practice in the Supreme Court of the United States is shown by the decision in *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506. The court held that the evidence disclosed a clear and undisputable case of contributory negligence on the part of the plaintiff. The defendant had failed to ask the court to direct a verdict, but had asked an instruction directing the jury to find for the defendant, if they should find that the plaintiff knew the box car was the proper place for him, and that his position on the plot of the engine was a dangerous one. The court concluded its opinion as follows: "The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to

give such instruction, and error to refuse." Instead of rendering judgment for the defendant, however, the case was remanded with directions to issue a venire de novo. How much stronger case could be presented than that? There was an affirmative showing by the plaintiff's own evidence of a fact that effectually barred recovery. In *Pleasants v. Fant*, 22 Wall. (U. S.) 116, 22 L. Ed. 780, the court gives a full exposition of the principles upon which the motion to exclude evidence rests. In the concluding part of the opinion, Mr. Justice Miller said: "It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial." He then shows the absurdity of requiring the submission of the evidence to the jury under such circumstances, and says: "In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or, if he has done his best, he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury, such a case as a jury might justifiably find for him a verdict." It is to be observed here that that court says that, when a motion to direct a verdict is made, the plaintiff has a right to take a nonsuit. He is not bound to let his case be withdrawn from the jury in that way. He may get out of court, for the time being, for the purpose of bettering his case on another trial.

This court, in *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999, announced the two principles declared by the Supreme Court of the United States. There was a case of insufficiency of the evidence, one in which the court might have directed a verdict, had it been requested, and this court reversed the judgment, set aside the verdict and remanded the case, suggesting that the trial court, on the same evidence, in another trial, might direct a verdict "first giving the plaintiff an opportunity to suffer a nonsuit if he desired." When an appellate court, on reversing a judgment and setting aside a verdict for insufficiency of the evidence, whether there has been a motion to exclude at the conclusion of plaintiff's evidence, a motion to direct a verdict upon all the evidence, or a motion to set aside the verdict, renders judgment for the defendant, it denies to the plaintiff the opportunity to take a nonsuit. In the case of motions to exclude and direct, he is not given an opportunity to better his case

in view of the final action by the court; for the reason that he is under no duty to ask for a nonsuit in the trial court, because the court refuses and overrules the motion. His situation is the same as a plaintiff when his declaration or bill is demurred to. As long as the court rules with him, holding his pleadings sufficient, there is a presumption of correctness, upon which he may rely, and he is under no duty to ask leave to amend. It is only when the court says the pleading is insufficient that the party is put under a duty to ask leave to amend. So, where the sufficiency of his evidence is challenged by a motion to exclude or direct a verdict, as long as the court rules in his favor, he may well suppose that his evidence is sufficient, and is excused from making application to the court for leave to strengthen it. For the court afterwards to turn around and render a judgment against him, without giving the opportunity to better his condition, which he could have had in the court below, and of which that court could not have deprived him, is to take him by surprise, and do him a rank injustice. Besides, for aught the court can know, except by way of guess, it may grievously injure him. The Supreme Court of Vermont, in reversing a judgment in which such a motion was made and ought to have been sustained, said: "While we hold that it was the duty of the court to have entertained the defendant's motion to direct a verdict and enter judgment in its favor, and while generally it is the duty of this court to enter such judgment as the trial court should have done, yet, if the trial court had sustained the defendant's motion, the plaintiff might have desired, and been permitted, to introduce further evidence, and she may desire to do so on another trial. Hence the cause is remanded for a new trial." *Latre-mouille v. Railway Co.*, 63 Vt. 336, 22 Atl. 656. To see how the plaintiff, in such case, may protect himself by exercising his right to take a nonsuit, it is only necessary to bear in mind that the court, in acting upon such a motion, performs two functions. It first determined whether there is sufficient evidence to take the case to the jury. This is a preliminary step. If the court be of opinion that it is not sufficient, then follows the order of exclusion or direction of the verdict. Upon the announcement by the court that in its opinion the evidence is insufficient, the plaintiff has an opportunity, before the verdict is rendered under the direction of the court, to take a nonsuit and thereby prevent his case from being taken from the jury by the court in its then condition. He thereby saves to himself his constitutional right of a trial by jury. This principle puts it beyond the power of the defendant and the court to take his case from the jury in that way. Whether that right is a valuable one to him in a particular case, it is not for the court to say, until the defendant has put

himself in a position to authorize such action. Though a court may clearly see that no harm, in a practical sense, will result from forcing a defendant to trial on a bad declaration, it can never overrule a demurrer for that reason. He cannot be deprived, for reasons of mere expediency, of his right to require a good declaration or bill before pleading or answering. The law deems that right to be a valuable and sacred one, whether it be so, in the particular case or not, and does not permit any court to assert the contrary. Nor can a court properly deprive a litigant of any other legal right, because, forsooth, the judge cannot see how he is injured thereby. By rendering final judgment in such cases as this, the plaintiff is deprived of his opportunity to better his case. It directly and expressly refuses that which the trial court would have been bound to allow him, had it concluded the evidence was insufficient. The rendition of a judgment by the appellate court, in such a state of the case, works another injury in a legal sense, by putting the parties on an unequal footing. It enables the defendant to have three chances, one before the court and two before the jury; while the plaintiff has but one, a chance before the court. It allows the defendant to make a demurrer to the evidence against the plaintiff, for his own benefit, without subjecting himself to the operation of a demurrer. Upon the court's refusing his motion, he has a chance of a verdict in his favor. If he fails to get that, he comes up to the appellate court, on the issue of law, and has final judgment. If the verdict be for the defendant, however, and the plaintiff is compelled to come to this court to get rid of it, upon reversing the judgment and setting aside the verdict, he cannot have a final judgment against the defendant, but must go back and give the defendant another chance before the jury. Upon what principle an appellate court can justify such a discrimination between parties, I am unable to see. It is to be remembered in this connection, too, that the subject-matter of this discrimination is the constitutional right of a jury trial. It is more than a mere matter of form or technicality, even if it could be set aside and ignored as a matter of form. While the courts and text-writers say a motion to exclude or direct a verdict is equivalent to a demurrer to evidence, they do not mean that it is in all respects equivalent thereto, but only that, in determining whether it shall be sustained or overruled, the principles governing a demurrer shall apply. Where the parties join in a demurrer, the case is taken from the jury absolutely as to both parties. Neither has any right to go back to the jury, unless there has been error in admitting or excluding evidence. The whole matter is submitted to the court for final determination. What was said above about the inability

of the defendant and the court to take from the plaintiff his right to a trial by jury, was qualified by the phrase "in that way," namely, by a motion to exclude or direct a verdict. I am not to be understood as intimating that the plaintiff cannot be compelled to join in a demurrer. When he is compelled to do so, however, the other party is also compelled to withdraw his case from the jury, so that both parties stand on an equal footing, forever separated from the jury, and their case wholly in the hands of the court.

Very few of those courts, in which the practice of rendering judgment on a reversal obtains, if indeed any, have given this subject careful and mature consideration. They have dismissed it with a few words, usually with the remark that it is not perceived how the plaintiff can make a better case, or that it does not appear that he can do so, wherefore the granting of a new trial will be useless. I have observed that in one or two instances it has been said that it ought to be done in order to put an end to the litigation; but this reason falls under the condemnation of the great weight of authority. Even the courts that have given it have said in the same breath they would grant a new trial, if they could see that the plaintiff could make a good case, while others have said they would grant it in all instances in which it does not affirmatively appear that the plaintiff could not by any possibility make a good case. All the reasons assigned, by all the courts that indulge in that practice, may be included in that idea of utility or expediency, which utterly ignores legal principles, and, if extended, would lead to the abolition of all forms of action. It would only be necessary to have a judge and a jury, and all pleadings might be dispensed with. The trial of an equity suit on a declaration in debt would be perfectly justifiable. The suggestion that, as the plaintiff has had one trial, he has no legal right to another, is one advanced for the first time, so far as I am able to see, in *Maupin v. Insurance Co.* I think he has, unless the defendant has taken the proper step to deprive him of it by a demurrer to the evidence. Even in that case, it is likely the plaintiff may avoid the effort to bind him, by taking a nonsuit. While he must join in the demurrer or dismiss his action, I do not see that the court can compel him to further prosecute, or elect for him which alternative shall be taken. The statute forbids the taking of a nonsuit after the jury has retired from the bar, but limits the right no further, and I know of no authority in the court to add to it. The right may be of no practical value to him, but it is a legal right of which a court cannot deprive him, except by trampling the law under foot. *Maupin v. Insurance Co.* is the first decision by this court in which the rule here enforced was ever applied. No precedent for it will

be found in any of the Virginia decisions, prior to the division of the state. Even a fatal variance between the declaration and the proof was not ground for any such action, though it is in some other states. In *Calvert v. Bowdoin*, 4 Call (Va.) 217, the court laid down this proposition: "If the evidence differs from the statement in the declaration, a judgment of nonsuit will be given by the court of error; and the cause will not be sent back to the court below with a direction to call the plaintiff, or to instruct the jury that the evidence does not support the declaration." Instead of rendering a judgment for the defendant against the plaintiff, and making the matter *res judicata*, the court merely dismissed the action. This is in accord with the rule declared by the South Carolina court, and by the Pennsylvania court as above shown.

For these reasons, I am opposed to the departure made in the *Maupin Case* and in the case of *Harvey Coal Co. v. Dillon*, 53 S. E. 928, and would remand this case instead of rendering judgment for the defendant. If the defendant desired the case to be taken from the jury, it should have demurred to the evidence and deprived itself of any right to go to the jury, while taking that right from the plaintiff.

BRANNON, J. I concur in the judgment, but I doubt point 2 of the syllabus.

(74 S. C. 178)

WILDER v. D. W. ALDERMAN & SONS CO.
(Supreme Court of South Carolina. April 13, 1906.)

INJUNCTION—MOTION TO DISSOLVE.

Where the court granted a temporary injunction on the merits on execution of a bond by plaintiff, a refusal to vacate such injunction before trial on the merits was not error, where plaintiff had made out a *prima facie* case.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 357, 358.]

Appeal from Common Pleas Circuit Court of Clarendon County; Purdy, Judge.

Action by John T. Wilder against the D. W. Alderman & Sons Company. From an order refusing to dissolve temporary injunction, defendant appeals. Affirmed.

Wilson & Durant, for appellant. Willcox & Willcox, for respondent.

JONES, J. The plaintiff brought this action to enjoin defendant from entering upon plaintiff's lands and operating thereon its tramroad or iron railroad in the conduct of its business of manufacturing and selling lumber. On July 24, 1903, Judge Watts granted a temporary injunction until the trial of the cause upon its merits or the further order of the court, providing that plaintiff execute bond for such damages as may be sustained by defendant, with leave to defendant to apply on notice for a dissolu-

tion of said order. After filing of answer, motion was made before Judge Purdy to vacate said temporary injunction, which motion was refused by Judge Purdy, by his order dated May 29, 1905, on the authority of the case of Alderman & Sons Co. v. Wilson, 69 S. C. 156, 48 S. E. 85. From the last-mentioned order defendant appeals, alleging error in refusing to dissolve the injunction, in that (1) the injunction standing has the effect of changing the possession of the land from the plaintiff; (2) the temporary injunction is not essential to the assertion or preservation of any alleged legal right of the plaintiff; (3) because from the entire case there is not a prima facie showing of a clear legal right in the plaintiff to the relief sought. We agree with the circuit court that the case made by plaintiff falls within the rule stated in Alderman v. Wilson, supra, and we think he committed no abuse of discretion in refusing to dissolve the injunction pending trial upon the merits.

The judgment of the circuit court is affirmed.

(74 S. C. 76)

SPENCER NAT. BANK v. INMAN MILLS.
(Supreme Court of South Carolina. April 7, 1906.)

BILLS AND NOTES—PURCHASE BEFORE MATURITY—NOTICE.

Where a negotiable note has been purchased by a bank for value before maturity, it is not charged with notice that the note has been renewed and paid to the first payee because the renewal and payment passed through the bank; it being the bank in which the payee kept an account.

Appeal from Common Pleas Circuit Court of Spartanburg County; Watts, Judge.

Action by the Spencer National Bank against the Inman Mills. Judgment for plaintiff. Defendant appeals. Affirmed.

Simpson & Bomar, for appellant. Bulst & Bulst and Stanyarne Wilson, for respondent.

POPE, C. J. This is an action for the recovery by the plaintiff of \$1,000 of the defendant upon a negotiable note made by the defendant to the Slater Engine Company and by them transferred for value before maturity to the plaintiff. The trial came on before Judge Watts and a jury. After hearing the testimony on both sides the circuit judge directed a verdict for the plaintiff.

The following is a copy of the complaint: "The plaintiff above named, complaining of the defendant, alleges: (1) That the plaintiff, the Spencer National Bank, is now, and was at the times hereinafter mentioned, a corporation organized and existing under the acts of Congress of the United States of America, carrying on business in the city of Spencer, in the state of Massachusetts. (2) That the defendant, Inman Mills, is now, and was at the times hereinafter mentioned, a corporation organized and existing under

the laws of the state of South Carolina, carrying on business in the county of Spartanburg and state of South Carolina. (3) That Frank Slater and George M. Faulkner are now, and were at the times hereinafter mentioned, copartners under the firm name of the Slater Engine Company. (4) That heretofore the said defendant, Inman Mills, made its promissory note in writing, dated on the 13th day of May, 1903, at Inman, S. C., and thereby promised to pay to the order of the said Slater Engine Company \$1,000, four months after date, at First National Bank of Spartanburg, S. C. (5) That thereafter and before maturity the said Frank Slater and George M. Faulkner, under their said firm name of the Slater Engine Company, indorsed the said note to the said plaintiff, for value, and the said plaintiff is now the legal and bona fide owner and holder thereof. (6) That the cost of protest was \$1. (2) That no part of said note or protest has been paid, although payment of the same has been duly demanded. Wherefore the said plaintiff demands judgment against the said defendant for the sum of \$1,000, with interest thereon from the 15th day of September, 1903, together with \$1, the cost and disbursement of this action."

The answer of the defendant was as follows: "(1) Admits the allegations of paragraphs 1, 2, 4, 6 and 7 of said complaint. (2) Defendant admits that Frank Slater and George M. Faulkner were at the time mentioned in the complaint copartners, under the firm name of the Slater Engine Company, but alleges that the said parties have become insolvent, and that their affairs are now being administered in the bankruptcy courts. (3) Defendant says that as to the allegations of paragraph 5 it has no knowledge or information sufficient to enable it to form a belief, and the said allegations are therefore denied. (4) Further answering the complaint herein, defendant says that the note referred to in paragraph 4 of the complaint was and is without consideration, and has never been and is not now a legal and binding obligation against this defendant, for that this defendant received no consideration whatever for the said note, and that the said Slater Engine Company used said note in a way and for a purpose never intended by this defendant, and defendant alleges that it has never owed, and does not now owe, any sum whatever thereof to the plaintiff or to any other party. Wherefore defendant demands judgment that the complaint be dismissed, with costs."

The testimony in this case consisted of, on the part of the plaintiff, the two witnesses of the plaintiff bank, to wit, the cashier and the assistant cashier, both of whom explicitly denied any knowledge or information in relation to any defect in the note sued on, on the part of the bank. On the contrary, those two witnesses testify that the plaintiff purchased said note for full value on the 16th

day of May, 1903, and the said note matured four months after its date. There was one witness only on the part of the defendant, and he was the president and treasurer of the Inman Mills. His testimony denied any connection or correspondence with the plaintiff bank in regard to the note sued on. In other words, he gave no notice to the plaintiff until after the note fell due. This witness relied for the defense upon the fact that the Slater Engine Company had sold to it an engine for its mill in 1901, and that said defendant mill issued to the Slater Engine Company a note for \$1,550, and also one for \$1,200, which were from time to time renewed, but were finally fully paid, and that the renewals of those notes passed through the plaintiff bank, and from these circumstances it was contended by the defendant that the plaintiff bank should have inferred that the note sued on was without any value, except as a renewal of said former notes. But it will be seen that no notice was ascribed to the plaintiff bank, and so the circuit judge held that the testimony did not support any notice of a defect in the note here sued on.

It will be borne in mind that there was no affirmative defense in answer of the defendant in the way of a counterclaim or of an equitable assignment or subrogation. There was no testimony going to show any knowledge by the plaintiff of a defect in the engine sold by the Slater Engine Company to the defendant, Inman Mills. Therefore the circuit judge made no mistake when he held that there was no testimony going to show that the plaintiff was not a purchaser without notice for a valuable consideration of the note of the defendant for \$1,000 sued for. Such being the case, it was the duty of the circuit judge to direct the verdict. *Nicholls v. Hill*, 42 S. C. 28, 19 S. E. 1017; *Rice v. Bamberg*, 68 S. C. 184, 46 S. E. 1009; *Uzzell v. Horn*, 71 S. C. 438, 51 S. E. 253. There was no mistake in the circuit judge's refusing the motion for a new trial.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(78 S. C. 575)

**WORKINGMEN'S BUILDING & LOAN
ASS'N v. EPSTIN et al.**

(Supreme Court of South Carolina. April 2, 1906.)

**1. CHATTEL MORTGAGES—SALE TO MORTGAGEE
—CONSENT OF MORTGAGOR.**

Civ. Code 1902, § 3004, prescribes the method of sale of mortgaged personalty, but provides that the mortgagor may consent in writing to some other mode. *Held*, that a receipt executed by the mortgagor, acknowledging payment of a certain sum by the mortgagee on account of the purchase of mortgaged stock as per inventory, was a sufficient consent in writing to such a sale.

2. SAME—EXTINGUISHMENT OF MORTGAGE.

The rule of law which extinguishes a mortgage when a seizure of the mortgaged chattels is made and the sale is not conducted as re-

quired by statute does not apply where the mortgagee purchased the property under a written consent of the mortgagor, as authorized by Civ. Code 1902, § 3004.

Appeal from Common Pleas Circuit Court of Richland County; Watts, Judge.

Action by the Workingmen's Building & Loan Association against Philip Epstein and others. Judgment for plaintiff, and certain defendants appeal. Reversed in part.

Lyles & McMahan and A. D. McFaddin, for appellant. *Andrew Crawford and John T. Sloan*, for respondent *Epstin*.

JONES, J. The present controversy is between Wilbur & Son, junior mortgagee, and Epstein, mortgagor, over a fund of \$336.18 in the hands of the master, being balance of proceeds of foreclosure sale of real estate of defendant Epstein after payment of the plaintiff's senior mortgage. The contention before this court centers on the question whether Epstein's debt to Wilbur & Son was overpaid, as claimed by Epstein, by a sale of a stock of goods by Epstein to Wilbur & Son on November 22, 1897, at a valuation of \$3,075.78, or was it merely credited, as claimed by Wilbur & Son, by a sale of said goods on the 22d of December, 1897, at an agreed valuation of \$1,793.97. If Epstein's version of the transaction be true, then Wilbur & Son would be indebted to Epstein, and would have no right to the surplus fund in controversy. If Wilbur & Son's version be the correct one, then Epstein is indebted to them in the sum of about \$425.14, and Wilbur & Son would be entitled to the fund in question. The master and the circuit court do not accept either of these versions, but proceed on the theory that the stock of goods was not sold by Epstein to Wilbur & Son at an agreed price, but that Wilbur & Son took possession of said goods under a chattel mortgage thereon for \$2,500 and not having sold the goods as required by section 3004, Civ. Code 1902, the mortgage debt is extinguished, and so crediting Wilbur & Son's claim against Epstein with said sum of \$2,500, would leave Wilbur & Son not entitled to the fund in controversy, but indebted to Epstein in the sum of \$292.49, with interest from December 27, 1898, for which sum, with costs, decree was rendered against Wilbur & Son.

After careful consideration this court is of the opinion that the goods were sold by Epstein to Wilbur & Son on December 22, 1897, at an agreed price of \$1,793.97, that there was sufficient consent thereto, expressed in writing signed by Epstein, to comply with the provisions of section 3004, Civ. Code 1902, that Epstein is indebted to Wilbur & Son in the sum of about \$425.14, and that Wilbur & Son are entitled to the fund in controversy. The master expressly found as a fact that "Wilbur & Son did not take the goods at the valuation of \$3,075.78 fixed in the inventory Exhibit P," and the court con-

ours in this finding, which is not excepted to by Epstin and, in our opinion, is well supported by the testimony. This conclusion utterly destroys the contention of Epstin that there was a sale of the goods to Wilbur & Son on November 22, 1897, at the valuation shown by the inventory of that date, known as Exhibit P, and we may dismiss further consideration of circumstances relied on by Epstin to show that he made such sale. The inquiry, then, is, was there a sale of the goods on December 22, 1897, at the agreed prices, aggregating \$1,793.97, as shown by the inventory of December 22, 1897, known as "Exhibit Y"? That there was such a sale is supported by the testimony of T. A. Wilbur and T. S. Wilbur, and by their bookkeeper, D. L. Alexander, and is opposed only by the testimony of Mr. Epstin, whose contention throughout was that the sale was made November 22, 1897. The testimony is, therefore, undisputed that there was an actual sale and delivery of the goods by Epstin to Wilbur & Son, the only point of difference being the exact time of the sale and prices agreed upon, and it has been shown that the sale did not take place on November 22, 1897, under the inventory of that date. The testimony shows that Epstin was present and participated in taking the inventory of December 22, 1897 (Exhibit Y), along with the representatives of Wilbur & Son and in his own handwriting made correction of errors in said inventory. The first page of this inventory (Exhibit Y), purports to be "Stock of Philip Epstin, November 22, 1897," pages 1 to 9 inclusive, purport to contain "goods sold to T. A. Wilbur & Son, December 22, 1897," in the handwriting of a clerk of T. A. Wilbur & Son, then follows the items of the stock, showing number or amount, the price, and the total at the end of the line, aggregating \$1,793.97. In addition to the foregoing is the following receipt produced in evidence: "Charleston, S. C., Dec. 22, 1897. Received from T. A. Wilbur & Son, seventy-five and 00-100 dollars on account of purchase stock as per inventory this date. \$75. Philip Epstin, Trustee." In view of all this testimony, oral and written, we cannot accept the finding of the master and the circuit court that Epstin did not agree to the sale as per inventory of December 22, 1897.

Section 3004, Civ. Code 1902, prescribes the manner of advertising sale by the mortgagee of personal property under mortgage, but expressly provides that the mortgagor may consent in writing to a sale in some other mode, or at some other notice. The mortgagor's receipt in this case in connection with the inventory of December 22d, is a sufficient consent in writing to the sale on that date. The rule of law which extinguishes the mortgage when a seizure of all the mortgaged chattels is made and the sale is not conducted as required by statute, has, therefore, no application in this case. These

conclusions go to the marrow of this controversy, and it is not important to consider the exceptions in detail. We sustain appellant's exceptions raising the questions discussed and overruled all conclusions of the circuit court in consistent with the views announced.

The judgment of this court is that the judgment of the circuit court is reversed, in so far as it decrees against Wilbur & Son in favor of Philip Epstin for the sum of \$292.49 and costs and denies Wilbur & Son the right to the fund in controversy, whereas Wilbur & Son are entitled to receive the fund in controversy, it being less than the sum due by Epstin to them, and that in all other respects the judgment of the circuit court is affirmed.

(141 N. C. 471)

WOODY v. INTERMONT IRON & TIMBER CO.

(Supreme Court of North Carolina. May 22, 1906.)

LOGS AND LOGGING—SALES OF STANDING TIMBER—DEEDS—CONSTRUCTION.

A deed conveying to a purchaser standing timber branded as described, giving the purchaser the right of way through the land of the grantor for the removal of the timber, and authorizing the grantor, on clearing any of the land, to deaden the trees sold standing within the cleared land after the lapse of five years from the date of the instrument, providing he first gave a written notice of his intention to deaden, is an absolute conveyance of the trees branded as described, and the grantor has no right to an injunction restraining the purchaser from entering and removing the trees before the expiration of the time within which he may do so.

Appeal from Superior Court, Yancey County; Justice, Judge.

Action by A. A. Woody against the Intermont Iron & Timber Company. From an order dissolving an injunction, plaintiff appeals. Affirmed.

Action to declare void a certain deed and to restrain the defendant from cutting timber on the land described in it. The following is a copy of the deed: "For and in consideration of the sum of one hundred, thirty two and 75/100 dollars (\$182.75), in hand paid by the grantee to the grantor, receipt of which is hereby acknowledged, A. A. Woody and wife, Lyda, have bargained and sold and conveyed, and by these presents transfer and convey to Tate L. Earnest, agent, the following described timber, standing in the tree, as follows, to wit: 36 poplar and 10 ash, of the diameter of 24 to 30 inches in diameter, 45 poplar 30 inches and over; and 2 ash 30 inches and over, and the following other trees 24 inches in diameter: 9 cucumbers, 13 lynn, 11 chestnut oak, 25 other oaks, making a grand total of 153 trees, all of which said trees are standing at the date of these presents on the following described lands of the grantors, situated in Brush creek of Toe river, adjoining the lands of Moses

Fox and others, W. H. Dayton and others, and containing 100 acres, more or less, situated in the county of Yancey and state of North Carolina, which trees are branded as follows: To have and to hold to said grantee and successors and assigns, with usual right to convey, unincumbrances and general warranty, together with right of way over, through and upon any lands belonging to the grantors for the removal of any timber belonging to said grantee, successor or assigns, provided adequate and reasonable damages are paid for any injury done to any growing crops which may then be upon said lands. Should the grantor clear any of the lands on which the timber stands, they shall be at liberty to deaden such trees as stand within said cleared land after the lapse of five years from this date, provided they shall first give the owner of the * * * six months' written notice of their intention to deaden, and in consideration of the foregoing premises the grantors agree to protect said timber as long as it may remain upon said land. Witness our signatures and seals, this the ——— day of March, 1900. A. A. Woody. [Seal.] Lyda Woody. [Seal.]" From an order of Judge Justice, dissolving the injunction, the plaintiff appealed.

J. W. Pless and J. T. Perkins, for appellant. McBrayer & McBrayer, for appellee.

BROWN, J. It is contended that the deed is void under the authority of Hobbs' Case, 128 N. C. 46, 38 S. E. 26, 83 Am. St. Rep. 661. The instrument construed in that case is unlike this in every respect. This is an absolute conveyance of so many trees marked and branded, and contains no clause limiting the time within which they may be removed. It is possible the courts may so construe the meaning of the deed as to require the grantee, or those claiming under him, to remove the trees within some reasonable time. Bunch v. Lumber Co., 134 N. C. 116, 46 S. E. 24. But as it is plain that the time within which the defendant may enter and remove the trees has not yet expired, the injunction was properly dissolved. If the plaintiff desires to clear the land, he may give the six months' notice required in the instrument, and compel the removal of the trees, or he may deaden them with impunity.

Affirmed.

(141 N. C. 844)

STATE v. FARRINGTON.

(Supreme Court of North Carolina. May 16, 1906.)

1. INTOXICATING LIQUORS—WRONGFUL SALE—CRIMINAL PROSECUTIONS—PUNISHMENT.

For violating the statute prohibiting the sale of spirituous liquors without a license, the person convicted may be imprisoned in the county jail, with a direction that he be worked on the public roads.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 356-361.]

2. CRIMINAL LAW—CRUEL OR UNUSUAL PUNISHMENT.

Where no time is fixed by statute, the Supreme Court will not hold an imprisonment for two years, cruel and unusual.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3308.]

3. SAME—SENTENCE—REASONS.

In imposing sentence on a person convicted of selling liquor without a license, it was proper for the trial judge to state the reason that impelled him to impose the sentence passed.

Appeal from Superior Court, Guilford County; Ward, Judge.

T. B. Farrington was convicted of retailing spirituous liquors without a license, and he appeals. Affirmed.

The defendant was convicted for retailing spirituous liquors without license contrary to the statute. There was no exception to his honor's ruling upon the trial. The testimony tended to show that he had sold liquor upon two occasions, the last of which was 18 months before the finding of the bill of indictment. The solicitor introduced several other witnesses who swore that his reputation in the community was particularly bad, for selling whisky contrary to law. Some of the witnesses stated that it was generally reported that he had been engaged in the selling of whisky for 12 or 15 years up to about 12 months before the hearing of this case when he and his two sons had been indicted for burning a barn, the property of persons who had been active in prosecuting him for the unlawful sale of whisky. The court found as a fact that he was an old distiller before Watts law went into effect, and that after the enactment of the law he sold a lot of liquor around creating drunkenness in the neighborhood. The court thereupon sentenced the defendant to imprisonment of 12 months in the county jail, with direction that he be worked upon the public roads. To this sentence defendant excepted and appealed.

John A. Barringer, for appellant. The Attorney General, for the State.

CONNOR, J. (after stating the facts). It cannot, at this time, and in view of the many decisions of this court, be regarded as an open question that for violation of the statute prohibiting the sale of spirituous liquor without a license the person convicted may be imprisoned in the county jail with direction that he be worked upon the public roads. State v. Hicks, 101 N. C. 747, 7 S. E. 707; State v. Smith, 126 N. C. 1057, 35 S. E. 615. It is equally well settled that, when no time is fixed by the statute, this court will not hold an imprisonment for two years cruel and unusual. State v. Driver, 78 N. C. 423; State v. Miller, 94 N. C. 904. It is entirely proper for his honor to state the reasons which impelled him to impose the sentence of 12 months in jail with direction to work defendant on the public roads. While

we disclaim any purpose to review his honor's judgment in this case, it may not be improper to say that we think the reasons given amply sustain the judgment.

There is no error.

(141 N. C. 718)

CITY OF HICKORY v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 29, 1906.)

1. NUISANCE—PUBLIC NUISANCE—ENCROACHMENT ON PUBLIC RIGHTS.

A railroad freight depot in the center of a town, causing the obstruction of streets by cars and rendering the streets dangerous, is a public nuisance.

2. SAME—INJUNCTION—SUIT BY TOWN.

Where a freight depot in a town constituted a public nuisance, the town, acting through its official board, was a proper party to sue for an injunction.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 195.]

3. SAME—REMEDIES OF PRIVATE PERSONS—DAMAGES.

Though a freight depot in a town amounted to a public nuisance, any citizen might recover damages by showing that it was a nuisance to him.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 164-169.]

Appeal from Superior Court, Catawba County; Cooke, Judge.

Suit by the city of Hickory against the Southern Railway Company. From the judgment, both parties appeal. Affirmed.

See 50 S. E. 683.

E. B. Cline, T. M. Hufham, and Self & Whitener, for appellant. Witherspoon & Witherspoon and S. J. Ervin, for appellee.

CLARK, C. J. This is an action to restrain the defendant from enlarging its freight station in the town of Hickory; the plaintiff alleging that the increase in traffic and shifting of more trains would make it a nuisance and dangerous, and averring that the defendant can and should locate a building to accommodate its increased traffic at some point further off and not enlarge its present building in the center of the growing and populous town. Both parties appeal, but the whole matter can be treated in one opinion. Three main questions are presented: (1) The title to the lot in controversy; (2) whether the proposed addition of 70 feet at the end of defendant's depot will be a nuisance which the courts can and should enjoin; and (3) whether the plaintiff can maintain this action.

The defendant claimed title as follows: (1) A deed by H. W. Robinson and several others, November 9, 1855, granting to the Western North Carolina Railroad a right of way over their respective lands wherever situated, the same to be "so much and no more of said lands" than said company "would have the right to condemn for its use" under the provisions of its charter. It is admitted that H. W. Robinson was the owner

of the lot in question, that the defendant by purchase had succeeded to all the rights and property of said Western North Carolina Railroad Company, and that the right of condemnation extended to 100 feet on each side of the track. (2) A deed from H. W. Robinson to the Western North Carolina Railroad Company, May 26, 1859, and recorded in November, 1905. (3) The defendant further relies upon section 29, c. 228, p. 264, Acts 1854-55 (the charter of the Western North Carolina Railroad Company), which is a provision that, "in the absence of any contract" for the right of way, the construction and operation of the road for two years, without claim, shall bar any action for any land covered by the right of way. The railroad was constructed at this point in the fall of 1859, and has been in operation ever since. (4) A deed from H. W. Robinson March 10, 1880, to the Western North Carolina Railroad Company for a lot 400 feet by 500 feet, giving specific boundaries and embracing the station as its central point, conveying said property "for the purpose of a public square around the depot for the free and common use of both railroad and the town of Hickory, not to be built up or exclusively occupied by any one, to the exclusion of the public as a free common." This deed was drawn by the president of the Western North Carolina Railroad Company, who indorsed thereon: "The original deed having been destroyed without record, this deed is accepted in lieu thereof." This deed was proved and recorded in April, 1880. The deed of 1855 was not presented in evidence when this case was before us (137 N. C. 189, 49 S. E. 202), and this point was not passed upon.

We think, therefore, the court did not err in instructing the jury, as a matter of law, upon all the evidence, to find that the defendant owned the 100 feet on each side of the railroad by virtue of the deed of 1855, and that it did not hold that part of the lot in trust for the town, and the jury found, under proper instructions, that the defendant held the balance of the lot under the trust set out in the deed of 1880 (No. 4 above).

In the defendant's appeal there is no exception to these findings, except the last, and that exception is without merit, since it was adjudicated in the former appeal. 137 N. C. 189, 49 S. E. 202. Indeed, it is stated in this case (137 N. C., at page 203, 49 S. E., at page 205) that the record shows "the defendant in open court agreed that it did not claim any part of the land described in the deed and plats, except the main track and 100 feet on each side from the center of the track, and that it stood ready to have it so decreed by the order of the court."

This disposes of the plaintiff's appeal.

Defendant's Appeal.

It appeared in evidence that the present freight depot is too small to store the goods shipped over the road, and that in consequence

a great number of cars constantly stood upon the side tracks; also, that, upon complaint made and after due investigation, the Corporation Commission in December, 1903, adjudged "that the present depot facilities at Hickory for the handling of freights are insufficient and inadequate, and as at present operated are unsafe," and ordered that the defendant should "provide adequate and safe facilities for the handling of freights" at Hickory. From this order the defendant did not appeal, and, notwithstanding the adjudication that the handling of freight at the present location in the center of the town was unsafe, the defendant was proceeding to enlarge its warehouse, whereupon this action was begun, not to compel a removal of the warehouse now there, but to require that the additional facilities should be erected at a point where the increasing freight traffic and additional cars used might be shifted and handled without danger and delays to those crossing constantly from one side of the town to the other. There was ample evidence of the many dangers and inconveniences to the people of the town arising from the handling of the volume of freight at that point at present, and the certainty of increased danger in the future, both from the steady increase in the volume of freight and from the great increase of population in the town, and there was evidence of many eligible locations in or near the edge of the town where the defendant might readily locate its freight depot, separate and apart from its passenger station, as is now usual at all other towns of any size. The court charged the jury that if "the enlargement of the defendant's present freight depot by an extension on the eastern side" would "seriously interfere with and interrupt the streets of the town, which are in general use and necessary for the convenience of the citizens and for the business, in respect of travel or course of business, either by obstructing the streets for an unreasonable portion of the time, or by having it so that travelers along said streets, which cross the railroads at public crossings, cannot, by the exercise of reasonable, ordinary care, with safety pass over such crossings, that they should find as to that issue that the enlargement would be a public nuisance, but that, if it would merely give inconvenience to the public or cause some delay in their movements, which is incident to the operation of a railroad, it would not be a nuisance."

The defendant has no just ground of exception to this charge. The jury found that the proposed enlargement would be a public nuisance. Railroads are chartered for the public convenience, and are operated by the exercise of a public franchise. Such exercise must be subordinate to the public welfare, and they are subject to public regulations as to their charges and conduct. If they exercise their functions in such manner as to become a public nuisance, they are liable to damages or to injunctive relief. The operation of their freight business, growing rapidly, as it is shown to be, in the center of a large and growing town, will necessarily impede and render dangerous the circulation of people and business from one side of the town to the other. It necessitates the keeping of many box cars on the side tracks and their constant shifting up and down, cutting off the view of approaching passengers, and, indeed, of other freight trains. The jury has found this dangerous, inconvenient, and a public nuisance. Indeed, we might almost say that it would be a matter of common knowledge. If there are any good reasons why the defendant should have resisted the application of the town authorities, and should not rather have anticipated the public wishes and convenience by removing its freight depot to a more suitable location, they do not appear in this record. The plaintiff, acting through its official board, was a very proper party to institute this proceeding to render the passage of its streets across the railroad track safer, and prevent their obstruction by shifting freight cars. While any citizen might have recovered damages by showing that the enlargement of the depot was a nuisance to him (*Railroad v. Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739), it is especially appropriate that this action to prevent a public nuisance should be brought by the municipality in the interest of all its citizens.

While this judgment, which we affirm, restrains only the addition to the freight depot, it is to be presumed that the defendant will not only place the building and side tracks to give the additional freight facilities ordered by the corporation commission at a more suitable spot, where they will not be so dangerous and will not interrupt the traffic of the town, but that it will remove all its freight business to that point.

As to both appeals, we hold that there is no error.

(141 N. C. 355)

TWITTY v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 16, 1906.)

CARRIERS — REGULATION — FAILURE TO RECEIVE FREIGHT — PENALTIES — STATUTES.

Revisal 1905, § 2631, declares that freight agents of railroads shall receive all articles of the nature received by such company for transportation whenever tendered at a regular depot and forward the same by the routes selected by the person tendering the freight under existing laws and for a failure so to do imposes a penalty of \$50 for each day's delay and actual damages. *Held*, that where a freight agent refused to accept freight on January 27, 1905, or issue a bill of lading therefor because of alleged lack of time to ascertain the freight rates, but permitted the freight to remain in the railroad's warehouse until he had time to ascertain the rates, which he failed to do until February 8th, there was a failure to receive for transportation when tendered, creating a liability under such section.

Appeal from Superior Court, Rutherford County; O. H. Allen, Judge.

Action by R. M. Twitty against the Southern Railway Company, begun before a justice of the peace to recover \$200 penalties alleged to have been incurred under Revisal 1905, § 2631. From a judgment for plaintiff, defendant appeals. *Affirmed*.

The following are the agreed facts: "(1) This was an action instituted by plaintiff in the court of H. S. Taylor, justice of the peace in Rutherfordton, N. C., on the 31st day of January, 1905, for the recovery of four days' penalties at \$50 per day, aggregating \$200, under the provisions of section 1964 of the Code (section 2631 of the Revisal of 1905). (2) That on the 27th day of January, 1905, plaintiff sent 1,000 pounds of cotton seed meal to the agent of Southern Railway Company (defendant) at its regular depot or station at Rutherfordton, N. C., together with the correct amount of money to prepay the freight upon said 1,000 pounds of cotton seed meal to its destination, and plaintiff tendered said cotton seed meal for shipment to Rev. J. Seagle, at Hendersonville, N. C., also a regular depot or railway station or shipping point on the line of the defendant railway company within this state and with the tender of said freight for shipment plaintiff also tendered the money to prepay the said shipment of freight from Rutherfordton to Hendersonville. (3) That some few days prior to the date of tender of said freight for shipment plaintiff had ascertained from the agent of the defendant railway company at Rutherfordton, who was C. T. Hamrick, the exact amount of money necessary to prepay freight shipment but after plaintiff had received this information from defendant's agent, Hamrick, defendant transferred said Hamrick to another station or depot upon the line of its railway, to wit, Henrietta, and one C. W. Kitchens was sent by defendant to take the place of the said C. T. Hamrick as agent of the defendant company at Rutherfordton.

(4) That when plaintiff delivered the 1,000 pounds of cotton seed meal for shipment as stated above, and tendered the money to prepay the freight upon the cotton seed meal to Hendersonville, the agent of defendant railway company, the said C. W. Kitchens, who had but recently assumed the position of agent, refused to accept the money tendered to prepay freight and stated to the drayman who brought the 1,000 pounds of cotton seed meal to defendant's depot that he did not have the time then to look up the freight rates and that the drayman could leave the seed meal in the defendant's warehouse, and when he (the defendant's agent) had ascertained the freight, he would be ready to make the shipment; but defendant's agent gave plaintiff no receipt, and no bill of lading for said cotton seed meal and did not offer to ship the cotton seed meal until February 8, 1905. (5) That daily plaintiff called defendant's agent, and requested that the cotton seed meal be received for shipment, but each time defendant's agent, Kitchens, informed plaintiff that he was too busy with other work to ascertain the freight rates. (6) The said cotton seed meal remained at the defendant's warehouse until February 8, 1905, when defendant's agent informed plaintiff that he was ready to make the shipment, received from plaintiff the amount of money necessary to prepay the freight, and shipped the cotton seed meal as originally requested." His honor gave judgment for \$200 being the penalty for four days, and being the full amount claimed, and the defendant appealed.

Geo. F. Bason, for appellant. Sol. Gallert, for appellee.

BROWN, J. The defendant admits its liability for negligence in the brief filed in these words: "The defendant has never pretended that it is not liable to a penalty, and does not now make any such contention." The defendant contends that the suit was brought under the wrong statute, admitting that it is liable for the penalties denounced in section 2632. It is contended that there was no refusal to receive the freight for shipment. We are of opinion upon the facts agreed that there was a refusal by the agent "to receive for transportation when tendered." It was the duty of the agent to receive the freight, and to give a bill of lading for it. That is a "receiving for transportation." The agent received the freight for storage on January 27th and kept it until February 8th; but, under a fair interpretation, that is not a compliance with the statute. The fact that the agent did not know the freight rates is no excuse. It is his duty to know them. At least he could readily have telegraphed and ascertained, and need not have refused to give a bill of lading on that account.

We think, under the authorities and the facts agreed, the suit is brought under the

proper statute. *Carter v. Railroad*, 129 N. C. 213, 39 S. E. 827; *Currie v. Railroad Co.*, 135 N. C. 535, 47 S. E. 654.

Affirmed.

(125 Ga. 267)

HARRISON v. STATE.

(Supreme Court of Georgia. May 11, 1906.)

1. CRIMINAL LAW—NEW TRIAL—ADMISSION OF EVIDENCE—OBJECTIONS—SUFFICIENCY.

If a ground of a motion for new trial which alleged error in the admission of evidence, and which stated that "the objection that it was merely an opinion, a conclusion, and for that reason it should be left to the jury," sufficiently showed whether this objection was made and passed on by the presiding judge when the evidence was offered, still, where part of the evidence claimed to have been illegal was admissible and the objection was to the whole, its admission will not require a new trial. *Murphy v. State*, 50 S. E. 48, 122 Ga. 149.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1637; vol. 15, Cent. Dig. Criminal Law, § 2207.]

2. SAME—WAIVER.

The evidence complained of was substantially repeated several times without objection.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1632, 1651, 2122; vol. 15, Cent. Dig. Criminal Law, § 3147.]

3. SAME—APPEAL—REVIEW—OBJECTIONS TO EVIDENCE.

In *Monroe v. State*, 5 Ga. 135, the point being discussed was the rejection of certain sayings offered as *res gestæ*, and it was said that some part of the statement was admissible and some not; but the judgment was not reversed on this ground alone.

4. HOMICIDE—MUTUAL COMBAT.

The evidence authorized the charge as to mutual combat, and there was no error in charging the jury on that subject.

5. CRIMINAL LAW—APPEAL—REVIEW.

No error of law appears, and, the verdict being supported by the evidence and having been approved by the presiding judge, this court will not interfere.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Russ Harrison was convicted of murder, and brings error. Affirmed.

W. B. Sloan, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(125 Ga. 276)

COLE v. STATE.

(Supreme Court of Georgia. May 11, 1906.)

1. CRIMINAL LAW—EVIDENCE—RES GESTÆ—HOMICIDE.

On the trial of a defendant indicted for murder, where the evidence showed that, some 10 or 15 minutes after the difficulty between the accused and the deceased was over and the parties had separated, and one of them had left the place, a witness who had not been present saw the accused and found two knots on his left temple, which the witness rubbed with turpentine, a statement then made by the accused as a narrative of a past transaction, to the effect that the deceased struck him, formed

no part of the *res gestæ*, and was properly excluded from the evidence. *Dixon v. State*, 42 S. E. 357; 116 Ga. 186; *Warrick v. State*, 53 S. E. 1027, 125 Ga. —.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 808, 816, 817.]

2. SAME—DECLARATIONS OF DECEDENT.

Where a difficulty occurred at night between the accused, and the deceased, and the former struck the latter on the head, from which injury the deceased afterwards died, evidence that, on the morning after such difficulty, the person so stricken stated to the accused and a witness that he himself was to blame for the difficulty, and that he apologized for the way he had treated the accused, was properly rejected; it not appearing that this was a dying declaration, or was offered in rebuttal of any dying declaration.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 947.]

3. SAME—INSTRUCTIONS—REASONABLE DOUBT.

The charge of the court having fully explained to the jury the necessity to prove the accused guilty beyond a reasonable doubt, in order to authorize a conviction, it furnished no ground for a new trial that he also stated to them that "the state is bound only to establish his guilt to a reasonable and moral certainty, and if the state has done that, it is your duty to convict the defendant." Taking the entire charge together, there was no error on this subject. *Bone v. State*, 30 S. E. 845, 102 Ga. 387.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1906.]

4. HOMICIDE—EVIDENCE.

The evidence authorized the jury to find the defendant guilty of voluntary manslaughter. (Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Henry Cole was convicted of manslaughter, and brings error. Affirmed.

H. E. Coates and Pate & Turner, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(125 Ga. 334)

SMITH v. SMITH.

(Supreme Court of Georgia. May 14, 1906.)

DIVORCE—TEMPORARY ALIMONY.

The granting of temporary alimony in a divorce case is specially in the discretion of the trial judge, and, it not appearing that this discretion was abused in the present case, the finding and judgment of the lower court will not be disturbed. *Carlton v. Carlton*, 44 Ga. 216.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 613, 769.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Eva Smith against D. W. Smith. Judgment for plaintiff. Defendant brings error. Affirmed.

T. C. Battle, for plaintiff in error. Jas. L. Key, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(125 Ga. 296)

MASHBURN v. STATE.

(Supreme Court of Georgia. May 14, 1906.)

CRIMINAL LAW—APPEAL—NEW TRIAL.

There was sufficient evidence to authorize the verdict. No errors of law are complained of, and the judgment of the court below refusing a new trial will not be disturbed.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Dan Mashburn was convicted of crime, and brings error. Affirmed.

Bushee & Bushee, for plaintiff in error. E. F. Strozler, for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(125 Ga. 386)

SWAFFORD et al. v. SWAFFORD.

(Supreme Court of Georgia. May 16, 1906.)

1. APPEAL—BILL OF EXCEPTIONS—FILING—ENTRY BY CLERK—IMPEACHMENT.

The official entry made by the clerk of a trial court as to the date on which a bill of exceptions was filed in his office imports absolute verity, and cannot be impeached in the Supreme Court by the production of aliunde proof that the bill of exceptions was in point of fact filed at an earlier date. Ga., Fla. & Ala. Ry. Co. v. Lasseter, 51 S. E. 15, 122 Ga. 679, and citations.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3850-3852.]

2. SAME—DISMISSAL.

It appearing from the official entry made upon the bill of exceptions in this case that it was not filed in the office of the clerk of the trial court within 15 days from the date of the judge's certificate, the writ of error must be dismissed. Seaboard Air Line Ry. v. Wheat, 45 S. E. 77, 117 Ga. 751; Cook v. State, 47 S. E. 562, 120 Ga. 137.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Action between J. A. Swafford and others and J. M. Swafford. From the judgment, Swafford and others bring error. Dismissed.

Joseph T. Davis and W. S. Paris, for plaintiffs in error. R. E. A. Hamby, W. A. Charters, and Spencer R. Atkinson, for defendant in error.

EVANS, J. Writ of error dismissed. All the Justices concur.

(125 Ga. 382)

MOTT v. DOUGLAS HARDWARE CO.

(Supreme Court of Georgia. May 14, 1906.)

NEW TRIAL—SUFFICIENCY OF EVIDENCE—CONFLICTING EVIDENCE.

The evidence adduced on the trial of this case, though conflicting as to the terms of the contract under which the defendant occupied the premises of the plaintiff, warranted a finding that the former was merely a tenant at will. It follows that the trial court properly

submitted to the jury the contention of the plaintiff that such was the character of the tenancy, and committed no abuse of discretion in declining to set aside the verdict in his favor on the ground that it was contrary to law and the charge of the court, and without evidence to support it.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 144.]

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by the Douglas Hardware Company against K. Mott. Judgment for plaintiff, and defendant brings error. Affirmed.

Earnest Dart and Crovatt & Whitfield, for plaintiff in error. Krauss & Sheppard, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(125 Ga. 489)

McDOUGALD v. HERMAN.

(Supreme Court of Georgia. May 16, 1906.)

NEW TRIAL—DENIAL—DISCRETION OF COURT.

No complaint being made that error was committed by the court on the trial, and there being evidence in support of the verdict, the judge did not abuse his discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action between J. F. McDougald against Charles Herman. From the judgment, McDougald brings error. Affirmed.

S. C. Crane, for plaintiff in error. Moore & Pomeroy, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except LUMPKIN, J., disqualified.

(125 Ga. 467)

ATLANTIC COAST LINE R. CO. v. BAXTER.

(Supreme Court of Georgia. May 16, 1906.)

APPEAL—CONFLICTING EVIDENCE—RAILROADS—KILLING STOCK—EVIDENCE.

In an action for the killing of a cow by a railroad train, where the killing was admitted, and it was sought to show that the agents of the defendant used all ordinary diligence and that the occurrence was an accident, and where the engineer testified that he did not see the cow until she was killed, and that there was nothing to prevent his doing so except an embankment some three or four feet high, together with some shrubbery growing on the right of way, which he thought hid the cow and prevented his seeing her as she came on the track, and the fireman testified that he was engaged in attending to his duties on the engine and did not see the cow before she was hit, and also testified to the existence of the embankment and the shrubbery, which would prevent her from being seen, and where evidence was introduced on behalf of the plaintiff to the effect that there was no shrubbery or other thing on the right of way at that point to prevent any one from seeing the cow, there was

such conflict in the evidence as authorized the jury to pass upon the question of diligence or negligence; and, the verdict of the jury in the justice's court having been approved by the judge of the superior court on being reviewed by writ of certiorari, this court will not interfere. *Ga. Sa. & Fla. Ry. Co. v. Wisenbacker*, 48 S. E. 146, 120 Ga. 656.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3948, 4322; vol. 41, Cent. Dig. Railroads, §§ 1637, 1638.]

(Syllabus by the Court.)

Error from Superior Court, Wayne County; L. A. Parker, Judge.

Action by G. Baxter against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

S. R. Harris, Littlejohn & Popwell, and Kay, Bennet & Conyers, for plaintiff in error. Clark & Morris, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(125 Ga. 423)

MALLORY BROS. & CO. v. MOON.

(Supreme Court of Georgia, May 16, 1906.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

Under the facts of this case, this court cannot say that the court erred in granting a new trial on an extraordinary motion made therefor. *Hays v. Westbrook*, 22 S. E. 893, 96 Ga. 219; *Candler v. Hammond*, 23 Ga. 493.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action between Mallory Bros. & Co. and George Moon. From an order granting a new trial on an extraordinary motion, Mallory Bros. & Co. bring error. Affirmed.

E. P. Mallory and Lane & Maynard, for plaintiff in error. J. B. Hudson, Williams & Harper, and Shipp & Sheppard, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(125 Ga. 385)

CHURCHILL v. JACKSON et al.

(Supreme Court of Georgia, May 16, 1906.)

1. INFANTS—CUSTODY—JUDGMENT.

Under the facts of this case, the presiding judge did not abuse his discretion in awarding the custody of the child to the defendants in error.

2. SAME—RIGHTS OF GRAND-PARENTS.

The addition to the judgment of the provision that the child should be allowed to visit her paternal grandfather, the plaintiff in error, once a month, if the latter so desired, even if not definite as to the length of such visits, would not furnish ground for a reversal; but, on application, the presiding judge could amend such judgment by making it more specific in this respect, if necessary.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Action by C. N. Churchill against W. A. Jackson and others. From the judgment, Churchill brings error. Affirmed.

B. F. Walker, G. L. Calloway, and E. P. Davis, for plaintiff in error. R. L. Gamble, and Cain & Hardeman, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(105 Va. 439)

RICHMOND STANDARD STEEL SPIKE & IRON CO. v. DININNY.

(Supreme Court of Appeals of Virginia. June 14, 1906.)

CORPORATIONS — FOREIGN CORPORATIONS — FAILURE TO COMPLY WITH STATUTES—LIABILITIES OF OFFICERS.

Code 1887, § 1105 [Va. Code 1904, p. 522], making the officers, agents, and employes of foreign corporations which have not complied with the statute liable to residents of the state having claims against the corporation, and providing that service on either of such officers, etc., shall be service on the corporation, has no application to an officer residing without the state and against whom an action was instituted by attaching his property in the state.

Appeal from Circuit Court of City of Richmond.

Action under Code 1887, § 1105 [Va. Code 1904, p. 522], by the Richmond Standard Steel Spike & Iron Company against F. C. Dininny, Jr., president of the Chesterfield Coal Company, a foreign corporation, to enforce a stockholder's liability. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

William L. Royall, for appellant. Coke & Pickrell and Wm. Crump Tucker, for appellee.

BUCHANAN, J. This is a proceeding under section 1105 of the Code of 1887 [Va. Code 1904, p. 522], against F. C. Dininny, Jr., president of the Chesterfield Coal Company, a foreign corporation, which had failed, as is claimed, to comply with section 1104 of that Code [Va. Code 1904, p. 521], which provides among other things that every foreign corporation doing business in this state shall have an office therein in which all claims due residents of the state against such company may be audited, settled, and paid; that such corporation shall, by written power of attorney, appoint some person residing in this state its agent, upon whom all lawful process may be served, and who shall be authorized to enter an appearance for it; that such power and an authenticated copy of the charter of the corporation shall be delivered to the clerk of the court of the county or corporation wherein such office is located, who shall record the same and transmit copies thereof to the Secretary of the Commonwealth.

Section 1105 provides that "the officers, agents and employes of any such company doing business in this state without complying with the provisions of the preceding section, shall be personally liable to any resident of the state having a claim against such company, and, moreover, service of process upon either of such officers, agents or employes shall be deemed a sufficient service on the company."

It is admitted that the defendant has, at no time, been a citizen or resident of this state, or present in the state engaged in carrying on the business of the company, but at the time this action was instituted, is

now, and has always been a citizen and resident of the state of New York, and that this action was instituted, not by serving process upon him, but by attaching his property located in this state.

The first question to be considered and determined is whether or not the defendant, upon the facts agreed, comes within the provisions of section 1105. If he does, then every agent and employe of the company, no matter where they reside, are also within its provisions; for it is plain, from the language of the section, that the same liability is imposed upon the agents and employes of the company that is imposed upon its officers.

There are good reasons why the controlling officials of a foreign corporation, who cause their company to carry on business in this state in violation of her laws, should be made liable to her citizens for their claims against the company growing out of such business, if it could be done, although nonresidents of the state; but there is no reason for making, and it would be the grossest injustice to attempt to make, liable the subordinate officers and the agents and employes of the company who did not reside in the state, and who were in no way responsible for their company's acts in this state. If the defendant is personally liable for the plaintiff's claim and his property can be attached in this state and subjected to the satisfaction of the plaintiff's claim, any agent or employe of the company, no matter where he may reside, is also personally liable, and his property in the state may also be subjected for its payment, although he has never been in the state and did not even know that his company was doing business in it.

While the language of the statute may be sufficiently comprehensive to embrace all officers, agents, and employes of such company, no matter where they reside, it is also, we think, under well-settled rules of interpretation, susceptible of the construction that it was only intended to include such officers, agents, and employes as are or have been in the state aiding in carrying on the prohibited business.

Statutes derive their force from the authority of the Legislature, and, as a necessary consequence, their effect will be limited to the boundaries of the state. Sutherland on Stat. Constr. § 218.

"The legislative authority of every state," says Judge Cooley, "must spend its force within the territorial limits of the state. The Legislature of one state cannot make laws by which people outside of the state must govern their actions, except as they may have occasion to resort to the remedies which the state provides, or deal with property situated within the state." Cooley's Const. Lim. (5th Ed.) p. 149.

This being so, the Legislature will not be held to have been guilty of the folly (if any other reasonable construction can be placed

upon the statute) of attempting to impose liabilities upon the citizens and residents of other states who have never been in the commonwealth and over whom it has no jurisdiction, especially when such imposition, if it could be enforced, would result in the grossest injustice.

"If the words of a statute," says Endlich on Interpretation of Statutes, § 258, "though capable of an interpretation which would work manifest injustice, can possibly, within the bounds of grammatical construction and reasonable interpretation, be otherwise construed, the court ought not to attribute to the Legislature an intention to do what is a clear, manifest, and gross injustice." See, also, sections 264 and 295; and Sutherland on Stat. Constr. §§ 287, 323, 324; Immigration Soc., etc., v. Com., 103 Va. 46, 48 S. E. 509; Cooley on Const. Lim. (5th Ed.) p. 204.

The Legislature having no power to make officers, agents, and employés, other than those who are within its jurisdiction, liable for claims against such corporations, the reasonable construction of the statute would seem to be that only such officers, agents, and employés were intended to be embraced by the statute. This view is strengthened by that provision in the statute which declares that service upon any of the said officers, agents, or employés shall be deemed a sufficient service on the company, since no service upon them could be had without the state. This construction brings the provisions of the statute within the power of the Legislature, and prevents a conflict with the general principles of law which it may be assumed the Legislature would not intend to disregard.

Several important and interesting questions were raised and discussed in the petition for this writ of error, and in the briefs of counsel, but in the conclusion we have reached, that the defendant is not liable for the plaintiff's claim under the statute, even if established, it is not necessary to consider those questions since their decision could not affect this case.

We are of opinion that there is no error in the judgment complained of, and that it must be affirmed.

(105 Va. 335)

NORTHROP et al. v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia. June 14, 1906.)

STREET RAILROADS — REGULATIONS — ORDINANCES — CONSTRUCTION.

A municipal ordinance requiring a street railway company to sell "tickets * * * to pupils presenting a certificate of enrollment in some school at the rate of two for five cents," to be used between specified hours from Monday to Friday, inclusive, adopted after the city had rejected the provision in the franchise proposed by the company requiring the sale for the accommodation of children going to and from school tickets at half rates to be used between specified hours, when construed in connection with the practice, adopted by the company and continued for several years, of selling tickets at the rate of two for five cents to the students

of a business college, must be construed as requiring the company to sell tickets at such rates to the students of such college.

Error to Hustings Court of City of Richmond.

William Northrup and another, as receivers of the Richmond Passenger & Power Company, were convicted of a violation of a municipal ordinance of the city of Richmond, and they bring error. Affirmed.

Munford, Hunton, Williams & Anderson, for plaintiffs in error. H. R. Pollard, for defendant in error.

KEITH, P. A warrant was issued by the police justice of the city of Richmond, charging William Northrop and Henry T. Wickham, as receivers of the Richmond Passenger & Power Company, with the violation of an ordinance of the city requiring the Passenger & Power Company to place on sale at convenient points within the city of Richmond tickets to be sold and delivered to pupils presenting certificates of enrollment in the Smithdeal Business College, a school located in the city of Richmond, at the rate of two for five cents, to be used between the hours of 8 a. m. and 4 p. m., from Monday to Friday, inclusive, which ordinance was approved December 23, 1899.

The receivers appeared, and a fine of \$25 and costs was imposed upon them. From this judgment they took an appeal to the hustings court of the city of Richmond, where the judgment of the police justice was affirmed; and to that judgment a writ of error was awarded by this court.

The ordinance of the city of Richmond which controls this case is as follows: "And the said company shall place on sale at convenient points within the city of Richmond, tickets to be sold and delivered to pupils presenting a certificate of enrollment in some school, at the rate of two for five cents, to be used only between the hours of 8 a. m. and 4 p. m., from Monday to Friday, inclusive."

The plaintiffs in error are charged with a violation of this ordinance, because they refused to sell the tickets, for which it provides, to a pupil duly enrolled in Smithdeal Business College, which is located in the city of Richmond, the contention of the Passenger & Power Company being that the descriptive terms used in the ordinance, "pupils * * * in some school," do not embrace students attendant upon a college, but that, in their usual and ordinary acceptation, the words, "pupils in some school," refer to institutions of a subordinate character which teach elementary learning, in distinction from places for more advanced instruction, which take distinctive names, such as academy, college, high school, seminary, university. Wharton's Law Dict. Or, accepting Webster's definition, a school is a place of primary instruction, an establishment for the instruction of children; as, a primary school, a common school, a grammar school.

This position, taken in connection with the provisions of the ordinance which limit the hours and the days upon which the tickets are to be sold at the reduced rate, would be entitled to great weight but for two considerations.

In the franchise granted by the city on the 28th of August, 1895, to the Richmond Traction Company, the sale of school tickets was provided for as follows: "And said company shall place on sale for the accommodation of children going to and from school, tickets at half rates, to be used only between the hours of 8 a. m. and 4 p. m. from Monday to Friday, inclusive." This language was offered by the Richmond Passenger & Power Company to the council of the city for adoption in the ordinance under which its franchises are held; but the council refused to incorporate that language in the franchise granted to the Passenger & Power Company, and embodied in the ordinance the provision as it now stands and under which the prosecution took place.

The ordinance, as it exists, is much broader in its terms and more favorable to the city than that which was proposed by the Passenger & Power Company for adoption; indeed, if the ordinance had been adopted in the terms in which it was offered by the Passenger & Power Company, it would have been plain and unambiguous, and would have excluded the class of persons who are now insisting upon its benefits as it was adopted; for the phrase "children going to and from school" would, without doubt, have referred to young people in attendance upon institutions of a subordinate character, and, in common acceptance, would have embraced only places of primary instruction and establishments for the instruction of children. But "pupils" is a word of much broader signification, and the council doubtless preferred it, and insisted upon its substitution in the place of the word "children" with the intention that it should embrace classes of young persons receiving instruction at more advanced institutions of learning, who would not be aptly described as "children going to and from school."

The other consideration to which we refer is that pupils of this institution had been granted the privilege of using half-rate tickets until the fall of 1903, when the company made a rule by which they were denied the privilege theretofore enjoyed, and by which they were not permitted to purchase or use the half-rate tickets.

It cannot be said that the view, insisted upon by the plaintiffs in error, is so plain and unambiguous as to render a resort to rules of construction unnecessary. The ordinance adopted, taken in connection with that which was proposed by the Passenger & Power Company, and rejected by the city when the franchise was granted, leaves in very great doubt, to say the least, whether the broad construction insisted upon by the city, or the narrow

construction placed upon the language by the other party to the contract, should be adopted. It is the duty of courts to get at the true intent of the parties to the contract, and it is a recognized and accepted canon that, where the construction is doubtful, it is proper to look to the construction which the parties themselves have placed upon the contract. What more natural, indeed, than that the courts, in order to ascertain the intention of the parties, should seek for light in the construction which the parties themselves have placed upon the language which they have seen fit to employ. This ordinance was granted by the city to the Passenger & Power Company in December, 1899, and the use of half-rate tickets was enjoyed by the pupils of the Smithdeal Business College until the fall of 1903. See *Va. Pass. & Power Co. v. Com'th*, 103 Va. 644, 49 S. E. 995; *Vincennes v. Citizens Gas Light Co.* (Ind. Sup.) 31 N. E. 573, 16 L. R. A. 485; *Page on Contracts*, § 1126; *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652; *City of Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. Ed. 594.

As to rules governing the construction of penal statutes, see *Johnson v. So. Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, and *U. S. v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080, where it is said that, "though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature."

Speaking of penal statutes, Mr. Justice Story, in *U. S. v. Winn*, 3 Sumner, 209, Fed. Cas. No. 16,740, says: "Where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intention of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the Legislature."

We are of opinion that the judgment should be affirmed.

(105 Va. 341)

NORTHROP et al. v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia. June 14, 1906.)

STREET RAILROADS — REGULATIONS — ORDINANCES — VALIDITY.

Where a street railway company sold tickets at a price fixed by an ordinance requiring the company to sell tickets to pupils in the schools of the city at the rate of two for five cents and to students enrolled in a college in the city, it could not deny the same privilege to students of another college.

Error to Hastings Court of City of Richmond.

William Northrop and another, as receivers of the Richmond Passenger & Power Company, were convicted of violating a municipal ordinance of the city of Richmond, and they bring error. Affirmed.

Munford, Hunton, Williams & Anderson, for plaintiff in error. H. R. Pollard, for defendant in error.

KEITH, P. This case is identical with that between the same parties decided at this term (53 S. E. 962), except that this refers to students at Richmond College, while the other has reference to students at the Smithdeal Business College, and that in this case there is no evidence with respect to the construction placed by the parties upon the ordinance of the city of Richmond, or that the students of Richmond College have at any time enjoyed the privilege of purchasing tickets at a reduced price. There seems to be no material difference with respect to the circumstances surrounding the parties in the two cases. If students of Smithdeal College are entitled to the privilege of purchasing tickets at reduced rates by virtue of the ordinance of the city, it is not easy to see why the students of Richmond College should not enjoy the same privilege. It does not appear that the privilege was ever refused, or that it was ever demanded by the students of Richmond College. The record is wholly silent on the subject. When it was granted to the Smithdeal College students by the railway company, it could not have been denied to the students of Richmond College upon any reasonable construction of the ordinance of the city which the railway company had accepted. Any discrimination between the students of the two colleges would have been arbitrary and capricious. If, a just construction of the ordinance, the one class was entitled to the privilege, and the railway company in the one case admitted and adopted that construction, there could have been no valid reason for adopting a different construction in a substantially identical case.

The judgment is affirmed.

(105 Va. 394)

HOBSON'S ADM'R v. HOBSON'S ADM'R et al.

(Supreme Court of Appeals of Virginia. June 14, 1906.)

1. APPEAL—DECREE APPEALABLE—ASSIGNMENT OF DOWER.

A decree confirming the assignment to decedent's widow of one-third of a tract of land sought to be subjected to deceased's debts, and decreeing that the widow take title "with metes and bounds set forth in a plat filed with the report of commissioners, including buildings thereon, as her dower," was reviewable on appeal under Code 1904, § 3454, providing that a person who thinks himself aggrieved by any decree concerning title to or boundaries of land, etc., or by which the possession or title to

property is changed, etc., may present a petition for an appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 118-125.]

2. EQUITY—PLEADING—AMENDMENT OF BILL—NEW CASE.

An original bill was filed to enforce payment of judgments for which decedents, father and son, were jointly liable, rendered for debts contracted prior to May 28, 1906, and to subject certain real estate owned by each thereto. It then transpired that the only real estate owned by either was a certain tract in controversy which was conveyed by the father to the son on May 28, 1896; the deed being recorded the following September. Complainant had no knowledge of such conveyance until long after the filing of his bill, when he was advised that the deed was voluntary and fraudulent as to creditors. Held, that an amended bill and a bill of revivor, seeking to set aside such conveyance for fraud, was not demurrable as alleging a cause of action not germane to the original bill.

Appeal from Circuit Court, Powhatan County.

Suit by H. K. Adams, as administrator of Wm. T. Hobson, deceased, and others, against E. A. Baugh, as administrator of John H. Hobson, deceased, and others. From a decree in favor of defendants, plaintiffs appeal. Reversed.

Edward S. Brown, for appellants. R. G. Southall and Jos. P. Sadler, for appellees.

CARDWELL, J. This is the second appeal from decrees of the circuit court of Powhatan county in this cause; the first being from a decree of April 18, 1901, when this court held that the decree did not come within the scope of section 3454 of the Code of 1904 and dismissed the appeal as improvidently awarded. *Hobson v. Hobson*, 100 Va. 218, 40 S. E. 899.

John H. Hobson owned a tract of 552 acres of land in Powhatan county, and plantation tools, vehicles, horses, cattle, etc., such as are usually found on farms in that county. His son, B. A. Hobson, an only child, had lived with his father all his life, and owned no property of any kind. The father was an old man and a widower, while the son was a young man with a wife and five children, and the two lived together on the said farm.

The father had given deeds of trust on his personal property to secure some of his debts, and another deed of trust upon all crops of the year 1896, grown on the farm, farming implements, horses, cattle, etc., and all household and kitchen furniture, in fact everything on the said tract of land. All of this personal property of John H. Hobson seems to have been disposed of as early as 1896, to pay the debts provided for in the deeds of trust mentioned, leaving unpaid debts due from John H. Hobson, amounting to several thousand dollars, and from B. A. Hobson amounting to nearly as much; some of these debts being against the former alone, some against the latter alone, and some against both of them, and the tract of land above mentioned, worth

\$2,208, was the only resource for the payment of any of these debts.

On the 17th day of October, 1896, the appellant, H. K. Adams, sheriff of Cumberland county, and as such administrator of Wm. T. Hobson, deceased, obtained joint judgments against Jno. H. Hobson and B. A. Hobson, upon which executions were issued to and returned by the sheriff of Powhatan county, "No effects known to me." September 20, 1897, the appellant instituted two equity suits in the circuit court of said county, the object of each being the enforcement of the payment of the said judgments, the suits being lien creditors' suits and for general relief on behalf of the complainant and all other lien creditors of Jno. H. Hobson and B. A. Hobson. In one it was sought to reach the real estate, if any, of Jno. H. Hobson, and in the other the real estate of B. A. Hobson, supposed to be at that time the rightful owner of the 552-acre tract of land.

These suits were matured at rules and set for hearing, there being no answer, or demurrer, plea, or appearance to either of them, and they were united and heard together.

In February, 1899, John H. Hobson died, and on the 8d of September, 1900, B. A. Hobson died. After this appellant and those for whose benefit these suits were instituted learned for the first time, as they fully explain in the record, that John H. Hobson had, on the 28th of May, 1896, gone to the courthouse of Amelia county, and there executed and acknowledged before a justice of the peace, a near kinsman of the grantor's family, a deed conveying to his son, B. A. Hobson, his said tract of 552 acres of land, setting forth that his son had paid him \$3,300 for it, which deed was kept as a secret till September 15, 1896, when it, together with two other deeds from John H. and B. A. Hobson to secure certain creditors of John H. Hobson, and conveying for that purpose all standing timber, all crops, and other personal property then upon said tract of land, was put to record in the clerk's office of Powhatan county.

Upon these and other facts coming to the knowledge of those interested in the recovery in the suits originally instituted by appellant, none of whom resided in Powhatan county, and some of whom were nonresidents of the state, they employed other counsel, in the cause to file an amended bill and bill of revivor charging directly that the deed of May 28, 1896, from the father to the son, was voluntary, fraudulent, and void as to the creditors of the father. This amended bill and bill of revivor was filed by appellant on December 3, 1900, as a general creditors' bill and praying general relief, to wind up the estates of John H. and B. A. Hobson, making the administrators, the heirs, and other creditors of both the father and the son, parties defendant, setting forth the debts and the priority of the debts of the father,

and the debts and the priority of the debts of the son, and charging that the deed of May 28, 1896, was voluntary, fraudulent, and void as to the father's creditors, and made with the intent to defeat the father's creditors and to give a homestead exemption to the son and dower rights in the land conveyed to the son's wife, etc.; and documentary evidence was filed, as exhibits, with the bill and as parts thereof, to prove the facts therein alleged.

Anne R. Frayser, guardian, and her infant son, by his guarlian ad litem, answered the bill setting forth a judgment obtained against John H. Hobson alone, for the infant's money that he had borrowed, and asked "that all his legal and equitable rights shall be strictly enforced." The widow of B. A. Hobson, deceased, and his infant children, by their guardian ad litem, also answered the bill, claiming that the deed of May 28, 1896, from John H. Hobson to B. A. Hobson was made for a valuable consideration, but as to how the consideration was paid they confessedly could not positively state, though they do undertake to state reasons for believing that it had been paid. They also pleaded laches on the ground that the amended bill and bill of revivor was not filed until after the death of both John H. and B. A. Hobson, but this defense was afterwards withdrawn, and they demurred to the bill.

Upon the amended bill and bill of revivor, a general replication to the answers thereto, and joinder in the demurrers, the cause was heard on April 18, 1901, and the decree made from which the appeal was taken in *Hobson v. Hobson*, supra.

This court having held that the decree of April 18, 1901, was not an appealable decree, when the cause went back to the circuit court, appellant moved the court to set aside the dismissal of the amended bill and bill of revivor, and to hear the cause on "the answers thereto as well as the demurrers, and that the principles of the cause be adjudicated as well as the demurrers"; but the motion was overruled, and thereupon appellant united with said Anne R. Frayser, guardian and next friend of her infant son, in an original bill in the nature of a bill of revivor against the administrators and heirs, and other creditors of John H. and B. A. Hobson, a general creditors' bill to wind up the estates of these deceased debtors, charging, in addition to the legal and equitable rights of appellant enforceable in the cause, that the judgment asserted by Anne R. Frayser, guardian and next friend of her infant son, was against John H. Hobson alone for the infant's money which he had borrowed; that the deed of May 28, 1896, tended to defeat the infant's claim wholly, and that the deed was voluntary, fraudulent, and void as to this debt, filing documentary evidence as exhibits with the bill and as parts thereof, to prove the allegations therein.

Again the defendants interposed a demur-

rer on the ground that this bill made an entirely new case, and by its decree of October 18, 1902, the court sustained the demurrer, holding that it "states an entirely new cause of action, which is an inconsistent and repugnant case," and dismissed it.

Every effort was made by appellant to have his case heard upon its merits, and to have an adjudication as to whether or not the deed of May 28, 1896, was fraudulent and void as to the creditors of John H. Hobson, the grantor, but these efforts were successfully met at every turn with the suggestion of a "new case." Finally, after accounts of the debts asserted in the cause had been ordered, but the commissioner directed "not to state anything in conflict with the ruling of the court in the former decrees," and after the court had appointed commissioners and ordered them to assign to the widow of B. A. Hobson one-third of the tract of 552 acres of land conveyed in the deed of May 28, 1896, alleged to be fraudulent, as her dower, although she had not asked for an assignment of dower, and no party to the cause had asked it, the county of Powhatan, by reason of changes made by the new Constitution, fell in another judicial circuit; thereupon appellant and Anne R. Frayser, guardian and next friend of her infant son, still seeking the relief to which they believed themselves entitled, filed a petition for rehearing, on the ground of error of law apparent on the face of the decrees theretofore entered in the cause. On November 12, 1904, the cause was again heard on the papers formerly read on said petition for rehearing, with a demurrer thereto on the ground that it "sets up an entirely new case, entirely antagonistic to, and contradictory of, the original bill." Whereupon the demurrer was sustained and the petition dismissed.

On the 9th of February, 1905, the last of the decrees in the cause complained of was made, confirming the assignment to the widow of B. A. Hobson of one-third of the tract of 552 acres of land, and decreed that she take title "with metes and bounds set forth in plat filed with report of commissioners, including the buildings thereon, as her dower."

The appeal now before us brings under review the decrees mentioned, the last-named being clearly an appealable decree under section 3454 of the Code of 1904.

It is not necessary that we consider in detail the several errors assigned in the petition for the appeal, nor review at length the decrees complained of, since, in the view we take of the case, all other errors committed by the court below flow from the initial error in prohibiting appellant, as a creditor of John H. Hobson from putting in issue by his amended bill and bill of revivor, dismissed on demurrer by the decree of April 18, 1901, the bona fides of the deed from the said John H. Hobson to his son of May 28, 1896. While that was an interlocutory decree from which an appeal did not lie, the dismissal of the ap-

peal therefrom as improvidently awarded was in no sense an affirmation of the decree, as seems to have been considered by the court below, inasmuch as appellant has at all stages of the case been denied the right to put in issue and have considered and decided the bona fides of the deed of May 28, 1896. In other words, he has not been able at any time to have a hearing of his case upon its merits, but has been met at every turn with a demurrer, on the ground that his amended pleading, alleging that the deed of May 28, 1896, was voluntary, fraudulent, and void as to the creditors of John H. Hobson, made a new case antagonistic to, and contradictory of, the original bill. That such an amendment in a case like this is permissible seems now too well settled to admit of discussion.

In *Kinney v. Craig*, 103 Va. 158, 48 S. E. 864, all of the cases decided by this court, and other authorities bearing upon the question, are reviewed. There the original bill was to enforce a vendor's lien on land, the complainants relying upon the land on which their lien rested as sufficient to satisfy their demand; but it turned out that this was not the case, and they sought by amendment of their original bill to put in issue the bona fides of a deed made by their debtor for the benefit of his children, and to subject the property thereby conveyed, which he owned when the debt asserted was contracted, to the payment of this debt, and it was held that the refusal of the circuit court to allow the original bill to be so amended was error.

In the case at bar, the object of the original bill filed by appellant was to enforce the payment of judgments for which John H. and B. A. Hobson were jointly liable rendered for debts contracted prior to May 28, 1896, and to that end to subject the real estate owned by each; but it turned out that the only real estate owned by either was the tract of 552 acres of land conveyed by John H. Hobson to B. A. Hobson, May 28, 1896, recorded in September following, though not known of by appellant until long after the filing of his original bill, and being then advised that this deed was voluntary, fraudulent, and void, and made with intent to hinder, delay, and defraud the creditors of the grantor, the purpose of his amended bill and bill of revivor, dismissed on demurrer by the decree of April 18, 1901, complained of, and of other amendments to the original bills thereafter tendered, was to put the bona fides of that transaction in issue. The amendments offered made no change of parties, except to bring before the court the administrators and heirs of John H. and B. A. Hobson, both of whom had died after the original bills in the cause were filed, and only brought forward material facts omitted from the original bills, to enable the court to do complete justice in the cause. It is not pretended that appellant could not at that time, by an original bill, have attacked the deed in

question on the ground of actual fraud, and it is inconceivable that the defendants to the amended bill offered by him could have been prejudiced by having to meet the issue made by the amendment offered instead of on an original bill. Neither upon reason or authority should the appellant have been denied the right to so amend the pleadings in the cause as to put in issue the bona fides and validity of the deed of May 28, 1896. *Kinney v. Craig*, supra, and authorities there cited.

It follows that we are of opinion that the said decree of April 18, 1901, and all other decrees following it, which denied to appellant the right to have heard and determined in this cause the question whether or not the deed from John H. Hobson to his son, B. A. Hobson, of May 28, 1896, was voluntary, fraudulent and void as to appellant and other creditors of said John H. Hobson, and the decree of the 9th of February, 1905, confirming the assignment to the widow of B. A. Hobson, deceased, of one-third of the 552 acres of land conveyed in the said deed of May 28, 1896, as her dower, should be reversed and annulled, and the cause remanded to the circuit court for further proceedings therein, to be had in accordance with the views expressed in this opinion.

(105 Va. 486)

MAYO, HYSORE & CO. v. PHILADELPHIA TEXTILE MACHINERY CO.

(Supreme Court of Appeals of Virginia. June 14, 1906.)

CONTRACTS—CONSTRUCTION—DURATION.

A contract providing that it should continue for 18 months from date "and thereafter until 6 months shall have elapsed after written notice" of cancellation given by either party, was not an absolute contract for 2 years, but was terminable at the expiration of the 18 months by proper notice within a year from date.

Appeal from Circuit Court of City of Richmond.

Action by Mayo, Hysore & Co. against the Philadelphia Textile Machinery Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Christian & Christian, for appellant. Meredith & Cocke, for appellee.

HARRISON, J. This controversy involves the construction of a contract entered into between the parties to this litigation, in which the defendants, Philadelphia Textile Machinery Company, agreed to pay the plaintiffs, Mayo, Hysore & Co., at the rate of \$2,000 per annum during the term of the contract, for certain privileges and considerations set forth therein. The controverted clause is as follows:

"It is hereby further agreed between the parties hereto, that this agreement shall take effect on the first day of November, 1902, and shall continue for the period of eighteen months from that date, and there-

after until six months shall have elapsed after written notice shall have been received by either party of the intention of the other party to withdraw from this agreement."

On the 28th of October, 1903, the defendants gave the plaintiffs, Mayo, Hysore & Co., the following notice: "We hereby notify you of our intention to withdraw from the agreement which we made with you dated November 1st, 1902, at the expiration of the period of eighteen months mentioned in said agreement, to wit, on May 1st, 1904, which will make the last of the eighteen payments come due April 30th, 1904."

The plaintiffs refused to accept this construction of the contract, and brought this action of assumpsit to recover further and subsequently monthly installments to those mentioned in the notice given by the defendants. The contention of the plaintiffs is that the controverted clause creates an absolute and unconditional contract of two years' duration that neither party could terminate by notice short of that period; that effect must be given, if possible, to every word of the contract; and that by no other construction would any effect or meaning be given to the word "thereafter" which occurs in the following part of the clause; "and shall continue for the period of eighteen months from that date, and thereafter until six months shall have elapsed after written notice," etc.

It is indubitably true that in the construction of written contracts every part of the contract must be made, if possible, to take effect, and every word of it must be made to operate in some shape or other. *Tate v. Tate's Ex'r*, 75 Va. 522; *Richmond Ice Co. v. Crystal Ice Co.*, 90 Va. 239, 37 S. E. 851.

Looking alone to the written contract, and giving to this rule its full force and effect, we are of opinion that the construction sought to be placed by the plaintiffs upon the clause in question cannot be sustained. It would seem reasonable that if the parties had agreed upon two years as the minimum duration of their contract, they would have expressed so simple an understanding in the written memorial which they signed. Instead, however, of naming two years as the minimum duration of the contract, they expressly and specifically say that the contract "shall continue for the period of eighteen months from date." The added words, "and thereafter until six months shall have elapsed after written notice shall have been received," were not intended to extend the minimum duration which had been fixed at 18 months, but to provide for terminating the contract, and to prescribe the length of notice necessary to put an end to it. The contract was one of indefinite duration, unless six months' notice of withdrawal was given by one of the parties. It could not be terminated by notice in less than 18 months, and would not terminate then or thereafter "until six months shall have elapsed after written notice shall have been received," etc. In

other words, if either party gave notice at any time within one year after the date of the contract that he desired to withdraw, the contract would terminate with the expiration of the 18 months mentioned therein. If the notice of withdrawal was not given until after the expiration of one year from the date of the contract, then it would not terminate until six months shall have elapsed after the written notice had been received. The contract does not provide when notice to terminate shall be given; it is left to either party to terminate the contract at pleasure, provided the minimum duration of 18 months expressly stated therein is not diminished. Of course it was possible, depending upon when the notice to terminate was given, that the contract might continue in force for two years, or more, from its date; but it was equally possible for it to be terminated with the minimum period of 18 months, fixed therein, provided the notice was given in time.

According to the express terms of the contract, two events must happen before it can be considered terminated: (1) The expiration of 18 months from its date; and (2) the expiration of six months after the notice of withdrawal has been received. Both of these requisites were fulfilled in this case. The 18 months had expired, and the period of six months had elapsed since the notice of withdrawal given by the defendants was received by the plaintiffs. The provisions of the contract, with respect to its life, having been met, it ceased to exist when the period of 18 months from its date expired.

For these reasons the judgment of the circuit court must be affirmed.

(73 S. C. 481)

WILSON v. SOUTHERN RY.

(Supreme Court of South Carolina. March 15, 1906.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is a want of ordinary care on the part of a person injured by actual negligence of another, combining and concurring with that negligence and contributing to the injury, and can never exist except where the injury has resulted from the negligence of the defendant as a concurrent proximate cause.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 83-93, 110, 111.]

2. MASTER AND SERVANT—INJURY TO SERVANT—ORDERS OF SUPERIOR.

Where a conductor has, under the rules of a railroad company, control of the movement of trains, but the engineer has a right to disregard his order, if contrary to rules or dangerous to persons or property, the engineer is not responsible where the trains are moved by order of the conductor contrary to orders, where the conductor has been specially appointed pilot of the latter for the trip; he not being acquainted with the road or the trains running thereon.

3. SAME.

In running a train the conductor is a representative of the company, and where an in-

jury is caused by his negligence the company is liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 502.]

4. SAME—RELEASE FROM LIABILITY.

Under Const. 1895, art. 9, § 15, providing that every employe of a railroad corporation shall have the same remedies for an injury from the acts or omissions of the corporation or its employes as are allowed by law to other persons, when the injury results from the negligence of a superior, any implied agreement to release the company from liability to an engineer for negligence of a conductor while working under a rule providing that the engineer shall be jointly liable with the conductor for the movement of the trains, is null and void.

5. SAME—CONTRIBUTORY NEGLIGENCE.

A servant obeying the instructions of a representative of the master on the spot, is not guilty of contributory negligence in so doing.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 778-788.]

6. SAME.

The fact that an act of an engineer is done in the presence and under the immediate direction of a conductor of the train is equivalent to the assurance by the master that the servant may safely proceed to the work required of him.

Appeal from Common Pleas Circuit Court of Abbeville County; Klugh, Judge.

Action by W. A. Wilson against the Southern Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

So much of the charge as pertains to the questions raised is: "The defendant answers the complaint by denying, first of all, that it was negligent, and alleges that the injury to the plaintiff, if he suffered injury, was caused by his own negligence solely, and in addition to that alleges that whatever injury the plaintiff may have sustained was caused by acts of his of a negligent character, which, in connection with the facts that he alleges in his complaint as constituting the negligence of the defendant, contributing along with those alleged facts or acts of negligence, caused his injury. As an affirmative defense the defendant relies upon the doctrine of defense of contributory negligence. If the defendant was not negligent at all, then, as a matter of course, the plaintiff would not be entitled to be compensated at the expense of the defendant. If the plaintiff suffered injury and it was the result solely of his own negligence or carelessness, as a matter of course he cannot claim compensation from the defendant for injury caused by such cause as that, his own negligence. Where two persons are in fault, and one suffers injury because of the joint fault of both, the law will not allow him to recover from the other in damages by reason of that injury, because that would amount to allowing a person to reap the benefit from his own wrong; and so that is the principle underlying the doctrine of contributory negligence. Where a person is negligent, and his negligence results in injury to another person, yet if that other person is also negligent at the same time, and his negligence

concurs with the negligence of the person whose negligence causes injury, and, concurring with it, contributes to the injury, so that it becomes a proximate and immediate or direct cause of the injury, so that he would not have been injured if he had not himself been negligent, although the other party may also have been negligent, under those circumstances the law will not allow him to recover damages for his injury, from the other party. So that is what is meant by the doctrine of contributory negligence, the defense of contributory negligence. * * *

"Negligence scarcely needs a definition. It means the failure of a person to exercise due care or prudence. The absence of due care is the briefest, as well as perhaps the clearest, definition of negligence. Expressed more fully, it is the failure of a person to do that which a person of ordinary prudence would do under the circumstances, or the doing of that which under similar circumstances a person of ordinary prudence would not do. It is either positive or negative; the doing of a careless thing or the failing to do a careful thing or a prudent thing. In this case, if the plaintiff suffered injury, and if his injury was caused solely by the negligence of the defendant in the particulars set out in the complaint in reference to the running of this train and the giving of orders, the directions of the conductor as the agent of the defendant, and the other particulars set out in the complaint; if he was injured by those acts of the defendant, and if those acts were the acts of the railroad company, which failed, under the circumstances of the situation, to exercise the care which an ordinarily prudent railroad company would exercise, then the plaintiff is entitled, if he suffered injury from that negligence, to be compensated for it. If the plaintiff was not injured by any negligence of the defendant, or the defendant was not negligent in the particulars alleged in the complaint, then the plaintiff is not entitled to recover from the defendant, although he may have suffered injury. Or, on the other hand, if his injury was caused solely by his own negligence, which is another contention of the defendant, then he is not entitled to recover damages from the defendant for his own fault. And, in like manner, if the defendant was negligent, if the railroad company was negligent in the particulars alleged in the complaint, and if plaintiff was also negligent in the particulars in which the defendant in his answer alleges, and his negligence, along with the negligence of the defendant, both combining together, caused the injury, and if the injury would not have been caused to him, even by the negligence of the defendant, unless he also had been negligent, and his negligence contributed as a direct or proximate cause of the injury, then that would make a case of contributory negligence, where the plaintiff would not be entitled to recover damages from the defendant. * * *

"Both the defendant and the plaintiff have requested me to charge you certain propositions of law, and, in so far as they are sound and applicable to the case, I will give them to you, and it is my pleasure to do so. They are given to you, of course, as much a part of the instructions of the court as anything else.

"First of all, on the part of the defendant, I am requested to charge you that, 'as a general rule, the conductor of a train is the representative of the master, the railroad company, and has control over the management of the train, and for his negligence the company is ordinarily responsible to an inferior servant injured thereby. This rule, however, does not apply where the company, by reasonable rules received by its employes and acted upon by them, has imposed a joint duty upon such conductor and such inferior servant, and the injury to the latter is caused by the concurrent negligence of both.' The first part of that proposition is a general rule of law, that is, that the conductor is in control of the train, and all of the other employes are subject to his directions, and that the company will be responsible for the injury to any of the other employes that results through the negligence of the conductor in giving orders, because the conductor is the immediate representative of the company itself, and orders from him are orders given by the company. If the company establishes a rule for its employes and acquaints them with the provisions of the rule, and that rule imposes upon the conductor and some other employe a joint duty, and they proceed in the discharge of that duty and are jointly negligent in the performance of the duty, as a matter of course, if one of them is injured he cannot recover because of the negligence of the conductor or the other party, provided his own negligence did contribute as a proximate cause of the injury, and that is the meaning of this instruction, and I so charge you. It is really a part of the general doctrine of contributory negligence.

"(2) 'If the jury believe from the evidence that the plaintiff, at the time of his alleged injury, was acting under the rules herein set forth, and that such rules are reasonable, I charge you that the plaintiff as engineman, and the conductor of his train were jointly responsible for the movement of his train, and the defendant is not responsible for damages inflicted upon him as the result of the joint and concurrent negligence of the plaintiff and his conductor.' And then it sets out the rules upon which the defendant relies for that instruction, to wit: 'Rule 204. Train orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineman, and also to any one who acts as his pilot. A copy for each person addressed must be supplied by the operator.'

And then rule 502: 'They [engineemen] are jointly responsible with the conductor for the movement and protection of their trains in accordance with the rules; and while they must obey all proper orders by the conductor or others as provided by the rules, they are individually responsible for the observance of rules relative to their duties, and must decline to obey any order by the conductor or any other person which involves the violation of such rules, or peril to persons or property.' And special rule L: 'Conductors and engineemen are required to consult with each other and have a thorough understanding as to their meeting points.' Under those rules the responsibility still rests upon the conductor to give orders for the movement of the train and the management of the train, and while the rule does impose upon any other employé and especially the engineman, the duty to decline to obey an order which involves the violation of the rules, or which apparently or palpably exposes either persons or property to peril, still the rule entails or imposes upon the engineer the duty of obeying the orders of the conductor, where the orders are proper orders, by the very terms of the rule. So that, after all, it becomes a question for you to determine, if the question arises in this case, as to whether the engineer obeyed the order of the conductor and was negligent in obeying it. Then you must determine whether such an order or direction by the conductor was proper or not, because it is not competent for the court to charge you, as a matter of fact, whether an order by the conductor is proper or not. That is a matter of fact for you to determine, the court being prohibited from instructing you as to the facts. So that if you should find that the conductor gave to the engineer an order which was not a proper order, and which the engineer knew, or ought to have known under the circumstances, was not proper, and the engineer obeyed that order, and if you should conclude that such obedience of the conductor's orders amounted to negligence on the part of the engineer, and that that negligence caused his injury, or contributed to it as one of the direct or proximate causes, then that would amount to a case of contributory negligence, which would relieve the defendant of responsibility to the plaintiff for any injury he may have suffered. On the other hand, if you conclude the conductor gave proper orders, then the rule makes it the duty of the engineer to obey such orders, and if in pursuance of proper orders given by the conductor, the engineer, without any negligence on his part, proceeded and met with injury, and if you should conclude that the orders of the conductor—that the conductor himself was negligent, that negligence would be imputed to the defendant itself, and the defendant would be responsible to the plaintiff for any injurious consequences to the plaintiff from the giving of such orders by the conductor. Subject to these

explanations, I charge you that proposition.

"(3) 'Even if the defendant was negligent, the plaintiff cannot recover damages if the injury was caused or contributed to any degree by his own negligence, combining and concurring with negligence of defendant and contributing therewith as a proximate cause of the injury.' That is merely another form of the doctrine of contributory negligence, which I have already explained, and I so charge you.

"(4) 'If the defendant had issued orders to the plaintiff, as engineman, concerning the movement of his train, and the plaintiff neglected such orders, and such neglect caused or contributed to the disaster, he is not entitled to damages.' That also is in accordance with the instructions already given you, that is, if the plaintiff caused his injury by his own negligence as the sole cause, of course, he cannot recover, or if he contributed to his injury by negligence on his part, which was the proximate cause of the injury, along with the negligence of the defendant, then that also would defeat his recovery, and I so charge you."

"On behalf of the plaintiff, I am requested to charge you:

"(2) 'That under the law of this state, the conductor, in the running of a train under his charge, is the representative of the railroad, and if the jury find from the testimony that the plaintiff was injured in the manner and by the means set out in the complaint, and that such injury was caused by the negligence of the conductor, then the plaintiff would be entitled to recover such damages as the jury find from the testimony he has sustained, provided the negligence of the conductor was the proximate cause of such injury.' I charge you that.

"(3) 'That by article 9, § 15, of the Constitution of this state, every employé of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation, or its employées, as are allowed by law to other persons, not employées, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and any contract or agreement, expressed or implied, made by any employé to waive the benefit of this section, shall be null and void, and in this case, if the jury finds from the testimony that the plaintiff was injured by the negligence of the conductor, then any implied agreement to release the company by working under a rule which provided that he was jointly responsible with the conductor, would be null and void under this section of the Constitution, and would not prevent his recovery.' I charge you that. * * *

"(6) 'That the plea of contributory negligence set up by the defendant in its answer herein, is an affirmative defense, and, there

fore, under that plea, in order to excuse itself, the defendant must satisfy the jury by the preponderance of the testimony on that issue, that the negligence of the plaintiff contributed to the injury he suffered as a proximate cause thereof, without which the injury would not have occurred, and unless the defendant has so satisfied the jury, then they should find against the defendant on that plea.' I have specifically charged you that already, and so charge you. * * *

"(10) 'That a servant obeying the instructions of the representative of the master on the spot is not guilty of contributory negligence, although, if by such obedience, he disobeys a rule of the master.' I charge you that.

"(11) 'That the fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to the work required of him, and he is, therefore, not bound in such a case to search for danger. He may rely for safety upon the conduct of the conductor.' I so charge you.

"(12) 'That under rule 367 of the defendant company, the conductor is the man who is put in charge of the train, and every person employed thereon. They are made responsible for the safe and proper management of such trains, and for a thorough performance of the duty by the train employes, and for the observance and enforcement of all rules and orders relative thereto.' That is the meaning of rule 367, and I so charge you. * * *

The jury retired, and returned with the request for further instructions from his honor.

"The Court: I understand that some of the jurors desire some further instruction, or rather that you desire some explanation as to the relationship, I might say, between the engineer and the conductor, as to what the authority of the conductor is. Rule 367, which I have not before me—perhaps you had better let that rule be read. This is the substance and meaning of rule 367 of the rules of the road governing all the employes—that under rule 367 of the defendant company, the conductor is the man who is put in charge of the train and every person employed thereon. They are made responsible for the safe and proper management of such trains and for the protection and care of passengers, baggage, and freight, for the thorough performance of duty by the train employes and for the observance and enforcement of all rules and orders relative thereto. That makes the conductor in effect what he is very often called in speaking of him, the captain, the head man of the train, and, of course, the other members of the train crew are subject to his orders. But here is rule 502, which presents some modifications of that rule 367: Enginemen are

jointly responsible with the conductor for the movement and protection of their trains in accordance with the rules—one of which is 367.

"The Foreman of the Jury: Can I ask one question? Some of the jurors think that the conductor has authority, and that the engineer is compelled to obey his orders. They want to know, when the conductor says, 'Pull out,' is the engineer compelled to obey his orders?

"The Court: This is copied from the rule book: 'They [enginemen] are jointly responsible with the conductor for the movement and protection of their trains in accordance with the rules, and while they must obey all proper orders by the conductor and others, as provided by the rules, they are individually responsible for the observance of rules relative to their duties, and must decline to obey any order by the conductor or any other person which involves a violation of such rules or peril to persons or property.' So, that, while the conductor is in control of the train, and it is the duty of the engineer to obey the orders of the conductor, still the rules themselves make it imperative on the engineer to decline or refuse the order of the conductor, if the order involves violation of the rules laid down for the engineer's own government, or peril to persons or property. I presume it would take a long time for you and me to read them all and find out whether there are rules there specially for the government of engineers and conductors and firemen, etc.; I presume that there are. If the conductor gives an order to the engineer that involves a violation of some rule laid down for the special government and guidance of the engineer, the engineer has the right and is commanded to refuse to obey, the rule being higher than the verbal order of the conductor. And then the engineer also is required to refuse to obey the order from the conductor, where it involves peril to persons or property. As a matter of course, a great deal must be left there to the perception and the judgment of the engineer as to whether an order does involve a violation of a rule that is laid down for the guidance of the engineer, or whether an order of the conductor involves peril to persons or property. Of course, if it does not apparently involve such peril, if the engineer knows that it does not involve peril of that kind, then it is his duty to obey the order; or if he does not know or has no good reason to believe it will involve any such peril, then he is bound to assume it does not, and it is his duty to obey the order, and he must obey it, under the rule. So, you see, a great deal must depend upon the engineer's own knowledge of the conditions surrounding him as to whether an order of the conductor will involve a violation of a rule of the company or peril to persons or property; a great deal must be left there to the knowl-

edge of the engineer of the conditions surrounding him, and if an order from the conductor does involve a violation of the rules of the company, the engineer is required to refuse to obey; if it involves peril to persons or property, he is required to refuse to obey that order; unless it does either one or the other, then he is required to obey that order of the conductor.

"Of course, it is a question of fact here for you as to whether there was any order given by the conductor or not, and if so, whether that involved violation of the rules, which order the engineer would have the right to refuse to obey, or whether it involved peril to person or property apparent to the engineer. You do not have regard for the consequences in determining whether it did involve peril to life or property, but you have regard to the situation of the engineer at the time, and all the facts and circumstances in which he was acting, and if, in view of the conditions and circumstances in which he was at the time, if the conductor gave an order which involved peril to life or property, the engineer of course is required to refuse to obey that order; but if it did not, so far as the engineer could see, it was his duty to obey. * * *

Defendant appeals from judgment for plaintiff.

Exceptions:

"(1) Error of the presiding judge in charging the jury as follows: 'Where a person is negligent, and his negligence results in injury to another person, yet if that other person is also negligent at the same time, and his negligence concurs with the negligence of the person whose negligence causes injury, and concurring with it, contributes to the injury, so that it becomes a proximate and immediate or direct cause of the injury, so that he would not have been injured if he had not himself been negligent, although the other party may also have been negligent; under those circumstances the law will not allow him to recover damages for his injury from the other party. So that is what is meant by the doctrine of contributory negligence, the defense of contributory negligence.' Specification: This contains an erroneous qualification of the doctrine of contributory negligence, in that the defendant is required to prove that the plaintiff's negligence was such that without it the injury would not have occurred. The defendant is absolved, if the plaintiff's negligence be shown to have been a proximate cause concurring with the negligence of the defendant. Such negligence may have been a proximate cause without being the efficient cause; i. e., the cause without which the injury would not have occurred.

"(2) Error of the presiding judge in charging the jury as follows: 'And in like manner, if the defendant was negligent, if the railroad company was negligent in the particulars alleged in the complaint, and if the

plaintiff was also negligent in the particulars in which the defendant in his answer alleges, and his negligence, along with the negligence of the defendant, both combining together, caused the injury, and if the injury would not have been caused to him, even by the negligence of the defendant, unless he also had been negligent, and his negligence contributed as a direct or proximate cause of the injury, then that would make a case of contributory negligence, where the plaintiff would not be entitled to recover damages from the defendant.' Specification: This contains an erroneous qualification of the doctrine of contributory negligence, in that the defendant is required to prove that the plaintiff's negligence was such that without it the injury would not have occurred. The defendant is absolved, if the plaintiff's negligence be shown to have been a proximate cause concurring with the negligence of the defendant. Such negligence may have been a proximate cause without being the efficient cause; i. e., the cause without which the injury would not have occurred.

"(3) Error of the presiding judge in charging the plaintiff's sixth request to charge, which was as follows: 'That the plea of contributory negligence set up by the defendant in its answer herein, is an affirmative defense, and, therefore, under that plea, in order to excuse itself, the defendant must satisfy the jury by the preponderance of the testimony on that issue, that the negligence of the plaintiff contributed to the injury he suffered as a proximate cause thereof, without which the injury would not have occurred, and unless the defendant has so satisfied the jury, then they should find against the defendant on that plea.' Specification: This contains an erroneous qualification of the doctrine of contributory negligence; in that the defendant is required to prove that the plaintiff's negligence was such that without it the injury would not have occurred. The defendant is absolved if the plaintiff's negligence be shown to have been a proximate cause concurring with the negligence of the defendant. Such negligence may have been a proximate efficient cause without being the efficient cause; i. e., the cause without which the injury would not have occurred.

"(4) Error of the presiding judge in charging the jury as follows: 'Under those rules (referring to the rules cited in the defendant's second request to charge) the responsibility still rests upon the conductor to give orders for the movement of the train.' Specification: Under said rules the conductor had nothing to do with giving orders for the movement of his train; such orders were train orders issued by another authority, the train dispatcher, to the conductor and engineer jointly, who were jointly responsible for their execution.

"(5) Error of the presiding judge in charging the plaintiff's second request to charge, which was as follows: 'That, under the law

of this state, the conductor, in the running of a train under his charge, is the representative of the railroad, and if the jury find from the testimony that the plaintiff was injured in the manner and by the means set out in the complaint, and that such injury was caused by the negligence of the conductor, then the plaintiff would be entitled to recover such damages as the jury find from the testimony he has sustained, provided the negligence of the conductor was the proximate cause of such injury.' Specifications: There was a testimony tending to show that in this particular case the conductor was not the representative of the railroad company in the running of the extra train upon which the plaintiff was engineer; on the contrary, that the movement of said train was under train orders, issued by the train dispatcher, directed to both the conductor and engineer, who, under the rules, were jointly responsible for their execution and the proper movement and protection of the train. It was error, therefore, to apply said principle to the facts of this case without appropriate modification. Even if the collision was due to the negligence of the conductor, the plaintiff himself was also negligent in permitting the conductor to overlook his orders.

"(6) Error of the presiding judge in charging the plaintiff's third request to charge, which was as follows: 'That by article 9, § 15, of the Constitution of this state, every employé of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation, or its employés, as are allowed by law to other persons, not employés, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and any contract or agreement, expressed or implied, made by any employé to waive the benefit of this section shall be null and void; and in this case, if the jury finds from the testimony, that the plaintiff was injured by the negligence of the conductor, then any implied agreement to release the company by working under a rule which provided that he was jointly responsible with the conductor would be null and void under this section of the Constitution, and would not prevent his recovery.' Specification: The constitutional provision referred to has no application to the issues presented in this case nor to the evidence. The company had the right, notwithstanding the Constitution, to delegate the care, protection, and movement of the train jointly to the engineer and the conductor. If they allowed their train to collide with another train of the movements of which they were duly notified by train orders, they were both jointly responsible therefor. And even if the collision was due to the negligence of the conductor, the plaintiff himself was also negligent in allowing the conductor to overlook the orders. For

this reason, there could have been no implied agreement by working under the rule to waive the benefit of said section; he would be answerable for his own negligence.

"(7) Error of the presiding judge in charging the plaintiff's tenth request to charge, which was as follows: 'That a servant obeying the instructions of the representative of the master on the spot is not guilty of contributory negligence, although if by such obedience he disobeys a rule of the master.' Specifications: (a) This is an erroneous proposition of law. (b) It has no application to the facts of this case, as under the rules the engineer as well as the conductor was charged with the duty of executing the orders for the movement of his train. (c) It eliminated the question of the plaintiff's duty, under rule 502, to decline to obey any order by the conductor, which involved the violation of the rules or peril to person or property, and of his contributory negligence in such regard. (d) It eliminated the question, under the rules, of the joint responsibility of the engineer and conductor for the movement and protection of their trains, and of the engineer's contributory negligence in such regard. (e) Whether, under a given state of facts, the plaintiff was or was not guilty of contributory negligence, is a question of fact for the jury and not for the court to decide.

"(8) Error of the presiding judge in charging the plaintiff's eleventh request to charge, which was as follows: 'That the fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to the work required of him, and he is, therefore, not bound in such a case to search for danger. He may rely for his safety upon the conduct of the conductor.' Specifications: (a) This is an erroneous proposition of law. (b) Whether a given state of facts constitutes contributory negligence or not, is a question for the jury and not for the court to decide; the charge was, therefore, violative of section 26, art. 5, of the Constitution. (c) It has no application to the facts of this case, as, under the rules, the engineer as well as the conductor was charged with the duty of executing the orders for the movement of the train. (d) It eliminated the question of the plaintiff's duty, under rule 502, to decline to obey any order by the conductor which involved the violation of the rules or peril to person or property, and of his contributory negligence in such regard. (e) It eliminated the question, under the rules, of the joint responsibility of the engineer and conductor for the movement and protection of their trains, and of the engineer's contributory negligence in such regard. (f) It excludes from the jury inquiry as to the manner in which the plaintiff may have done the work he was directed to do. (g) It relieves the plaintiff from the obligation to exercise

ordinary care to avoid danger. (b) It erroneously declares that no matter what the conditions are, whether known to the conductor or not, whether known to the plaintiff or not, the plaintiff may blindly go ahead and do what he is told to do. (l) It destroys the defense of the plaintiff's contributory negligence, and of the sole negligence of the plaintiff."

T. P. Cothran, for appellant. Wm. N. Graydon, for respondent.

POPE, C. J. This action of the plaintiff was to recover damages of the defendant because of personal injuries. The trial was heard before Judge Klugh and a jury. The verdict was for \$800 for the plaintiff. An appeal was taken. The history of the facts, or allegations of fact, in the pleadings and testimony was about as follows: The plaintiff had no knowledge or experience with the railroad track and the stations on defendant's railroad from Columbia, S. C., to Charlotte, N. C., and, when called upon by the railroad authorities to run the train known as No. 74 from Columbia to Charlotte, objected to doing so because of his want of knowledge of these things; but the defendant insisted that he would do so and agreed to place him in the hands of a pilot for said trip, which was done by placing over him Capt. Drake as such pilot, who was the conductor of said train known as No. 74. The difficulties of the trip over said railroad at that date were greatly increased by reason of an accident on another line of defendant's system of railroads, which necessitated many of defendant's trains being run on the railroad from Columbia to Charlotte and vice versa. The plaintiff, under the pilotage of Capt. Drake, who was conductor on train No. 74, started on his trip on the morning of June 8, 1903—having lost sleep during the nights of the 7th and 8th of June, 1903—and no accident occurred except that, on account of delays of his train, when he reached the station of White Oak, being more than 12 hours late, his train lost its class as No. 74, and became known as "extra 193." That when his train (extra 193) reached the station known as "Ft. Mill," he was held 25 or 30 minutes. That at Ft. Mill the station agent, who was also the telegraph operator, as plaintiff alleges, negligently and recklessly gave the plaintiff the signal to leave the station by showing him the "white board," and also negligently and recklessly gave him an order conferring on extra 193 the right of track over No. 73, which was not due to leave Charlotte for 50 minutes. That Charlotte was only 14 miles from Ft. Mill, and plaintiff had ample time to have gone there. That at that time said station agent knew, or ought to have known, that there was a passenger train coming from Charlotte and due to leave Pineville, the station above Ft. Mill, and between that

place and Charlotte, and that a collision was inevitable. That when he was ordered to leave Ft. Mill, plaintiff had been on duty for more than 20 hours and was in no condition to run his engine. That the conductor, Drake, who had been ordered to pilot him, negligently and recklessly gave plaintiff orders to leave Ft. Mill, when he knew, or ought to have known, that the fourth section of No. 33 was coming and was bound to collide with extra 193. That acting upon the said orders and instructions from those who had a right to direct his services, the plaintiff being ignorant of the whereabouts of the passenger train and thinking that the track was clear, pulled out of Ft. Mill and collided with the passenger train before he got to Pineville, the next station. That seeing a collision inevitable, he jumped, broke his ankle, etc.

The defendant answered, denying the charges of negligence and recklessness, charging that the accident was due to the negligence of the plaintiff, and pleading the contributory negligence of the plaintiff, as follows: As a further defense, the defendant alleges that at or about 9 o'clock a. m. of June 8, 1903, the day upon which the collision occurred, the plaintiff while acting as engineer of extra 193, received from the defendant at White Oak, S. C., a written order that the fourth section of train No. 33, a train running in the opposite direction, would run 8 hours 20 minutes late; that the regular schedule leaving time at Charlotte of train No. 33 was 8:50 a. m., and the leaving time of said fourth section of 33 at Charlotte, according to said order, was 5:10 p. m.; that the regular schedule leaving time at Pineville of train No. 33 was 9:11 a. m., and the leaving time of said fourth 33 at Pineville, according to said order, was 5:31 p. m.; that the regular schedule leaving time at Ft. Mill of train No. 33 was 9:22 a. m., and leaving time of said fourth 33 at Ft. Mill, according to said order, was 5:42 p. m.; that said fourth 33 was 20 minutes late, and, leaving Charlotte at 5:30 p. m., it passed Pineville, without stopping, at 5:43 p. m., $6\frac{1}{2}$ miles north of Ft. Mill; that the plaintiff with his train, extra 193, arrived at Ft. Mill at 5:25 p. m., and left that station at 5:48 p. m., going in the direction of Pineville; that the plaintiff negligently, carelessly, and recklessly overlooked the order that he had received as aforesaid, notifying him of the movement of fourth 33, and in consequence collided "head on" with the said fourth 33 between Ft. Mill and Pineville, at or about 5:52 p. m.; that the plaintiff, when he left Ft. Mill, knew, or with the exercise of ordinary care should have known, that fourth 33 at that time was coming towards him between Pineville and Ft. Mill, and that a collision was inevitable; that by the rules of the company under which the plaintiff was working, he was jointly responsible with the conductor for the move-

ment and protection of his train. "The defendant alleges that the aforesaid negligent acts and omissions of the plaintiff contributed to his injury in the manner stated, in conjunction with the alleged acts of negligence on the part of the defendant set forth in the complaint."

The plaintiff admitted that when he arrived at White Oak he passed three sections of No. 33, and that he knew that there was a fourth section to come, not only by the signals given and the whistles blown by those trains, indicating another section following, but by a written order handed to him by the agent at White Oak, reading as follows: "4th 33, engine unknown, will run 8 hrs. 20 m. late Charlotte to Winnsboro, and 8 hrs. late Winnsboro to Columbia."

Reference is made to the word "pilot." In the rules of defendant railway, a pilot is thus defined: "A person assigned to a train when the engineman or conductor, or both, are not fully acquainted with the physical characteristics, or running rules of the road or portions of the road, over which the train is to be moved." Rule 105: "Both conductors and enginemen are responsible for the safety and, under conditions not provided for by rules, must take every precaution for their protection." Rule 367: "They [conductors] will have charge of the trains to which they are assigned and of all persons employed thereon. They are responsible for the safe and proper management of such trains, for the protection and care of passengers, baggage, and freight, for a thorough performance of duty by the train employes, and for the observance and enforcement of all rules and orders relative thereto. * * * " Rule 502: "They [enginemen] are jointly responsible with the conductor for the movement and protection of their trains in accordance with the rules; and while they must obey all proper orders by the conductors or others, as provided by the rules, they are individually responsible for the observance of rules relative to their duties, and must decline to obey any order by the conductor or any person which involves the violation of such rules or peril to person or property." Special rule 50: "Conductors and enginemen are required to consult with one another and have a thorough understanding as to the meeting points." "A train receiving this order is not required to protect itself against opposing extras unless directed by orders to do so, but must keep clear of all regular trains unless required by rule."

Let the report of this case contain the judge's charge and the exceptions thereto. We will now pass upon these exceptions.

1. The first three relate to an alleged failure of the circuit judge in his charge to the jury in regard to the defense of contributory negligence. An examination of the charge of the circuit judge will show it to be in exact accord with the definitions of this court of

contributory negligence. The principles are announced in *Freer v. Cameron*, 4 Rich. Law, 232, 55 Am. Dec. 663; *Cooper v. Railway Co.*, 56 S. C. 91, 95, 34 S. E. 16. In this latter case this court said: "The best definition of contributory negligence we have seen is the following from 7 Ency. Law (2d Ed.) 371: 'Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.'" It is thus seen that contributory negligence by plaintiff can never exist except when the injury has resulted from the negligence of the defendant as a "concurring proximate cause." In *Bowen v. Railway Co.*, 58 S. C. 228, 36 S. E. 590, this exact definition has been adopted by the Court. In *Easler v. Railway Co.*, 59 S. C. 322, 37 S. E. 941, where the definition in the two previous cases of *Cooper* and *Bowen* was adopted, Chief Justice McIver remarked as follows: "From this as well as what is said in *Farley v. Basket and Veneer Co.*, 51 S. C. 237, 28 S. E. 193, and in *Disher v. Railway Co.*, 55 S. C. 192, 193, 33 S. E. 172, it is apparent that the definition of contributory negligence can only arise when the injury complained of is the compound result of both plaintiff and defendant, both contributing to such result by their combined and concurrent action as a proximate cause of the injury. Hence, as is said by the late Judge McGowan, in *Simms v. Railway Co.*, 26 S. C. 497, 2 S. E. 490, 'Until a prima facie case of negligence is made out against the defendant there can be no such question as that of contributory negligence on the part of the plaintiff.'" In the notes of the 7th Ency. of Law, 372, 373, in discussing the subject of contributory negligence, the learned author lays down the principles in exact accord with our definition. In notes, page 373, in the *American and English Ency.*, the author well quotes from the annotator of the *American Decisions*: "Scarcely any theme in the whole range of legal science has been more fruitful in adjudications than the subject of contributory negligence; but the multiplicity of decisions on this point has not by any means cleared it of difficulties. On the contrary, it has in some respects seemed rather to 'darken counsel' by the introduction of a great variety of metaphysical refinements and subtle distinctions." If contributory negligence is made clear by the circuit judge, too many refinements had better be obviated by him. It seems to us that where a definition is broad and true that it is better to adhere to the same rather than to follow the suggestions overly refined. We, therefore, overrule these exceptions.

2. Exception 4. It must always be remembered that it is a concrete case and not an abstract one that is under consideration on

appeal. Under the rules of the defendant company, when the plaintiff objected to taking No. 74 out of Columbia because he was unacquainted with said division, and had never worked on it, did not know the road and did not care to go out over that division, the master mechanic told the plaintiff that the conductor, Mr. Drake, would pilot the plaintiff over said road, and that Mr. Drake told him of his directions to act as pilot. An observation of the rules of the defendant road shows that the engineman, along with the conductor are responsible for the safety of their train. See rule 105 and also rule 368, which hold that conductors and enginemen are jointly responsible. While rule 367 provides that conductors will have charge of the trains to which they are assigned, and of all persons employed therein, they are responsible for the safe and proper management of such trains, for the protection and care of passengers, baggage, and freight, for a thorough performance of duty by the train employes, and for the observance and enforcement of all rules and orders relative thereto. When these rules are considered, including the appointment of the conductor as pilot, it will be seen that the circuit judge did not err here as complained of. The train cannot move ordinarily without the order of the conductor, and, therefore, orders issued by another department of the railroad cannot supersede the authority given under these rules, to the conductor. This exception is overruled.

3. Exception 5. The conductor is to a certain extent the master of the railroad train, and when injury is produced by his negligence in carrying out the purposes of his appointment, the defendant railroad is responsible therefor. This exception is overruled.

4. Exception 6. Error was assigned because the circuit judge charged plaintiff's third request. We think there was no error here. This exception is overruled.

5. Exception 7. When the circuit judge charged the tenth request of the plaintiff, "That a servant obeying the instructions of the representatives of the master on the spot is not guilty of contributory negligence in so obeying said master," he committed no error. *Carson v. Railway Co.*, 68 S. C. 55, 46 S. E. 525. This exception is overruled.

Exception 8. The error assigned to the circuit judge is in charging plaintiff's eleventh request: "That the fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to the work required of him," etc. This was not error. See *Carson v. Railway*, 68 S. C. 55, 46 S. E. 525. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is, hereby affirmed.

(73 S. C. 516)

STATE v. SMALLS et al.

(Supreme Court of South Carolina. March 16, 1906.)

1. HOMICIDE—EVIDENCE—CONDUCT OF ACCUSED.

On trial for murder, evidence that accused were under the influence of liquor prior to the killing, and shot off their guns several times, and that their conduct was threatening toward a third person a short time before the homicide, and that after the homicide, carrying their guns, they went to the home of deceased, was admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 341.]

2. SAME.

Evidence that accused, on trial for murder, was in the habit of cursing, was immaterial.

3. GRAND JURY—DRAWING—IRREGULARITIES—WAIVER.

Where the jury commissioner, in drawing a grand jury, instead of following the provisions of Cr. Code 1902, § 39, providing that the persons whose names are first drawn, to the number required, shall be returned as grand jurors, and those afterwards drawn, as trial jurors, assigned to the grand jury as their names were drawn those persons whom he supposed best qualified for grand jury duties, was an irregularity, and where known to defendants before the trial was waived where no objection was made under Civ. Code 1902, § 2947, providing that no irregularity in drawing jurors shall set aside the verdict unless the party objecting was injured by the irregularity, or objection was made before return of the verdict.

Appeal from General Sessions Circuit Court of Darlington County; Dantzler, Judge.

Bob Smalls and John Nall were convicted of murder, and appeal. Affirmed.

Geo. W. Brown, for appellants. Solicitor Johnson, for the State.

WOODS, J. Upon their trial in the court of General Sessions for Darlington county, Bob Smalls and John Nall were convicted of the murder of Frank Scott, with a recommendation to mercy as to John Nall. The presiding judge, Hon. Chas. G. Dantzler, sentenced Bob Smalls to be executed on May 5, 1905, and John Nall to imprisonment for life.

1. The deceased was shot to death on the public highway. In their appeal the defendants first complain of the admission of evidence to the effect that while walking on the public road on their way to the place where the killing occurred, they were under the influence of liquor and shot off their guns several times; that their conduct was bolsterous and threatening toward Jackson Granville, who overtook them a short time before the homicide, and that after the homicide had been committed, still carrying their guns, they went to the home of deceased. The same point was made in *State v. Miller*, 73 S. C. 877, 53 S. E. 426, where the facts were remarkably similar. In that case the court said: "The general rule is that proof of distinct and independent offenses is not admissible on the trial of a person accused of crime, but there are exceptions to or

modifications of this general rule, as where such evidence reasonably tends to show the malice, intent, or motive of the defendant with respect to the crime charged, or where the offense is so closely connected with the crime charged as to bring it within the rule of *res gestæ*. Wharton's *Crim. Evid.* (8th Ed.) §§ 30-47. See, also, a full and elaborate note to *People v. Molineux* (N. Y.) 61 N. E. 286, 62 L. R. A. 193. The testimony admitted tended to show that the defendants were, a short time before the homicide, approaching the place where it occurred armed with a deadly weapon and with a mind ready for mischief. The conduct, actions, and general behavior of the accused immediately before the killing are admissible to show that he was armed and in a vicious humor. 4 Elliott on *Evid.* § 3029." See, also, *State v. Smith*, 12 Rich. Law, 430; *State v. Thrallkill*, 71 S. C. 140, 50 S. E. 551.

It is next submitted the circuit judge committed the error of requiring John Nall to testify as to his shooting along the public road before the homicide and thus incriminate himself, shooting on the highway without just cause or excuse being a statutory misdemeanor. The record does not bear out this charge of error. After Nall on cross-examination had testified without objection to his shooting on the public road before reaching the place where the homicide occurred, defendant's counsel objected "to further testimony as to shooting along the road at other places than at the place of homicide." This objection was overruled, and defendant's counsel did not until then make the point that defendant had the right to refuse to answer as to shooting along the highway prior to the homicide. It is true, the point was not sustained, but no further question was asked or answered about shooting except that which was done at the time and place of the homicide.

2. It is further insisted that testimony introduced, on the cross-examination of John Nall, that Bob Smalls was in the habit of cursing, was irrelevant and prejudicial. This witness subsequently testified that Smalls cursed that day. We are unable to see how the evidence as to his being in the habit of using profane language could have affected the result of the case.

3. It is next earnestly insisted that there was such illegality in the drawing of the grand jurors by whom the bill was found and of the petit jurors by whom the defendants were convicted, that the whole trial was a nullity. Under section 39, of the Criminal Code of 1902, "the persons whose names are first drawn, to the number required, shall be

returned as grand jurors, and those afterwards drawn, to the number required, shall be jurors for trials." It appears from the affidavit of the jury commissioner, that instead of following the statutory method, they assigned to the grand jury as their names were drawn those persons whom they regarded best qualified for grand jury duties, leaving the others drawn for the petit jury. As expressed in the affidavit, "the whole 36 as drawn were not assigned to the petit jury, nor were the whole 12 as drawn assigned to the grand jury, but as the grand and petit jurors were drawn together the assignments to the one or the other venires were made, assigning as aforesaid, as we saw it, the best business men to the grand jury." It does not appear this irregularity was not known to defendants before the trial, and yet no objection was then made that the bill was not found by a legal grand jury or that the petit jurors were not legally drawn; on the contrary, the objection is made for the first time in this court. Section 2947 of the Civil Code of 1902 provides: "Nor irregularity of any writ of venire facias, or in the drawing, summoning, returning or empanelling of jurors, shall be sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict." This applies to grand as well as petit jurors. *State v. Jeffcoat*, 26 S. C. 114, 1 S. E. 440. There is no substantive evidence that the defendants were injured by the irregularity.

We do not think the method of drawing the jury was, as defendant's counsel contends, more than an irregularity and such a fatal defect as to leave the court without jurisdiction to try the defendants. There is no allegation or proof that those who composed the juries were not *probi et legales homines*, that is, good and lawful men competent to act as jurors, and statutes which prescribe the time and manner of selecting jurors are usually regarded as directory. *State v. Baldwin*, 2 Hill, 379; *State v. Blackledge*, 7 Rich. Law, 338; *State v. Clayton*, 11 Rich. Law, 581; *State v. Boyd*, 56 S. C. 382, 34 S. E. 661; *State v. Berkeley*, 64 S. C. 194, 41 S. E. 961; *State v. Johnson*, 66 S. C. 23, 44 S. E. 58; *Rhodes v. Ry. Co.*, 68 S. C. 494, 47 S. E. 689.

The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence of Bob Smalls heretofore imposed.

(74 S. C. 42)

McCREARY et al. v. COGGESHALL et al.
(Supreme Court of South Carolina. March 15, 1906.)

1. WILLS—REMAINDERS—CONSTRUCTION—MERGER OF ESTATES—DEFEAT OF INTERMEDIATE REMAINDER.

Testator devised certain property to A., and, in case of his death leaving issue, then in such case to such issue in fee, but in default of issue to B. *Held*, to vest the fee in B. after the termination of the life estate, with the contingent remainders limited thereon, and, where B. acquired the life estate, the contingent remainders thereby merged into the fee, if not contrary to intent of parties.

[Ed Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1440; vol. 43, Cent. Dig. Remainders, § 7.]

2. EVIDENCE—ANCIENT DOCUMENTS.

The genuineness of a letter written 70 years ago may be proved by comparison with writings of the author known to be genuine.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2381.]

3. ACKNOWLEDGMENT—VALIDITY.

St. 1804 (5 St. at Large, p. 479) provided that clerks of the courts of record shall be ex officio justices of the quorum. A justice of the quorum was a magistrate authorized to take probates under act 1878 (7 St. at Large, p. 247). *Held*, that a deed executed before one Bruce, "U. Q.," is valid; the letters signifying "Unum Quorum," and the omission of his official title did not affect the probate.

[Ed Note.—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, § 164.]

4. EJECTMENT—EVIDENCE—NONSUIT.

In ejectment, letters of defendants' grantees in connection with several deeds, parol evidence of successive possessions, and admissions of those who held the land successively, held sufficient to justify the court in not granting a nonsuit, on ground of total failure of proof of the locus in quo.

Appeal from Common Pleas Circuit Court of Darlington County; Aldrich, Judge.

Action by James H. McCreary and others againsts A. C. Coggeshall and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Dargan & Coggeshall and Woods & Macfarland, for appellants. H. H. McClelland and Spears & Dennis, for respondents.

An opinion was filed in this case on the 21st day of October, 1905, but on petition for rehearing the following order was made November 2, 1905:

PER CURIAM. Since the hearing and decision of this cause, Mr. Justice WOODS has recalled the fact, which he had entirely overlooked, that the question of the effect of section 109 of the Code of Civil Procedure of 1902 on the rights of remaindermen was involved in a cause pending in the court of common pleas in which he had been one of counsel. The views of the court on this point are not questioned in the petition for rehearing, but at the request of Mr. Justice WOODS, made for the reason above stated, the cause is opened so that argument on this point may be heard by the court without his participation. As the cause is to be re-

opened, counsel will be heard also on the issues referred to in the petition for rehearing.

It is therefore ordered that the cause be set down for rehearing at the November term, 1905, of this court, upon the call of the Fourth circuit.

The case was reargued at November term, 1905; Mr. Justice WOODS sitting at the request of all counsel, and the question of the effect of section 109, Code Civ. Proc. 1902, on rights of remaindermen having been withdrawn.

WOODS, J. A judgment was recovered by the plaintiffs for the possession of a tract of land containing 630 acres, and defendants appeal.

As it is necessary at every point of the discussion to have in view the precise terms of certain portions of the will of Thomas Hunter, under which both parties claim title, they are here set out in full:

"Item. I lend to my granddaughter, Mary Ann Coleman, for and during the term of her natural life and no longer, all my lands situate, lying and being on Belly Ache, including George King's old place, and also Henry King's supposed to contain nine hundred acres, and also four negroes, Carolina, Sarah and her two children, and the future issue and increase of the females. It is my will and desire that my executors retain and manage the said land and negroes for the benefit of my granddaughter until she arrives to the age of twenty-one or marriage, and then to be delivered over to her; and in case my said granddaughter, Mary Ann Coleman, should die leaving issue of her body then living, then to him or her, or them so living, and to their heirs and assigns forever; but in case the said Mary Ann Coleman should die leaving no issue of her body living at the time of her death, then I give, devise and bequeath all the aforesaid land and negroes to my son, Morris W. Hunter, his heirs and assigns forever.

"Item. I give, devise and bequeath unto my son, Morris W. Hunter, his heirs and assigns forever, all the rest and residue of my real and personal estate of what kind or nature soever, and wheresoever situate or being, and also, after the death of my wife, Margaret Hunter, I give, devise and bequeath all the real and personal estate hereinbefore loaned to her, to him the said M. W. Hunter, his heirs and assigns forever.

"Lastly. I do hereby nominate my son, Morris W. Hunter, and my friends, Samuel Bacot and James R. Ervin, executors of this my last will and testament."

2. We have italicized the portions requiring special attention. Thomas Hunter died about 1831, leaving surviving him his children, William, Morris, and Rachel, and his grandchild, Mary Ann Coleman. Mary Ann Coleman married Samuel McCreary, and died

in 1902, at the age of 90 years, leaving surviving her children, the plaintiffs, J. H. McCreary, J. A. McCreary, Susan Hawthorne, Mary McClelland, and Mattie Massey, who now claim the land in dispute as "issue of her body living" at the time of her death, under the second item of the will. We first consider the case on the assumption that there was evidence to the effect that Morris W. Hunter, one of the heirs and the residuary devisee of Thomas Hunter, acquired title to the life estate of Mary Ann McCreary, née Coleman, and that the defendants, or at least one of them, derived title to the land and possession of it through him. The defendants, taking the position that the plaintiffs took under the will a remainder contingent on surviving their mother, the life tenant, the fee being in Morris W. Hunter, the residuary devisee, pending the contingency upon which plaintiffs should take, contended, if Morris W. Hunter, owner of the fee, did acquire the life estate of Mary Ann Coleman, it became immediately merged in the fee, which he already held, and the contingent remainder, being thus left without any particular estate to support it, would be defeated. The circuit judge refused to so charge, but, on the contrary, instructed the jury the contingent remainder intervening between the life estate and the fee prevented a merger.

There can be no doubt that the limitation to the issue of Mary Ann Coleman, and, in default of such issue, to Morris W. Hunter, created a contingent remainder with a double aspect, and not an executory devise. It is said in *Fearne on Remainders*, 393-395: "Lord Mansfield, in the voice of the court, said it was perfectly clear and settled that, where an estate can take effect as a remainder, it shall never be construed an executory devise or springing use. And Lord Kenyon, chief justice, in delivering the opinion of the court, said, if ever there existed a rule respecting executory devises which had uniformly prevailed without any exception to the contrary, it was that which was laid down by Lord Hale, in the case of *Purefoy v. Rogers*, that, where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only and not otherwise. From the last noticed case, and that of *Hopkins v. Hopkins* therein referred to, it appears that where the contingent estate may, in the nature of its original limitation, take effect during, or by the time of the determination of, the particular estate (supposing that particular estate to take place), the possibility or probability of its not doing so, in the common course of things, or from its relation to other limitations, interposed by the testator, will not take it out of the general rule that denies the construction of an executory devise to a limitation that may take effect as a contingent remainder." This

is conclusive against the contention of the respondent. A reading of the will shows that the limitation to the children of Mary Ann Coleman who survived her would take effect, if at all, at her death. Mary Ann Coleman's life estate was the particular estate to support the remainder, which could take effect immediately on its determination. Hence, under the rule stated by Mr. Fearne, it could not be an executory devise. *McElwee v. Wheeler*, 10 S. C. 392; *Faber v. Pollice*, 10 S. C. 376; *Fearne on Rem.* 373; 2 Wash. on Real Prop. 625. The residuary devise to Morris W. Hunter vested in him the fee after the life estate, with the contingent remainders limited thereon. *Hopkins v. Mazyck*, Rich. Eq. Cases, 263; *Williams v. Kibler*, 10 S. C. 414.

The general rule that a life estate is drowned or merged in the fee, when acquired by the owner of the fee to the destruction of an intervening contingent remainder, is too deeply imbedded in the common law to be now judicially questioned. Whenever this application of the doctrine of merger has been under discussion by writers on the common law, the leading case of *Purefoy v. Rogers*, decided in 1672, and reported in 2 *Saunders*, 380, in which the doctrine is laid down, has been followed. The rule is thus comprehensively stated in 2 Wash. on Real Prop. 638: "At common law there were various ways in which a contingent remainder might be defeated, by destroying the particular estate on which the remainder depended before it vested. It might be done by a feoffment or forfeiture, or by the inheritance descending upon the tenant and merging his particular estate in itself, or by the particular estate and the inheritance becoming united by conveyance or act of the parties, since the outstanding of a contingent remainder would not prevent the merging of the two; it not being an intervening estate." It is remarkable that a somewhat careful search has disclosed very few cases in American courts in which the precise point was involved. In a text-book of high rank our own case of *Mangum v. Piester*, 16 S. C. 316, is cited as authority for the proposition that, "where the particular estate merges in inheritance either by the act of the particular tenant or by the descent to him of the inheritance after the particular estate has taken effect, intermediate contingent remainders are destroyed."

It is true the court held in that case a life estate became merged in the remainder when it was purchased by the remainderman, but the remainder there under discussion was held to be vested, and the limitation over an executory devise, and not a contingent remainder. The subject of the barring of intervening contingent remainders by merger could not therefore arise, and was neither discussed nor decided. Nor was the precise point here under consideration necessarily involved in *Boucknight v. Brown*, 16 S. C. 155; 170, as will be found on examination of the

facts of the case; but in the course of the discussion the court uses this language: "A contingent remainder may be destroyed at common law by fine or recovery, by merger of the particular estate, or by any displacement thereof, and this is the great and essential difference between a contingent remainder and executory devise." *Redfern v. Middleton, Rice*, 459, decided that alienation by the life tenant by deed of feoffment with livery of seisin operated as a forfeiture of the life estate, resulting in the destruction of the contingent remainder depending upon the life estate as the particular estate supporting it. To the same effect are *Faber v. Police*, 10 S. C. 376; *McElwee v. Wheeler*, 10 S. C. 392; and *Snelling v. Lamar*, 32 S. C. 72, 10 S. E. 825, 17 Am. St. Rep. 835. While the possibility of destroying contingent remainders by merger was not involved in those cases, yet forfeiture by deed of feoffment, with livery of seisin and merger, have equal common-law sanction as methods of barring contingent remainders, and the remarks of Chief Justice McIver, in *Bank v. Garlington*, 54 S. C. 413, 426, 32 S. E. 513, as to the former, apply also to the latter: "There is no doubt that under the common law of England a tenant for life could bar contingent remainders by executing a deed of feoffment, with livery of seisin, and there is as little doubt that this portion of the common law became a part of the law of this state by virtue of the act of 1712, incorporated in Gen. St. 1882, § 2738." The act of 1883 (18 St. at Large, p. 430; 1 Civ. Code 1902, § 2485) provides that "no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment with livery of seisin." However unfortunate it may be regarded that our statute was not modeled after the English statute 8 & 9 Vict. c. 106, and thus made comprehensive enough to prevent the unjust destruction of the rights of contingent remaindermen by merger and other artificial means, the court cannot extend the statute beyond its plain meaning. But even if the statute had expressly provided against the destruction of contingent remainders by merger, it could have no effect to defeat a right acquired by merger before the enactment of the statute. Here, if *Morris W. Hunter* acquired the preceding life estate, and thus defeated the contingent remainder, this was accomplished, and his rights and the rights of those claiming under him were vested long before the act was passed. The possibility of defeating it might have been taken away by statute, but after it had been actually destroyed, and the entire unlimited title acquired by Hunter, his title could not be altered by statute. *Bank v. Garlington*, 54 S. C. 429, 32 S. E. 513. The circuit judge was therefore in error in saying to the jury that the life estate could not merge in the fee because of the intervening contingent remainder, but the unsound-

ness of the reason given manifestly could not avail appellants, if merger was prevented by any other circumstance appearing from the undisputed evidence. This brings us to the difficult inquiry as to the effect of the intention of the parties.

Inasmuch as there seems to be considerable doubt as to the state of the law on this subject in South Carolina, a statement of the rule obtaining elsewhere and a brief review of our decisions seems desirable. The view generally held is that merger is not favored in the courts of law or equity, and in equity, at least, it will not take place if opposed to the intention of the parties either actually proved or implied from the fact that merger would be against the interest of the party in whom the several estates or interests have united. This doctrine is sustained by an unbroken current of authority in the other states of the Union and in England. *Forbes v. Moffet*, 18 Ves. 384; *Ins. Co. v. Murphy*, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; *Welsh v. Phillips* (Ala.) 25 Am. Rep. 679; *Jackson v. Relf* (Fla.) 8 South. 184; *Knowles v. Lawton* (Ga.) 68 Am. Dec. 290; *Westheimer v. Thompson* (Idaho) 32 Pac. 205; *Temple v. Whittier* (Ill.) 7 N. E. 642; *Thomas v. Simmons* (Ind.) 2 N. E. 204; *Shimer v. Hammond* (Iowa) 1 N. W. 656; *Bank v. Webb* (Mich.) 23 N. W. 51; *Horton v. Maffitt* (Minn.) 100 Am. Dec. 222; *Bassett v. O'Brien* (Mo.) 51 S. W. 107; *Mattews v. Jones* (Neb.) 66 N. W. 622; *Salvage v. Haydock* (N. H.) 44 Atl. 696; *Gore v. Brian* (N. J. Ch.) 35 Atl. 897; *Gardner v. Astor* (N. Y.) 3 Johns. Ch. 53, 8 Am. Dec. 465; *Watson v. Mortgage & Investment Co.* (Or.) 8 Pac. 548; *Bryar's Appeal* (Pa.) 2 Atl. 344; *Dodge v. Hogan* (R. I.) 31 Atl. 268; *Haggood Shoe Co. v. Bank* (Tex. Civ. App.) 56 S. W. 995; *Carpenter v. Gleason* (Vt.) 4 Atl. 706; *Rorer v. Ferguson* (Va.) 31 S. E. 817; *Stewart v. Eaton* (Wash.) 55 Pac. 314. It is argued, however, that the rule is different in this state, and that something more than even actual proof of the intention, as a part of the principal contract from which merger would usually result, is necessary to prevent it; that an express contract separate and distinct must be proved. It cannot be denied our cases are in some confusion, and it is therefore desirable to reconcile them as far as possible and state the true rule.

In none of our earlier cases on the subject of merger is the effect of intention considered and we therefore commence with the case of *Agnew v. Railroad Co.*, 24 S. C. 18, 58 Am. Rep. 237. In this case it was not necessary to go further than to hold that an express separate agreement incorporated in the deed made to the mortgagee that the mortgage should remain open for his protection prevented merger; but effect was given to this paper, not because it was incorporated in the deed or was in writing, but as the expression of an intention that the mortgage should not merge. The court says, quoting from 2 *Pomeroy's Eq.* § 791: "If the intention has

been expressed, it controls," etc. In his dissenting opinion Mr. Justice McIver says: "But, in addition to this, the fact that the intention which, according to the authorities relied on, determine the question of merger, is expressed in writing, cannot be decisive. It may facilitate proof of the existence, but it cannot give it an effect which it would not otherwise have. According to those authorities, if the intention that there shall be no merger is ascertained, whether by express proof or implied from the circumstances, it controls. I do not see how it is possible that the mode in which it is ascertained can affect its nature or effects. It is true that there are some things which are required to be in writing, as, for example, a contract for the sale of land, which have no efficacy unless so expressed; but this is not of that class." In *Navassa Guano Co. v. Richardson*, 26 S. C. 401, 2 S. E. 307, the mortgage was held to be merged by the acceptance of the mortgagee of the mortgagor's interest, on the ground that there was not only no proof of an express agreement against merger, as in *Agnew v. Railroad Co.*, supra, but not a word of evidence tending to show any intention against it.

While in this case the statement of the controlling influence of intention, quoted from *Jones on Mortgages and Pomeroy's Eq. Jurisprudence*, seems to be recognized, it is held to have no application to the case of a mortgagee taking a conveyance of the land as a satisfaction of his mortgage, for the reason that the mortgagee in this state has no estate in the land, but a lien upon it, and anything he takes in satisfaction is payment, though it may prove afterward valueless in his hands. The case therefore rests on the absence of proof of intention that the mortgage should not be satisfied, and on the nature of a mortgage under our statute law. In *Bleckley v. Branyan*, 26 S. C. 424, 429, 2 S. E. 319, referring to the satisfaction of a mortgage by merger, the court says: "On account of this seeming hardship, it has been held that the mortgagee, thus purchasing the equity of redemption, may set up the prior mortgage against subsequent incumbrances, if the parties at the time of the transfer intended and covenanted to prevent merger and to keep the mortgage open. See *Agnew v. Railroad Co.*, 24 S. C. 18, 58 Am. Rep. 237, and authorities. So that the real question in this case is whether the facts as to the intention of the parties bring it within the principle announced in the case of *Agnew v. Railroad Co.*, supra." It is then held that there was not only no evidence of intention to keep the mortgage open, but that the facts led to a contrary conclusion. It is true in this case the court said: "We cannot venture to go further in relieving a mortgagee who purchases than was indicated in the case of *Agnew v. Railroad Co.*, supra." But this clearly did not mean that there must be present the precise facts of *Agnew v. Railroad Co.* in order to prevent merger, for what was

indicated in that case was the principle that merger would be prevented by an intention that it should not occur, either expressed or implied, because the interest of the mortgagee required it. In *Agnew v. Renwick*, 27 S. C. 562, 573, 4 S. E. 223, Mr. Justice McIver uses this language: "Where parties have taken the precaution to protect themselves against the operation of the general rule, by an express covenant to that effect, they then bring themselves under the exception recognized in *Agnew's Case*, beyond which this court has said it will not venture to go; but where no such precaution has been taken, then the case must fall under the operation of the general rule." This cannot be regarded as having the force of *stare decisis*, for the reason that it is stated in the opinion it would be difficult, if not impossible, to find any evidence of intention to keep the mortgage open, and for the further convincing reason that a reference to the case will show the conclusion might well be sustained on other grounds, and the majority of the court concurred in the result only.

Up to this point, therefore, it cannot fairly be said the court ever adjudged that the intention would not control, unless evidenced by an express agreement in writing. On the contrary, the tendency was to regard the fact of the intention controlling in whatever way it might be indicated. But in the second appeal, in *Bleckley v. Branyan*, 26 S. C. 445, 6 S. E. 291, the court was unanimous, and it is there said to be settled in this state that: "A mortgagee who buys the estate under mortgage not under process of foreclosure of his lien extinguishes the debt or claim, with lien on the land," and that the only exception to this rule is the one recognized in *Agnew v. Railroad Co.*, 24 S. C. 18, 58 Am. Rep. 237, whereby the mortgagee may, by express agreement in writing, protect himself from such a result." There is a dictum to the same effect in *Parker v. Parker*, 52 S. C. 382, 29 S. E. 805, but, so far from the result of the case resting on that ground, it was decided that the mortgage remained open. While the case of *Michalson v. Myrick*, 47 S. C. 297, 25 S. E. 162, rests mainly on the ground that merger did not take place because the deed from which it was claimed to result was held to be absolutely void for fraud, yet the court by a dictum gives sanction to the controlling effect in equity of intention, either expressed or implied. The precise question was involved, however, in *Lipscomb v. Goode*, 57 S. C. 182, 35 S. E. 493, and an intention to keep the mortgage open was implied, because it was to the interest of the mortgagees that it should not be satisfied, and it was held there was no merger. *Powell v. Patrick*, 64 S. C. 190, 41 S. E. 894, is to the same effect. In *Glenn v. Rudd*, 68 S. C. 102, 46 S. E. 555, 102 Am. St. Rep. 659, the difficulty is pointed out of reconciling the cases in this state which intimate that to prevent merger an express contract against it is necessary, and

those which hold the contract against it is sufficiently shown by proving the intention, and that the intention will be implied when the interests of the party against whom the merger is claimed require it. But the single point decided was that an agreement to keep the mortgage open after conveyance of the property to the mortgagee need not be in writing and incorporated in the deed of conveyance.

From this review we think it clear the later cases in this state establish the proposition, which as we have seen is in accord with the doctrine universally recognized in other jurisdictions, that in equity at least merger will not take place if opposed to the intention of the parties, affirmatively proved, or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests became united. It is argued, however, that, though in equity an intention that it shall not take place may prevent merger, at law, whenever the greater and lesser estate coincide in the same person without any intermediate estate, the rule that merger takes place is inflexible, and entirely unaffected by the intention; that is to say, if in this case *Mrs. McCreary* had made, and *Hunter* had accepted, a deed to the life estate, accompanying the execution with the most explicit expression of an intention on the part of both of them that merger should not result to the destruction of the contingent remainder, the life estate nevertheless would have been merged and the contingent remainder destroyed. It will hardly be thought that any such difference "at law" and "in equity" can be rested on a difference between the jurisdiction and practice of courts of law and courts of equity. If this supposed distinction ever had such a foundation, it has been taken away by the adoption of the reformed procedure. *Pomeroy's Code Remedies*, §§ 94 to 103. The court on its law side will recognize and enforce equitable rights wherever they are necessarily involved in the decision of a legal issue. For example, if A. in a suit against B. to recover possession of land, proves his own title, and B. shows a deed from A. for the land in dispute, this would be a complete bar to A.'s recovery; but, if A. then proves the deed to B. was intended as a mortgage and the debt had been paid, he would still have the right to recover possession, and it makes no difference whatever whether we call his right legal or equitable. So if, in an action to recover possession of land, the title of the plaintiff depends upon an alleged merger, if the merger would be held by a court of equity not to have taken place because contrary to the intention, the plaintiff could not recover.

If it is contended the supposed distinction is founded on the difference between equitable and legal estates and interests, we can find no authority which compels us to recognize it. Indeed the doctrine that merger at law

will take place without respect to the intention seems rather to have been taken for granted by the courts of equity than established by the decisions of the courts of law. The statement that at law the intention of the parties can have no effect seems to be founded on *Compton v. Oxenden*, 2 Vesey, Jr., 261, and *Forbes v. Moffatt*, 18 Vesey, 334; the Lord Chancellor in the former case using this language: "It is a clear principle, both at law and in equity, that, where there is a confusion of rights, where debtor and creditor become the same person, there can be no right put into exertion; but there is an immediate merger. But it is true in equity, though there may be that which, if all was reduced to a legal right, would of necessity operate as a merger, this court, acting upon the trust, will, on the intent, express or implied, preserve them distinct, and that confusion of rights will not take place." Similar expressions will be found in *Smith v. Roberts*, 91 N. Y. 470; *Bassett v. O'Brien* (Mo.) 51 S. W. 107, and our own cases of *Agnew v. Railroad Co.*; *Michalson v. Myrick*, and *Lipscomb v. Goode*, supra, and other modern cases. But these expressions have the weight of dicta and nothing more, for in all the cases in which they are found the rule of equity and not the rule of law was involved and under discussion, and we have been able to find no law case in which it was adjudged that merger had taken place or would take place at law though opposed to the intention of the parties as established by the evidence. There is high authority against the existence of such rigidity in the rule of merger at law as is stated in the equity cases to which we have referred. "The intention is considered in merger at law, but it is not the governing principle of the rule, as it is in equity, and the rule sometimes takes place without regard to the intention, as in the instance mentioned by Lord Coke." 4 Kent's Com. *102. So far as we can discover, there is no reference in Coke on Littleton, where the general doctrine of merger is laid down, as to the effect of intention. In *Appeal of Fink* (Pa.) 18 Atl. 621, it was held where a widow holds dower, which is a legal interest, in lands, the fee to which descends to her by the death of her son, merger of the two estates becomes a question of intent, and cannot take place against the wishes of the widow, and will not be presumed against her interest. To the same effect is *McLeery v. McLeery* (Me.) 20 Am. Rep. 683, where it is said the tendency in the courts has been to admit and apply the same principle in law and in equity. It is true, in *Youmans v. Wagner & Co.*, 30 S. C. 302, 9 S. E. 106, 3 L. R. A. 447, it was held that the widow's dower was merged when she acquired the fee, but there was no proof of a contrary intention, and no reference to the effect of intention. In *Flanigan v. Sable* (Minn.) 46 N. W. 854, the action was on promissory notes, and on the question of merger the court says:

"The distinction in practice between law and equity having been abolished, and both legal and equitable remedies being now administered by the same court, and in the same action, there is no reason why the rule at law, which was merely technical, should obtain in any case; but the equity rule should always be applied, regardless of the form of action." It is said in 20 Am. & En. Ency. 590: "This distinction appears to be of waning importance, as now in the main the equitable doctrines of merger have superseded the legal doctrines even in courts of law." *Ib.*, 591 and 595; note to *Jones v. Morey*, 3 *Lead. Cases Amer. Law Real Property*, 236.

From the inception of the rule that merger would take place and the contingent remainder thereby defeated when the owner of the fee acquired the preceding particular estate, an exception was allowed when the will itself gave the particular estate and the fee to the same person, for the reason that to apply the rule in that case would defeat the intention of the testator. *Fearne on Remainders*, 340-344; 2 *Wash. on Real Prop.* 638, 639. The same exception was applied to a deed to avoid defeating the intention of the grantor in *Burton v. Barclay*, 7 *Bing.* 745, 20 *E. C. L.* 315. Since the law holds it to be practically possible for one person to be the owner of a separate life estate and of the fee at the same time, though this is technically impossible, in order to save the contingent remainder and thus give effect to the intention of the testator or grantor, as expressed in the will or the deed, it would be difficult to find any sound reason against giving a like effect to the common intention of the separate owners of the life estate and of the fee simple, when the owner of the fee acquires the life estate. The whole doctrine of merger is founded on the reasoning that it is technically impossible for a man to hold a valid charge on property which he himself owns, or a life estate in lands to which he has a fee simple title. If the technical argument may be overcome for the sake of the intention in one case, it would be difficult to find just reason to disregard the intention in the other. To do so without reason would be a reproach to the administration of justice. Obviously nothing but precedent from which there is no escape would justify the establishment of one rule as to merger as equitable and another as legal. The tendency of the law is to conform to equity. "Since the doctrines of equity began to react upon the law, and especially since the impulse given by the brilliant career of Lord Mansfield, the common-law courts have consciously adopted and applied, as far as possible, purely equitable notions—not so much the technical equity of the court of chancery, but the principles of natural justice—in their decision of new cases, and in the development of the law, until a large part of its rules are as truly equitable and righteous in their nature

as those administered by the chancellor." 1 *Pomeroy's Eq. Jurisp.* § 69.

We conclude there is no controlling authority that the intention is not to be regarded in an issue of law or as to legal estates, but, on the contrary, the tendency of modern authority is to regard the intention controlling at law as well as in equity. There is certainly no reason to be found for any distinction. It is not necessary in this case to decide whether "in law" the intention against merger is to be implied from the fact that it would be contrary to the interest of the party in whom two estates are united for one to be merged in the other, for, assuming that the burden is on the plaintiffs to affirmatively prove the intention against it, we think such intention is clearly established by the evidence, and nothing was offered to disprove it.

No deed from Mrs. McCreary to Morris Hunter was offered in evidence; defendant's claim that he acquired the life estate of Mrs. McCreary being based entirely on proof of possession. Mr. Peter A. Brunson, a witness of the highest respectability, testified that Morris Hunter was in possession of the land in 1835 claiming it as his own. It is impossible, however, that he was making any such claim against Mrs. McCreary at that time, for he writes to her on February 20, 1836, about the land, referring to it as "your land." In addition to this, the will directed him and the other executors to "retain and manage" the land for Mrs. McCreary, then Miss Coleman, until "she arrives at the age of twenty-one years or marriage," and there was no proof of any notice to her of adverse holding. *Floyd v. Mintsey*, 7 *Rich. Law*, 181. When Hunter went into possession, therefore, in 1835, he held it for Mrs. McCreary, and his subsequent holding would be regarded permissive without proof to the contrary. The witnesses, Jas. G. Hutchinson and Albert Sawyer, say they knew of his possession, but testify nothing of the claim under which he held. The defendant's claim of adverse possession by Morris Hunter against Mrs. McCreary therefore rests on the evidence of Henry Perkins and H. L. Poston, and they cannot take the benefit of this evidence without its qualification. Both these witnesses say Hunter was in possession claiming only the life interest of Mrs. McCreary, saying the "heirs were out west," clearly referring to the children of Mrs. McCreary, plaintiffs in this action. The proof was plenary and undisputed of declarations to the same effect made by Thos. P. Lide, who was afterwards in possession under a sheriff's deed purporting to convey the interest of Hunter; and as late as 1885 the defendant A. C. Coggeshall wrote Mrs. McCreary, saying: "I own a part of your lifetime interest in a tract of land in this county, which was sold to Mr. Thos. P. Lide in 1858 by the sheriff to satisfy a claim of Mr.

Hopkins P. Charles against Maurice W. Hunter, Esq. I would like to either buy the interest of your heirs or sell them mine. * * * I would like for them to make me an offer to either buy or sell." Even if there had been testimony which left something to go to the jury as to the intention of Morris Hunter, this could not help defendants, because the claim of title in him acquired by possession adverse to Mrs. McCreary is without support, and therefore the life estate did not merge in the fee while he held the fee. His possession could not have begun to be adverse until after his letter to Mrs. McCreary, dated February 20, 1836, in which he acknowledges her title and right. Before this date, on December 30, 1835, Mrs. McCreary, née Coleman, was married and remained under the disability of coverture until 1861, four years after the death of Morris Hunter. The law will not presume a deed from her while under this disability. 2 Wash. 316. Nor could title be acquired against her by adverse possession. *Jones v. Reeves*, 6 Rich. Law, 132. If Thos. P. Lide acquired the fee by his purchase of Morris Hunter's interest at sheriff's sale, and he and his successors in possession acquired the life estate of Mrs. McCreary by adverse possession or presumption of a deed from her, this possession was accompanied and qualified by the statement that the contingent remainder of the plaintiffs was unclaimed and unaffected. If Hunter or any of his successors who had acquired his fee in the land had claimed under a deed from Mrs. McCreary, expressly stipulating the contingent remainder should not be destroyed by its execution, this beyond doubt would be an expression of intention against merger, because by merger the remainder would necessarily have been destroyed; and, when the claim to the life estate is based on adverse possession accompanied by a declaration that the contingent remainder was unaffected, the result cannot be different.

The charge that merger did not take place and the contingent remainder was not defeated, was right, not for the reason stated by the circuit judge, but because it was the understanding and intention of all parties concerned that there was no merger, and that the contingent remaindermen should have the land upon the death of the life tenant. Before ending the discussion of this point it may be well to say that if any of the grantees claiming under Morris W. Hunter had acquired the land without knowledge of the intention that there should be no merger, and relying upon the rule that ordinarily in such conditions the life estate is merged and the contingent remainder destroyed, a very different question would have been presented.

3. The defendants objected to the introduction of a letter from Morris W. Hunter to Mary A. McCreary, dated 20th February, 1836, offered as an admission by him that he

had not acquired her life estate, on the ground that the genuineness was not proved. The letter was an ancient document and required no proof. 1 Elliott on Evidence, § 421. It was found among the papers of Mrs. McCreary, the addressee, nearly 70 years after it was written, and to solve any doubt of its genuineness it was competent to introduce for the purpose of comparison the records of the ordinary's office presumably written by Hunter, the incumbent of that office. It is said in *Cantey v. Platt*, 2 McCord, 261: "When a writing is offered in evidence, so antiquated as to render it difficult, if not impossible, to produce a witness who had ever seen the person write, whose signature is attached to the writing, justice would be defeated if a comparison of handwriting were not permitted. In the case of *Allesbrook v. Roach*, 1 Esp. Rep. 351, the jury were allowed to examine papers admitted to be the party's handwriting to compare them with the writing in question, and to draw their own conclusions. And in the case of *Brumand Rowlins*, 7 East, 232, the signature in an entry made by a person long since dead was allowed to be compared with another signature of the same person in a deed of settlement. So, also, where a parson's books were produced to prove a modus, the parson having been long dead, a witness who had examined the parish books, in which the same parson's name was written, was permitted to swear to the similitude of the handwriting. Bull, N. P. 236."

4. Objection was made also to the introduction of the record of a deed from Morris Hunter to Thomas Hunter, dated February 18, 1820, purporting to be probated before "George Bruce, U. Q.," on the ground that the letters "U. Q." did not indicate the official designation of any officer authorized at that time to take a probate. The statute of 1804 (5 St. at Large, p. 479) enacted: "Clerks of the several courts of record of this state * * * shall be and they are hereby declared to be ex officio justices of the quorum." The letters here used no doubt signified "unum quorum." The probate of deeds taken not long before and just after the execution of this deed purport to have been made before "George Bruce, Clerk of the Court and one of the Quorum ex officio." Aside from any proof on the subject, the court of common pleas could take judicial notice that George Bruce was its clerk, and ex officio justice of the quorum. A justice of the quorum was a magistrate and therefore authorized to take probates under the act of 1788 (7 St. at Large, p. 247). The omission of his official title did not affect the validity of the probate. *Bank v. McMahon*, 37 S. C. 309, 16 S. R. 31.

5. The letter of A. C. Coggeshall to the life tenant, taken in connection with the several deeds, the parol evidence of successive pos-

sessions, and the admissions of those who successively held the land, was certainly evidence sufficient to justify the circuit judge in refusing to grant a motion for nonsuit made on the ground of a total failure to prove the locus in quo.

6. The motion for a new trial on "the ground that the verdict of the jury was against W. D. Coggeshall as well as A. C. Coggeshall, notwithstanding the plaintiffs proved that the said W. D. Coggeshall derived his title from one Thomas Rogers, a different source of title altogether from the title of A. C. Coggeshall, which might have superior to the title of Mary Ann Coleman or these plaintiffs, and in no way connected therewith," was properly refused. There was evidence that Thomas Hunter and those who claimed under his will, subject to the rights of the plaintiffs, were in possession of the land for a much longer period than was necessary to establish the presumption of a good title against all the world. The right of the plaintiffs to recover possession against A. C. Coggeshall, the last of these successive holders under the will, necessarily embraced the right to recover against W. D. Coggeshall because any independent title he or his grantors may have held was acquired by the life tenant and those who held under her by the long stretch of successive possessions adverse to all the world except the plaintiffs, the contingent remaindermen.

The sixth exception was abandoned, and as to it no opinion is expressed.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 520)

ROBERTS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. March 10, 1906.)

1. TELEGRAPHS—DELAY IN DELIVERY—LIABILITIES.

Where a telegram is received outside of office hours by an operator who happens to be in the office, which announces the serious illness of a relative, and death occurs before succeeding office hours, the telegraph company is not liable for mental anguish caused by not being with deceased before his death.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 33.]

2. SAME—NONSUIT.

Where an action against a telegraph company for delay in delivering telegram alleged both negligence and willfulness, and there was no evidence to support the charge of willfulness, a nonsuit may be granted as to that cause of action, leaving the question of negligence for the jury.

3. SAME—INSTRUCTIONS.

In an action for delay in delivering a telegram, whereby plaintiff was not able to attend the funeral of her sister and plaintiff testified as to her desire to attend such funeral, there could be no doubt as to the mental anguish, and therefore a failure to charge that the jury should consider whether mental anguish would result under the circumstances to a person of

ordinary strength and firmness, and not what might occur to an individual of peculiar temperament or fanciful imagination, was not error.

4. APPEAL—HARMLESS ERROR.

The admission of testimony which, though irrelevant and hearsay, can have no possible bearing on the issues, is harmless error.

5. TELEGRAPHS—DELAY IN DELIVERY—MENTAL ANGUISH.

In an action for delay in delivering a telegram, where the only mental anguish plaintiff could have suffered was from her inability to attend the funeral, the jury should be instructed that, if she had no intent to attend it, she could not recover.

Appeal from Common Pleas Circuit Court of Cherokee County. Frank B. Gary, Special Judge.

Action by Jennie Roberts against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. H. Ferrons, Evans & Finley, and J. O. Jeffries, for appellant. Butler & Osborne and E. A. Trescot, for respondent.

WOODS, J. The plaintiff recovered judgment for mental anguish arising from the failure of the defendant to deliver to her promptly the following telegram: "Toccoa, Ga., 1—1—24. To Mrs. Jennie Roberts, Blacksburg, S. C. Fannie will not live but a few hours. W. E. Acree."

1. The plaintiff lived in Blacksburg, S. C., and the telegram referred to the illness of her sister at Toccoa, Ga. The defendant's Sunday office hours at Blacksburg were from 8 to 10 a. m. and from 4 to 6 p. m., but the operator was also railroad agent, and, being at the office as railroad agent, he received this message at 2 o'clock p. m. on Sunday, January 24, 1904. It was not actually delivered until about 8 o'clock p. m. on Monday. The suffering alleged was for deprivation of the privilege, of which plaintiff would have availed herself, of being with her sister "before and at her death, and of attending her burial and funeral, and of being with her family in the bereavement and during said funeral." The last train on which it would have been possible for plaintiff to reach her sister's bedside before her death, which occurred at 10 o'clock p. m. on Sunday, passed Blacksburg at 2:30 p. m. The defendant owed the plaintiff no duty to deliver before 4 o'clock its regular afternoon office hour. *Bonner v. Tel. Co.*, 71 S. C. 303, 51 S. E. 117. It therefore was not responsible for the plaintiff's failure to be with her sister at and before her death, and the claim as to that alleged wrong need receive no further notice.

"2. The operator testified he sent a messenger to deliver the telegram as soon as it was received. The messenger's evidence was that he could get no answer to repeated knocks at plaintiff's front door, and the effort was made to prove she was away from home on Sunday. The plaintiff, on the other hand, testified she was at home and

knew of no effort to find her. There was some evidence that the telegram was again sent to plaintiff's residence at 3 o'clock the next day, and not delivered because of her absence. The circuit judge granted a nonsuit as to the cause of action for willful or wanton wrong, but refused it as to the cause of action for negligence. The appellant's position that there was only one cause of action, though both negligence and willfulness and wantonness were alleged, cannot be sustained, for it has been finally settled otherwise. When there is an entire failure of proof to support the cause of action for punitive damages, nonsuit should be granted as to that cause of action, leaving the cause of action for negligence to be submitted to the jury. *Machen v. Tel. Co.*, 72 S. C. 256, 51 S. E. 697.

There was certainly evidence to go to the jury tending to prove that the plaintiff could and would have attended the funeral services of her sister, which were held about 4 o'clock Monday afternoon, if the telegram had been promptly delivered, and the defendant's motion for nonsuit as to actual damages was properly refused. It is true she did not go when she did receive the message; but it was for the jury to say whether, from its contents and the time which had elapsed, she then had good reason to think she would be too late. It is sometimes difficult to draw the line between a scintilla of evidence and no evidence on the subject of willfulness, wantonness, or recklessness. It was held in *Young v. Telephone Co.*, 65 S. C. 93, 43 S. E. 448, *Machen v. Telegraph Co.*, supra, and *Willis v. Telegraph Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, that long delay, in the absence of effort to deliver, is evidence to go to the jury on the question of punitive damages. But here there was undisputed evidence of some effort to deliver. It may be the effort was not sufficiently vigorous to repel the imputation of negligence; but, on the whole, we think the circuit judge was right in holding the mere delay was not sufficient to go to the jury on the issue of willfulness, wantonness, or recklessness, in view of the evidence of efforts to deliver. The exceptions of both plaintiff and defendant as to the nonsuit are overruled.

The defendant complains that the circuit judge, after granting the nonsuit as to punitive damages, charged the jury: "If the jury is satisfied that the message sued upon was kept by the defendant's agent for several hours, and that he made no effort to promptly deliver the same, such facts may be considered by the jury on the question of reckless disregard of the rights of the plaintiff by the defendant." This being a mere inadvertence, immediately corrected by the court, the exception requires no further notice.

3. The fourth, sixth, and seventh exceptions involve the same legal question, which

will be made clear by reading the seventh, which is as follows: "Because his honor erred in modifying defendant's first request to charge, which was as follows: 'I charge you that, after hearing all the facts, as men of common sense, with knowledge and experience in ordinary human sensibilities, you shall determine whether any mental anguish or suffering would result under all the circumstances to a person of ordinary reason, strength, and firmness, and not what might occur to an individual of peculiar temperament or fanciful imagination.' His honor, in lieu of the said request, charged the following: 'I charge you, after hearing all the facts, as men of common sense, with knowledge and experience in ordinary human sensibilities, you should determine whether any mental anguish did result to plaintiff from the negligence of the defendant.' The error complained of being that in modifying said request his honor took from the jury their right to determine: (a) Whether or not, under such conditions, a person of ordinary reason, strength, and firmness would have suffered any mental anguish whatever; (b) whether or not the plaintiff was a person of ordinary reason, strength, and firmness; or (c) an individual of peculiar temperament or fanciful imagination."

The plaintiff in suits for mental anguish may testify to the fact that he suffered, after the circumstances from which the suffering might arise have been brought out; but he cannot testify as to his peculiar apprehensions, fears, and conclusions, because these might be due to individual temperament. In such cases it is generally proper to instruct the jury that, to warrant a verdict for damages, they must find not only that the plaintiff suffered mental anguish from defendant's breach of duty as a proximate cause, but that such breach of duty in their judgment would have brought suffering to a reasonable human being in the situation of plaintiff. *Willis v. Telegraph Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828. While the request was in accord with this view of the law, under the facts of this case, the modification complained of was not error. There was no evidence here of any conclusions or inferences or apprehensions which might have been peculiar to the plaintiff, and on account of which the jury might have awarded damages. The plaintiff stood before the court as an ordinary human being, who wished to attend the funeral of her sister, and who had testified she had suffered in mind, as surely every normal person would, because she had been deprived of the privilege by the negligence of the defendant. There could not be the least doubt of the mental anguish or of its nature. If the plaintiff's testimony as to her desire to attend the funeral was true, and there was, therefore, no question before the jury as to individual temperament or peculiar apprehension. Hence the omission

to charge on this subject was not reversible error.

4. It has not been suggested, and the court is unable to perceive, how a conversation over the telephone between the witness Freeman and some one in the office of the telegraph company could have any possible bearing on the issues before the court, and, even if the testimony as to that conversation was irrelevant and hearsay, it was certainly harmless.

5. The eighth exception will have to be sustained. The circuit judge refused the following request: "If the jury believed that the plaintiff, Mrs. Roberts, had no intention of attending the funeral of her sister, had she been informed in time to have so done, then there can be no injury, and their verdict should be for the defendant." As we have seen, it would have been impossible for the plaintiff to reach her sister before her death, even if the telegram had been promptly delivered. Hence, the only mental anguish for which the defendant could possibly be responsible was that which grew out of the plaintiff being deprived of the privilege of attending the funeral, and if she had no intention of exercising that privilege there could be no damage. *Hughes v. Tel. Co.*, 72 S. C. 518, 52 S. E. 107.

The judgment of this court is that the judgment of the circuit court be reversed, and a new trial ordered.

(73 S. C. 508)

MONTGOMERY v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina. March 16, 1906.)

1. CORPORATIONS—CORPORATE EXISTENCE—GENERAL DENIAL.

Where a complaint alleges the corporate capacity of defendant, a general denial does not put in issue such capacity.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2074.]

2. EVIDENCE—CERTIFIED COPIES.

Where there has been no notice to produce the original charter of a railroad company, a certified copy of the record of the Secretary of State's office of a charter of a company formed by consolidation of original railroad companies is inadmissible; there being no provision of law requiring such charter to be recorded.

3. DAMAGES—EVIDENCE—EARNING CAPACITY.

In an action to recover for personal injuries evidence of plaintiff's earning capacity at the time of the accident may be shown by evidence of an offer of wages made at about that time.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 490.]

4. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Assumption of risk by employe must be pleaded to be available.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Master and Servant, § 868.]

5. APPEAL—REVIEW—CONSTITUTIONAL QUESTIONS.

Where, in an action for personal injuries, the defense of assumption of risk is not pleaded,

and the question does not fairly arise on the record the Supreme Court will not consider whether Const. 1895, art. 9, § 15, relating to assumption of risk by railroad employes is violative of the fourteenth amendment of the United States Constitution.

6. TRIAL—INSTRUCTIONS.

An instruction that preponderance of evidence is that which carries conviction with it, depends on the character of the witness, his intelligence, his opportunity for knowledge, and not necessarily on the number of witnesses, is not a charge on the facts.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 455.]

7. SAME—CHARGE ON FACTS.

An instruction in an action for personal injuries that if the jury find that plaintiff has suffered mental anguish in the view of the dark days to come to his wife and little child, such suffering cannot be considered, is not erroneous as a charge on the facts as intimating a belief that plaintiff's injuries are permanent.

Appeal from Common Pleas Circuit Court of Kershaw County; Prince, Judge.

Action by W. C. Montgomery against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Stevenson & Matheson and Edward McIver, for appellant. Clarke & Von Tresckow, for respondent.

JONES, J. In this action plaintiff sued for damages for personal injuries and recovered judgment, from which defendant appeals on exceptions presenting the questions which we now consider.

1. The complaint alleged that the defendant Seaboard Air Line Railway is a corporation duly created and existing under the laws of this state. The defendant appeared and answered to the merits by a general denial. Plaintiff having closed his case, without offering any proof of the defendant's incorporation, a motion for nonsuit was made on that ground, and was refused on the ground that a general denial does not put in issue the corporate existence of the defendant. The first, second and eleventh exceptions challenge this ruling. The ruling was correct. A general denial does not put in issue the corporate capacity of a plaintiff suing a corporation. *Commercial Insurance Co. v. Turner*, 8 S. C. 107; *Steamship Co. v. Rodgers*, 21 S. C. 33; *Plametto Lumber Co. v. Risley*, 25 S. C. 309. For as great if not stronger reason, a general denial by a defendant sued as a corporation and answering to the merits as such, without specific denial of corporate capacity, must be regarded as a substantial admission of the character in which it was sued, and as not putting defendant's existence as a corporation in issue. *Rembert v. Railway Co.*, 31 S. C. 313, 9 S. E. 968; 5 Ency. Pl. & Pr. 79; 10 Cyc. 1347, 1354.

2. After refusal of the motion for nonsuit, the plaintiff, over defendant's objection, was allowed to introduce in evidence a copy of the charter of defendant company certified by the Secretary of State under the seal of the state. Appellant's third and fourth exceptions

question this ruling. The certified copy introduced purports to be a charter issued to a new corporation under the name of the Seaboard Air Line Railway, formed by the merger and consolidation of a number of corporations therein named pursuant to statute, now appearing as section 2050 et seq., Civ. Code 1902. In reference to charters granted by the Secretary of State creating original railway corporations we find in section 1921, Civ. Code 1902, that such charters are required to be recorded by the Secretary of State in books kept for that purpose. Therefore a certified copy of such record by the Secretary of State would be admissible in evidence under section 2388, which provides: "Attested copies of all records, signed by the keeper of such records respectively, shall be deemed and allowed as good evidence in any of the courts of this state of the original could or might have been if produced to the said courts." But with reference to charters of consolidated corporations, under sections 2050 et seq., while a charter is required to be issued, we do not find any requirements that such charter shall be recorded, although doubtless as a matter of fact they are customarily recorded. Section 2051 provides that the agreement of consolidation with certificate of its adoption by the secretary of the respective companies shall be filed in the office of the Secretary of State, and that a copy of said agreement and act of consolidation duly certified by the Secretary of State under seal shall be evidence of the existence of said new corporation. There seems to be little ground for having one rule of evidence applying to the introduction of certified copies of the charters of original railway corporations and another as applying to the charter of a new corporation formed by the consolidation of original railway corporations, but, in the absence of a statute authorizing it, we must hold that the copy of the charter was not admissible, there being no notice to adverse party to produce the original. But, whether the circuit court was in error or not, it was wholly immaterial and harmless in view of the conclusion reached on the first proposition above, that the incorporation of the defendant was not in issue under the pleadings.

3. The tenth exception alleges error in admitting the plaintiff's testimony that he had been offered a job as section foreman at \$43.81 a month, the same being irrelevant and not shown to be an offer made by one with authority to contract for the company. The plaintiff was injured in the employ of defendant as a section hand earning \$21.60 per month. The testimony was relevant as tending to show plaintiff's earning capacity at the time he sustained the injury. Impairment of earning capacity is an element of damage involved in personal injury cases. *Bussey v. Railway*, 52 S. C. 438, 30 S. E. 477; 3 Elliott on Evidence, § 1984. Whether the

offer of a better salary was bona fide and by one having authority, was not presented as an objection to the testimony before the circuit court, and cannot be urged for the first time in this court.

4. The eighth exception raises the question, whether the court erred in instructing the jury that the assumption of risk by the party injured is an affirmative defense and must be pleaded. There was no error in this. While such was the view of the writer as expressed in *Barksdale v. Railway Co.*, 66 S. C. 217, 44 S. E. 743, we have not found an express declaration to that effect, or to the contrary, in any decision of this court, but on principles of correct pleading such should be the rule. First, let us understand the nature of such defense. In the case of *Bodle v. Railway*, 61 S. C. 468, 478, 39 S. E. 715, 718, the court said: "The doctrine of assumption of risk by the employé is distinct from the doctrine of contributory negligence, although there may arise a certain condition of facts capable of supporting either inference. This has given rise to a great deal of confusion of statement when dealing with these defenses. 'Assumption of risk' rests in the law of contract and involves an implied agreement by the employé to assume the risks ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to hold the employer for a breach of duty in this regard. *Hooper v. R. R.*, 21 S. C. 547, 53 Am. Rep. 691. The law as to waiver applies because the relation between the employer and employé is contractual and waiver is the voluntary relinquishment of a known right. By the contract the employer and employé each assume certain risks, but, as in all contracts, either party may waive his right to insist upon strict performance of the other's contractual duty. When, therefore, a case arises in which it is shown (*upon proper pleading*) (*italics ours*) that the employé has assumed the risk from which the injury arose, or, what is the same thing in effect, has waived his right to hold the employer responsible for risk, the employé's action is defeated because of his agreement and not because of negligence. 'Contributory negligence,' on the other hand, rests in the law of torts as applied to negligence, and when such defense is established the plaintiff's action is defeated, not because of any agreement expressed or implied, but because his own misconduct was a proximate cause of the injury." In that case both assumption of risk and contributory negligence were pleaded, hence the court considered the question of assumption of risk upon proper pleading. In the *Barksdale* case, *supra*, there was a plea of contributory negligence, and the writer of this opinion took the view that, because of the distinction between the defenses of contributory negligence and assumption of risk, and the absence of any plea of assumption of risk, that the

court should not consider any exceptions involving that question. Mr. Justice Woods, in whose views Chief Justice Pope concurred, while recognizing the broad distinction between the two defenses outlined in *Bodie's Case*, at page 211 of 68 S. C., at page 745 of 44 S. E., said: "The defenses of assumption of risk and contributory negligence are so similar that they may fade into each other. The broad line of the difference is to be kept in view, but refined distinction between them do not advance the administration of the law. Nearly every case of contributory negligence on the part of an employé involves in a general sense some assumption of risk, because in order to be guilty of contributory negligence there must be the risk of apparent danger. When a servant risks this danger in the discharge of duty imposed on him in the course of usual duty, this would be, in an exact sense, a case of assumption of risk. But if he improperly risks the danger, which becomes the proximate cause of the injury, in doing that which is not imposed on him in the course of his usual duty, it would be contributory negligence." Then, after stating circumstances, Mr. Justice Woods said: "For this reason I venture to think the defense of contributory negligence was the appropriate one under which this issue should have been submitted to the jury." The effect of this view is to assimilate the defenses of contributory negligence and assumption of risk, especially as to that portion of the doctrine of assumption of risk which relates to an employé's remaining in the service of the master and using defective and unsafe machinery, after knowledge of the danger and without protest to the master. Now, since it is an established rule in this state that contributory negligence is an affirmative defense, and must be pleaded (*Wilson v. Railway Co.*, 51 S. C. 95, 28 S. E. 91; *Martin v. Railway Co.*, 51 S. C. 153, 28 S. E. 303) it must follow, especially from the last-mentioned view, that there must at least be a plea of contributory negligence to support a defense founded on that portion of the doctrine of assumption of risk which so closely resembles contributory negligence. Harmony and consistency in rules of pleading would certainly be promoted by adopting the same rule of pleading in both defenses.

We wish now to show that, whether we preserve a distinct cleavage between these two defenses or permit assimilation in part, correct rules of pleading require that assumption of risk should be regarded as an affirmative defense, and must be pleaded in order to be available. Section 170 of the Code of Civil Procedure 1902, provides: "The answer of the defendant must contain: (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defense or counterclaim, in ordinary

and concise language, without repetition." It thus appears that "new matter constituting a defense" must be pleaded. Bliss, Code Pleading, § 327, states: "Under a denial the defendant should be permitted to show no fact that does not go directly to disprove the fact denied. Evidence of facts which admit the act charged, but which avoid its force or effect, or which discharge the obligation, is inadmissible; but, on the other hand, facts may be proved, although apparently new matter, which instead of confessing or avoiding, tend to disprove those alleged by the plaintiff. Such facts support a denial. The plaintiff's allegations cannot be true because of certain other facts which are inconsistent with them." Mr. Pomeroy, in his *Remedies and Remedial Rights*, § 691, says: "The general denial puts in issue all the material averments of the complaint or petition, and permits the defendant to prove any and all facts which tend to negative those averments, or some one or more of them. Whatever fact, if proved, would not thus tend to contradict some allegation of the plaintiff's first pleading, but would tend to establish some circumstance, transaction, or conclusion of fact not inconsistent with the truth of those allegations, is new matter. It is said to be 'new' because it is not embraced within the statement of facts made by the plaintiff; it exists outside of the narrative which he has given; and proving it to be true does not disprove a single averment of fact in the complaint or petition, but merely prevents or destroys the legal conclusion as to the plaintiff's rights and the defendant's duties which would otherwise have resulted from all those averments admitted or proved to be true. Such is the nature of the new matter which cannot be presented by means of a denial, but must be specially pleaded, so that the plaintiff may be informed of its existence and of the use to be made of it by the defendant. Whether it is 'new' in the sense described must of necessity depend, and depend alone, upon the nature, extent, and variety of the material allegations which the plaintiff inserts in his pleading. * * *" As stated by this author in section 692 (new matter), "confesses and avoids all the material allegations of the complaint or petition; that is, it admits all the material facts averred therein, and avoids their legal result by means of the additional facts which are relied upon as constituting the defense." The plaintiff may, however, so frame his complaint that a general denial will admit proof of facts which would otherwise be new matter to be pleaded, as in *McElwee v. Hutchinson*, 10 S. C. 438; *Long v. Railway*, 50 S. C. 49, 27 S. E. 531; *Latimer v. Cotton Mills*, 66 S. C. 139, 44 S. E. 559; *Hutchings v. Manufacturing Co.*, 68 S. C. 514, 47 S. E. 710—wherein such affirmative defenses as payment, mitigation of damages, and contributory negligence were permitted on a general denial because of the particular allegations in the complaint which

would necessarily become issuable by denial. Our cases further illustrate the effect of general denial in personal injury cases by holding that such a plea covers a defense that negligence of plaintiff, or some third person, was the sole cause of the plaintiff's injury, on the ground that such fact negatives the allegation that defendant's negligence was the cause, and does not admit defendant's negligence, as does the plea of contributory negligence. *Wilson v. Railway*, 51 S. C. 95, 28 S. E. 91; *Kennedy v. Railway Co.*, 59 S. C. 543, 38 S. E. 169. But all the cases throughout limit the effect of a general denial to a mere negation of the material facts stated in the complaint.

Applying the foregoing elementary principles of pleading to the case in hand, it is clear that assumption of risk is new matter in the nature of confession and avoidance, and must be pleaded. The complaint alleges (1) the incorporation of defendant and its operation of the railroad whereon the injury occurred; (2) the employment of plaintiff by defendant as a section hand; (3) the duty of the plaintiff to perform such service and to assist in the operation of lever car; (4) his action in reference thereto under the order of the section master; (5) plaintiff's duty to obey the section master and the injury to plaintiff while obeying said order caused by the unsafe condition of the lever car, with its loose handle-bar and wheels having too much play so as to jerk and jump over the rough and uneven track of defendant, which caused plaintiff to be hurled violently in front of the car so that the left hand wheels thereof passed over his body, to his permanent injury; (6) the negligence and willfulness of the defendant in the premises; (7) the consequent suffering, trouble, and expense, and permanent injury.

A general denial necessarily put in issue the fact that plaintiff sustained any contractual relation with defendant, and that he suffered any injury while in the service of the defendant. Such defense is wholly inconsistent with the theory of assumption of risk, which involves an admission of the contractual relation of master and servant and an assertion that the injury which happened was the result of the risks impliedly assumed by the servant in his contract, or that the servant has by his conduct waived his right to call upon the master for compensation for injury resulting from the master's negligence. It is only plausible to say that plaintiff was bound to prove the contractual relation and the risk which resulted in his injury, and that he thereby in establishing his own case makes available to defendant any legal result or implication of law arising from such facts. This is true only when the plaintiff, in making out his case, must allege and prove facts from which the legal result claimed may follow. The plaintiff did not allege, nor was it necessary to allege, and prove that he had no knowledge, actual or constructive, of

the defective and unsafe condition of the machinery such as should have caused him to refuse to obey the order of the section master and quit the service, or take the risk upon himself. Such facts are not embraced within the statement of facts made in the complaint, are outside of plaintiff's narrative, are additional facts which to be available must be pleaded as new matter constituting a defense in avoidance of the case made by plaintiff. While a plea of contributory negligence involves an admission of the alleged negligence of defendant and avoids it by new matter, a plea of assumption of risk involves an admission of the alleged contractual relation of master and servant between the plaintiff and defendant, and injury as a result of risks incurred by plaintiff, but avoids liability by new matter showing that the injury resulted from risks voluntarily assumed by plaintiff. Therefore, any reason which supports contributory negligence as an affirmative defense to be pleaded, will also support assumption of risk as an affirmative defense to be pleaded, and every suggestion which may be urged to show that "assumption of risk" may be shown under a general denial may with equal force be urged to overthrow the well-settled rule in this state that a general denial will not support the defense of contributory negligence. We have perhaps considered this matter of pleading at too great length, but in view of the late expression of the court in *Chapling v. Toxaway Mills*, 70 S. C. 473, 50 S. E. 186, that might seem to imply a doubt on this subject, although in that case assumption of risk was pleaded, we have thought it best that the correct rule be stated and set at rest.

5. The foregoing conclusion renders it unnecessary to consider questions sought to be raised by the fifth, sixth, and seventh exceptions, which complain of error in refusing to charge certain requests of defendant touching the matter of assumption of risk. In the absence of any such plea, it was not error to refuse requests on that subject.

6. For the same reason we overrule the fourteenth exception, which alleges error in the charge of the court that "under article 9, § 15, of the Constitution, the doctrine of assumption of risk has no application to this case." Under this and other exceptions it was contended that article 9, § 15, of the Constitution, violated the fourteenth amendment to the federal Constitution in denying to railroad companies the equal protection of the law, in abridging their right to contract with employes with reference to assumption of risk by them, and in discriminating between conductors and engineers, and other employes. In the absence of any defense involving assumption of risk, defendant could not be prejudiced by any charge that such defense was inapplicable to this case under our Constitution. As it is not necessary to the disposition of this appeal to consider the validity of this provision of the Constitution,

and no such question fairly arises on the record, it is proper for the court to decline to go into that subject.

7. After stating the issues the court charged the jury, in part, as follows: "And it is this denial on the part of the defendant that makes it necessary for plaintiff, in order to recover, to establish the allegations of his complaint by the preponderance of the testimony, the weight of the evidence, it would be better termed perhaps; that means not necessarily the number of witnesses; one man's testimony might outweigh the declaration of a thousand; it depends upon the character of the witness, his intelligence, his opportunity for knowing, his reputation for truthfulness, his demeanor on the stand, all of those things that enter into a man's declaration which carry on their face the stamp of either truth or inveracity. It is how much you believe, what you believe, what is credible, what, squared with the straight-edge of common sense as applied to the experience of man, what is reasonable. Those are the things that help the jury to determine the weight of the testimony, not the number. You know men whose veracity, whose statements you would accept unquestionably against the statements of men whose character for veracity was bad, or whose opportunity for knowing was not good. So the weight of evidence is not to be governed by numbers. It is what you believe, what is credible, what is reasonable." It is contended by appellant's ninth and twelfth exceptions that this charge violated the Constitution, prohibiting judges from charging juries in respect to matters of fact, in invading the province of the jury by giving them rules for weighing the testimony in a case where there was conflict of testimony. We do not think the charge is subject to the criticism made. It does not state the testimony in whole or in part, does not intimate to the jury the judge's impression of the testimony, but is a clear and helpful statement of the meaning of the law when it declares that the plaintiff must recover by the preponderance of the evidence, or by the greater weight of the evidence.

8. The thirteenth exception alleges that the following charge was also a charge on the facts: "Now, in this case, if you should find that the plaintiff has suffered mental anguish because of the contemplation of the dark days to come in the future for his wife and little child, such suffering cannot enter into your judgment in this case, cannot enter into the amount of the verdict, cannot affect the amount of the verdict." It is contended that this charge was an instruction by the court that the prospect ahead of plaintiff's wife and child was dark and tended to express an opinion on a controverted point, namely: whether plaintiff's injury was permanent. We do not so understand the meaning or effect of this charge. In that portion of the charge from which this sentence is taken the

court was instructing the jury that plaintiff could not recover for mental suffering disconnected with physical injury, and was cautioning the jury not to take into consideration such mental suffering, if it existed.

The judgment of the circuit court is affirmed.

This case has been carried to the United States Supreme Court on a writ of error.

(73 S. C. 526)

JENKINS v. PENN BRIDGE CO.

(Supreme Court of South Carolina. March 22, 1906.)

CORPORATIONS—SERVICE OF PROCESS.

Service on a timekeeper of a foreign corporation doing certain construction work in the state is a good service on the corporation, under Code Civ. Proc. § 155, providing that service can be made on a foreign corporation only where it has property in the state, or the cause of action arose therein, or service can be had personally upon the president, cashier, treasurer, attorney, or secretary, or any agent thereof. (By divided court.)

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by Edward K. Jenkins against the Penn Bridge Company. Motion to set aside service of summons denied, and defendant appeals. Affirmed by divided court.

James F. Duncan and Nath. B. Barnwell, for appellant. Legare & Holman, for respondent.

WOODS, J. The plaintiff, Edward N. Jenkins, seeks in this action to recover of the defendant, Penn Bridge Company, a corporation chartered under the laws of the state of Pennsylvania, the sum of \$1,051.12 damages for breach of contract. The defendant, appearing specially for that purpose, moved before Hon. R. W. Memminger, circuit judge, to set aside the service of the summons, "on the ground that the defendant is a foreign corporation, and the person upon whom personal service of the summons was made is not, and was not at the time of said service, the president, cashier, treasurer, attorney, or secretary of said company or an agent thereof." The appeal is from an order refusing the motion.

In the affidavit of service made by C. St. C. Kirk, it is stated the summons was served "by delivering to J. W. Rowley, agent of defendant, at the Navy Yard, said county, and leaving with him copies of the same at Charleston Navy Yard." In support of the motion, S. P. White, the president of the company, submitted an affidavit in which he says: "That one J. W. Rowley, upon whom service was had in the above-entitled suit, is in no sense an agent for the said defendant company; that he is an employé of said company, paid by the day, and subject to discharge at a day's notice; that he is a laborer and timekeeper for said defendant

company, with no authority whatever to contract for said company, or bind it in any manner whatsoever; that the only agent of said company having control over the work in progress as aforesaid, and with authority to bind the company in any manner in connection with the said work, is one J. T. McMahon, the general construction agent of said company, who has sole charge of the work aforesaid." The affidavit of Rowley himself as to his relation to the corporation is to the same effect. No proof of Rowley's agency was offered by the plaintiff.

In section 155 of the Code of Civil Procedure, it is provided as to the service of the summons that "such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in this state personally upon the president, cashier, treasurer, attorney, or secretary, or any agent thereof." The object of service of the summons is not only to give notice to the defendant of the pendency of a suit against him, but to bring him under the jurisdiction of the court. If, therefore, Rowley was not an agent, service upon whom would not subject the defendant to the jurisdiction of the court. The circuit judge was in error in the view which he seems to have taken that the object of the service had been accomplished when the defendant received through the service notice of the suit, and by special appearance moved to set the service aside. *Hester v. Rasin Fert. Co.*, 33 S. C. 606, 12 S. E. 563; *Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937. The circuit judge held as a matter of fact, however, that Rowley was the agent of the defendant corporation, and it seems this finding would not be subject to review by this court unless entirely unsupported by the evidence. *Hester v. Rasin Fert. Co.*, supra. The only evidence on the subject was to the effect that Rowley was a laborer and timekeeper, paid by the day and subject to discharge at a day's notice, without authority to contract or bind the company in any manner whatever, and the question of law is whether a person who sustains this relation to his employer can be regarded an agent.

An agent is generally defined as a person who acts on behalf of another person who is his principal. While in practical affairs the relation assumes so many phases, it is often quite difficult to apply the definition, it is certainly necessary to constitute agency that there should be some kind of representation of the principal by virtue of authority conferred by him. Authority to contract is sufficient to constitute agency under this statute. *Gross v. Nichols (Iowa)* 33 N. W. 653; *Berlin Bridge Co. v. Norton (N. J. Sup.)* 17 Atl. 1079; *Packet Co. v. Pikey (Ind.)* 40 N. E. 527. The claim of agency based on any other authority short of power to contract it is said by high authority has rarely been

maintained, and certainly it should be allowed with great caution. *Moore v. Freeman's Nat. Bank*, 92 N. C. 590. "Employé" is manifestly a much broader term than "agent" and it is therefore not sufficient under this statute to show that the service was made on an employé without showing that such employé was also an agent. Of all classes of employés a day laborer has the most transient and readily severed connection with the person whom he serves, and no warrant will be found either in legal precedent or the common understanding of practical men for regarding him an agent or representative. The matter is thus forcefully stated in *Mulhearn v. Press Pub. Co. (N. J. Sup.)* 20 Atl. 760: "The line between those who represent and those who do not represent a foreign corporation for the purposes of this act cannot be defined by a formula. But it was never intended that every servant who happened to do some act in this state for a foreign corporation represented the company. Service upon a carter who was sent across the ferry into this state for a load of merchandise belonging to a foreign corporation would be absurd. These persons have little, if any, more representative character than the carter." *Connecticut Mutual Life Ins. Co. v. Spratly*, *Rose's Notes*, 3 Supplement, 993; *Abbeville E. L. & P. Co. v. Western E. S. Co. (S. C.)* 85 Am. St. Rep. note 933. The work of a laborer employed as a timekeeper is purely mechanical, implying no more discretion than that of a laborer who works with his spade. In a certain sense the master is responsible for the result of every laborer's work, and as to those with whom he contracts as well as the outside world he is bound by it, but this does not make the laborer an agent of the master upon whom process can be served to bind the master as principal.

The circuit judge rests his conclusion mainly upon the authority of the case of *Abbeville E. L. & P. Co. v. Western E. S. Co.*, 61 S. C. 361, 382, 39 S. E. 559, 55 L. R. A. 146, 85 Am. St. Rep. 890; but the facts of the case are entirely different, and neither the reasoning of the court nor the principle announced furnish any ground for holding that Rowley could be regarded the agent of the defendant in this case. After discussing the leading case of *Connecticut Mutual Life Ins. Co. v. Spratly*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, referring to that case, the court says: "As we have seen above, and as is held in the case last cited, the character of the agency depends upon the inquiry whether the agent can be regarded as the representative of the corporation in respect to the transaction out of which the suit arises. The practical inquiry, therefore, is whether George F. Schminke was the representative of the defendant corporation in this state, in regard to the transaction out of which this controversy arose. This must be determined by an ex-

amination of the undisputed testimony in the case, proceeding largely, and in fact entirely, from the defendant corporation itself." The court then holds that the letters of the defendant proved conclusively that the person served was sent to Abbeville as the representative of the defendant in the very matter in dispute and out of which the action arose. Here Rowley, the person served, had no connection with defendant's business except as a mere day laborer employed as a timekeeper. He, therefore, did not represent the defendant, and was not an agent upon whom the summons could be legally served in an action against the defendant, a foreign corporation.

The objections to the validity of the service which form the basis of the other grounds of appeal were not mentioned in the notice of motion, and therefore were not considered by the circuit judge.

I think the judgment of the circuit court should be reversed.

POPE, C. J., concurs.

JONES, J. (dissenting). The judgment of the circuit court should be affirmed. That court has found as matter of fact that J. W. Rowley, upon whom service was made in this case, was an agent of the defendant foreign corporation at the time of service. This is a finding of fact in a case at law, and cannot be disturbed by this court unless it is absolutely without evidence to support it. The person making service made affidavit that the service was made upon J. W. Rowley, agent of defendant at the Navy Yard, Charleston county. It appears by the affidavits of S. P. White, president of the defendant company, and J. W. Rowley, that said Rowley was a timekeeper employed by the defendant at the Navy Yard, where defendant is doing a piece of construction work for the United States government. It is true that these affidavits of S. P. White and J. W. Rowley say that Rowley had no authority to bind the said company in any way, but this is rather a conclusion of law, dependent upon the duties of a timekeeper. It is also stated that Rowley is paid by the day and subject to discharge at a day's notice, but the question does not depend upon the length or tenure of service, but the character or nature of the service. Let us, therefore, not concentrate attention on the statement that Rowley was a laborer, but direct attention to the undisputed fact that Rowley was timekeeper for the defendant in its construction work. On this point the affidavits are singularly silent as to the nature of Rowley's duties as a timekeeper. The circuit judge was left to make his own inference from the meaning of the term. According to Webster, a timekeeper is: "(2) A person who keeps, marks, regulates, or determines the time. Specifically: (a) A person who keeps a record of the time spent by

workmen at their work." According to the Century Dictionary a timekeeper is: "(c) One who notes and records the time at which something takes place, or the time occupied in some action or operation, or the number of hours of work done by each of a number of workmen." It would seem, therefore, that a timekeeper employed by defendant in its construction work to keep the time of its employes, probably numerous, keeps a record for the defendant from which no doubt its pay rolls are made up. Does that record not bind the defendant in any way? In a dispute between the defendant and its employes as to the amount due as shown by the timekeeper's record, would not such record, in the absence of fraud or collusion, bind the defendant on the ground that in making such record the timekeeper represents the defendant? What would be the difference in principle if the bookkeeper or money keeper of the defendant had been served instead of the timekeeper? The timekeeper represents his employer or principal in his relation to the other employes with respect to this particular part of defendant's business.

This cannot be called the position of a mere laborer, and cases that might be cited to the effect that service upon a mere laborer would not be service upon an agent of a foreign corporation have no application. The test of agency is not the power to make a contract binding the employer. Such power shows agency, but agency may also be shown by the fact that a person represents the master in some one or more of his relations to others, even though he may not have power to contract. The statute makes service on "any agent" of a foreign corporation sufficient. The statute, therefore, does not require that the agent shall be general, but is complied with by a service upon an agent having limited authority to represent his principal. We do not think that it can be said that the conclusion of the circuit court is absolutely without any evidence to sustain it, and that he committed error of law in dismissing the motion of defendant to set aside the service of process in this case.

Associate Justice GARY concurring in this view, and the court being evenly divided on the question, the judgment of the circuit court stands affirmed under the Constitution.

(73 S. C. 533)

INDEPENDENT STEAM FIRE ENGINE
CO. v. RICHLAND LODGE, NO. 39,
A. F. M., et al.

(Supreme Court of South Carolina. March 23, 1906.)

1. REFERENCE—WHEN ALLOWED.

Where a motion to transfer a cause from equity calendar No. 2, on which it had been reached, to law calendar No. 1, was overruled, it remained for trial, and it was proper, on motion for reference, for the court to make such an order.

2. SAME—EQUITABLE ACTION.

Plaintiff sued to have it adjudged that defendants had forfeited all interest in certain real property which they acquired under a written contract. The answer admitted defendants' claim under the agreement, but denied forfeiture of the interest thereunder. *Held*, that the suit was of an equitable nature, and a reference to a master of the whole cause was proper.

Appeal from Common Pleas Circuit Court of Richland County; J. P. Carey, Special Judge.

Action by the Independent Steam Fire Engine Company against Richland Lodge, No. 39, A. F. M., and others. Motion to transfer the action to calendar 1 was denied, and motion of plaintiff to refer the case to the master was granted. From both orders, defendants appeal. Affirmed.

Melton & Belser and Allen J. Green, for appellants. Barron & Ray, for respondent.

POPE, C. J. The decision of this case in the first appeal herein was that the complaint stated a cause of action. 70 S. C. 572, 580, 50 S. E. 449, 501. The judgment of this court was as follows:

"This is an appeal from an order overruling a demurrer to the complaint. It will be necessary, therefore, to set out the complaint in the report of the case (which was done at pages 573-578 of 70 S. C., and pages 490-501 of 50 S. E., inclusive). The main question in the case is, whether his honor, the circuit judge, erred in ruling that, under the written agreement set out in the complaint, the defendants cannot lawfully use the premises described in said agreement except as a 'Masonic hall' and for 'Masonic purposes.' The construction placed upon the agreement by the circuit judge gives effect to all the terms of the agreement, while that for which the appellants contend would render inoperative and ineffectual the words 'as a Masonic hall,' which are plain and unambiguous. The allegations of the complaint show an invasion of the plaintiff's rights. It is, therefore, entitled to some relief either legal or equitable, and the complaint is not subject to demurrer when the plaintiff is entitled to any relief whatever."

The judgment was affirmed.

The answer of defendants was as follows:

"The defendants, Richland Lodge, No. 39, A. F. M., Acacia Lodge, No. 94, A. F. M., and Columbia Royal Arch Chapter No. 5, above-named, answering the complaint herein:

"First. For a first defense: Admit the agreement set forth in paragraph 6 of the complaint, and so much of the complaint as alleges that these defendants claim an interest in the building and premises referred to herein and have been in continuous possession and enjoyment of the third story of said building from its completion until the present time; but said defendants deny each, and every other allegation in said complaint contained.

"Second. For a second defense: (1) Al-

lege that after entering into the agreement set forth in the complaint, the trustees in behalf of the Masonic fraternity named therein duly performed all the covenants, conditions, and stipulations of said agreement on their part to be performed, upon the completion of said building went into possession of the third story thereof, with the appurtenances thereto, and the said trustees, their successors in office, and these defendants have been and remained in exclusive and continuous possession and enjoyment of the same until the present time. (2) That under and by virtue of said agreement and the joint erection of said building as therein provided for, the said trustees acquired, for the use and benefit of the several Masonic bodies referred to therein and of the Masonic fraternity of Columbia, S. C., and became vested with an interest and estate in the said building and appurtenances and in the lot upon which the said building was erected, the said interest and estate being conveyed to them in fee simple, defeasible only upon the fall or destruction of said building; whereupon the said trustees are given the right to take and remove one-half of the material of which said building is constructed. That the said building still stands, and the event which the estate and interest conveyed is to terminate has not occurred, and may never occur. (3) These defendants admit that some time in the early part of the year 1900, having secured a larger and more convenient hall, they began holding their regular meetings therein, and have since continued to do so; but they do not intend and have never intended to abandon and discontinue permanently the use of said third story and hall thereof as a place for Masonic meetings; that defendants have removed only part of their furniture and personal belongings therefrom, part still remaining therein. That the said story has not been changed structurally in any way, and is as well adapted as it ever was for use as a Masonic hall whenever the Masons of Columbia, or any of them, shall find it desirable to use the same; that it is not required by the rules of Masonic order nor is it necessary that all the Masonic bodies of a city or community should have one and the same hall, but whether they shall have one hall or more is solely a matter of convenience; that the several Masonic bodies of Columbia, or one or more of them, may any day find it necessary to resume regular use of said third story as a place of meeting; that by said agreement these defendants are expressly authorized to manage and adapt said story and hall to their purposes as they may deem proper; and they aver that they have the right, and should be permitted to meet or not meet therein when and at such times, and with such intervals as may suit their convenience. (4) Further answering said complaint, these defendants allege that by the clause granting the third story of said building to the said

trustees, it was not intended, and the said agreement does not require that the said story should be used only as a Masonic hall in the sense of a meeting place for Masonic bodies, or that it should be so used continuously, and certainly no condition or limitation was imposed thereby for the termination of the estate and interest of said trustees and their cestuils que trustent in the event it should cease to be used. These defendants aver that, on the contrary, the utmost requirement of said clause is to impose upon the trustees named and their successors a duty to permit the use of said story and premises as a Masonic hall by the Masonic bodies interested in the trust thereby created, a duty which the said bodies alone have the right to insist upon or enforce. (5) These defendants admit that when and since they discontinued regular use of said third story as aforesaid, other organizations were permitted to use the same to hold meetings in, the amount paid by them as rent therefor being devoted to Masonic purposes; but the defendants allege that this use of said premises is merely the exercise by them and by the trustees on their behalf, of their right to manage and deal with their own property as they see fit; that said use of said premises does not contravene any requirement of said agreement, does not in any manner interfere with plaintiff in enjoyment of its portion of said building, and is a use of the same character, and no wise more onerous than the use heretofore made of said premises by the Masons themselves. (6) That notwithstanding these defendants discontinued the use of the said third story for regular Masonic meetings aforesaid in the early part of the year 1900, and thereupon permitted another organization to occupy the same, as it has since continued to do, and the plaintiff, who then occupied the bottom story of said building, well knew what was being done, plaintiff did not then in any manner object thereto, but consented to and acquiesced in the change being made, and never objected thereto until some time in the year 1903, more than three years thereafter, when a paid fire department having been established in the city of Columbia, the plaintiff company conceived the idea of selling its interest in said property, and distributing the proceeds among its members; and these defendants aver that plaintiff is now estopped to claim a forfeiture or loss of their rights by the defendants on account of any changes in the use of the said premises as aforesaid. (7) The defendants admit that the lodges referred to as True Brotherhood Lodge, No. 84, and Columbia Lodge, No. 108, have long become extinct; but allege that, by said agreement above-mentioned, the interest and estate in said building and premises acquired by the Masonic fraternity was vested in the trustees therein named and their successors in office, who remained the holders of the legal title thereto, the individual Masonic

bodies, as beneficiaries of the trust, having only a right to the use and enjoyment of the same so long as they continue in existence; that the present presiding officers of Richland Lodge No. 39, A. F. M., Acacia Lodge, No. 94, A. F. M., and Columbia Royal Arch Chapter, No. 5, are now the successors in office of the trustees named in said agreement, and still hold the legal title to the interest in said building and premises acquired as aforesaid, subject, however, to the trusts and duties by said agreement imposed. (8) Except as herein admitted, qualified, or explained, these defendants deny each and every allegation in said complaint contained."

The action was placed for trial upon calendar No. 2. Thereafter notice was given of a motion to be heard by the presiding judge when the cause was called, to transfer the action from calendar 2 to calendar 1, for trial of legal issues raised by the pleadings. This motion came on to be heard before Special Judge James P. Carey, on the 26th of May, 1905. After hearing argument, the judge overruled the motion in an oral order, but the defendants announced that they would appeal therefrom. Immediately thereafter counsel for plaintiff moved that the cause be referred to John S. Verner, master, to take testimony on all issues raised by the pleadings and to report the same.

"The above-entitled case docketed upon calendar No. 2, and upon the calling of the said case thereon a motion by the defendant's attorneys, upon previous notice, was made for an order transferring the said cause to calendar No. 1, on the ground that the same involved legal issues triable by a jury. I am of the opinion that the issues raised by the pleadings are equitable, and therefore refused the motion to transfer to calendar No. 1. Immediately upon the announcement of my ruling upon this question, defendants' counsel gave notice of intention to appeal therefrom to the Supreme Court; and subsequently counsel for plaintiff made a motion for an order referring the cause. Being of the opinion that the cause is an equitable one, and involves no issues triable by a jury, I have concluded to grant the order of reference. It is, therefore, ordered, adjudged, and decreed, that the motion to transfer the said cause from calendar No. 2 to calendar No. 1 be and hereby is refused, overruled, and denied; and it is further ordered, that the cause be referred to John S. Verner, master of Richland county, to take the testimony on all the issues raised by the pleadings, and to report the same."

The defendants then appealed upon the following exceptions: "(1) Because his honor the circuit judge erred in entertaining jurisdiction of this cause and hearing and determining the motion to refer the same to the master, after notice had been given that an appeal would be taken to the Supreme Court from his honor's rulings and order re-

fusing to transfer the said cause to calendar No. 1 for trial of the legal issues. (2) Because it is respectfully submitted that his honor the circuit judge erred in refusing to strike said cause from calendar No. 2 and place the same on calendar No. 1, inasmuch as this cause involves matters properly triable by a jury. (3) Because it is respectfully submitted that his honor the circuit judge erred in refusing to transfer the cause from calendar No. 2 to calendar No. 1, inasmuch as this cause involves the question of title to real estate, and other issues triable of right by jury, and the cause should, therefore, have been transferred. (4) Because it is respectfully submitted that his honor the circuit judge erred in holding and deciding that the issues raised by the pleadings were wholly equitable, and in referring the whole cause and all the issues to the master; whereas, the said cause involves certain issues triable of right by jury, and which could not be referred to the master without defendant's consent." We will now examine these exceptions in their order.

1. We do not see any grounds upon which this exception can be sustained. Indeed, the effort to hear a cause by piecemeal is highly objectionable; but in this case, the first motion was heard after the action had been regularly reached upon calendar 2. This motion being overruled, it remained for trial. When, therefore, the motion for a reference to the master was made, it was perfectly proper for the circuit judge to make the order of reference. Of course, if this court on a hearing of the appeal should hold that the circuit judge was in error in overruling the motion to change the case from calendar 2 to calendar 1, so much of the judge's order as refers the issues to the master would be invalid. The plaintiff must take his chances. No harm has resulted as yet to the defendants. The verbal notice of appeal should not have stayed the circuit judge.

2. Was it error of the circuit judge in holding that there were only equitable issues and not legal issues to be tried by a jury? Of course, if the pleadings raised issues of law for trial by jury, the law required a trial of the same by jury. As was well remarked by the late Chief Justice McIver, in *Holliday v. Hughes*, 54 S. C., 157, 31 S. E. 867: "Ever since the case of *Adickes v. Lowry*, 12 S. C. 97, recognized and followed in numerous subsequent cases, it has been the settled rule that, while under the Code of Procedure both legal and equitable issues may be tried in the same case, yet, at the trial, the legal and the equitable issues must be distinguished and decided by the court in the exercise of its distinct functions as a court of law and a court of equity, and only those should be determined by a jury which are properly triable by a jury, while those which would have formerly been triable in equity must

be determined by the judge in the exercise of his chancery powers." It seems in the case at bar, as disclosed by the pleadings, that the object of the plaintiff is that the defendants should be adjudged to have forfeited any and all rights under the agreement, that both plaintiff and defendants admit was made and evidenced by their respective hands and seals, and that the defendants have no present interest in the premises referred to in said agreement, as well as that the plaintiff should have such other and further relief as to the court may seem proper. The defendants admit that the agreement was made by them, and that under said agreement, up to the year 1900, the defendants occupied said third story as a lodge room, as a Masonic hall or for Masonic purposes, but that since said date the defendants have moved to their Masonic Temple, away from the plaintiff's present hall building, but that the defendants have rented said third floor, formerly used by them, to a different and distinct body from Masonry. Now, when the allegations of the answer are considered, it will be found that there are some allegations therein which seem to antagonize the allegations of the complaint. It is not unusual that antagonism in the statement of facts is sharply drawn by the parties to an action clearly within equity, yet such variance does not change the action itself. As was held in the case of *McLaurin v. Hodges*, 43 S. C. 187, 192, 20 S. E. 991, "The defenses set up by the defendant enter into the plaintiff's equitable cause of action as part of the very cause of action." We must overrule this exception.

3. It is admitted by both sides of this controversy, that the agreement, set up in the complaint, governs whatever rights these parties, respectively, claim. If those rights are equitable, as we think they are, the action is properly upon calendar 2, any questions of fact arising are in the equity action. There was no error by the circuit judge in so holding.

4. We think the views we have already expressed cover this exception. It is, therefore, overruled.

It is the judgment of this court that the orders appealed from herein be, and the same are, affirmed.

(78 S. C. 550)

COLUMBIA WATER POWER CO. v. NUNAMAKER (four cases). **SAME v. BEARDEN et al.** **SAME v. HUFFMAN.** **SAME v. YOUNGINER.**

(Supreme Court of South Carolina. Jan. 30, 1906. On Rehearing, April 2, 1906.)

1. INJUNCTION—RESTRAINING CONDEMNATION PROCEEDINGS—BOND.

Where an action is brought to enjoin condemnation proceedings, and the court grants a demurrer restraining order against them, he

cannot dispense with the injunction bond required by Code Civ. Proc. 1902, § 243.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 323, 324.]

2. SAME—ANCILLARY SUIT.

The rule that a bill filed on the equity side of a court to restrain suits at law in the same court is not an original suit, but ancillary to the original suit, does not apply to a suit in the common pleas to restrain condemnation proceedings instituted in a special statutory tribunal from which an appeal could be taken to such court.

3. CONSTITUTIONAL LAW — EQUAL PROTECTION OF LAWS.

Where plaintiff seeks to restrain condemnation proceedings, that the court requires of him a bond before granting the injunction, while no such bond was required of defendant, does not deny to plaintiff the equal protection of the laws.

Appeal from Common Pleas Circuit Court of Lexington County; Gary, Judge.

Actions by the Columbia Water Power Company against Arthur S. Nunamaker, against E. F. Nunamaker, against Eliza M. Nunamaker; against Lizzie Bearden and others, against Susan G. Huffman, against S. P. Younginer, and against Martha C. Nunamaker. From an order requiring plaintiff to give in each case a temporary injunction bond, it appeals. Affirmed.

The following are the exceptions: "Please take notice that the plaintiff in the above entitled seven cases excepts to so much of the order of Judge Ernest Gary, of date 28th June, 1905, which provides that the continuance of the restraining orders previously granted by him on June 12, 1905, in each of said seven cases, be conditioned upon the plaintiff in each of said cases filing a written undertaking with surety within 10 days, to the effect that plaintiff will pay to the defendants such damages, not exceeding \$200, as they may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto, and that it will ask that the order be reviewed upon any appeal now or hereafter taken from any order or final judgment therein, upon the following grounds: (1) Because the bringing and filing by the plaintiff of its several actions against the defendants above named, to have determined the question of the right of said defendants to condemnation, suspended the statutory proceedings for condemnation brought by the defendants until the trial and determination of the issue as to the right to condemnation and compensation; and the presiding judge should, as requested by plaintiff, have passed an order simply directing that, as said actions had been commenced, all further steps should be and thereby were suspended until the determination of the question of the right of defendants to condemnation. (2) Because, upon the bringing and filing by the plaintiff of its several actions to determine the question of the right of defendants to condemnation, the presiding judge, on 12th June, 1905, granted orders restraining the defendants

from prosecuting their statutory proceedings for condemnation, and the plaintiff was entitled to a continuance of said orders without the condition that it give an undertaking to pay defendants damage in any amount, and the presiding judge erred in his order of June 28, 1905, in making the continuance of his previous restraining orders conditioned upon the giving of an undertaking to pay damages to defendants. (3) Because the undertaking referred to in section 243 of the Code of Civil Procedure of 1902 does not apply to the actions brought by the plaintiff herein, with regard to and concerning the special condemnation proceedings instituted by defendants, and neither under said action nor under any other law can plaintiff be required to give an undertaking as a condition of having the question of right of defendants to condemnation determined, and the presiding judge erred in making such requirement. (4) Because under the laws of South Carolina there is no method of testing, as between plaintiff and defendants, the question of the right of defendants to condemnation, except by the bringing of an action by the plaintiff, and to require the plaintiff to give an undertaking to pay damages to defendants as a condition of the exercise of its right to maintain such action and to test the question, and to require no undertaking from defendants, is placing the plaintiff and defendants upon an unequal footing, and denies to the plaintiff the equal protection of the laws, and the presiding judge erred in placing such burden upon the plaintiff. (5) Because there were no facts showing any damages whatsoever that defendants could, in any event or in any amount, suffer by a continuance of the restraining orders, and the presiding judge, therefore, erred in requiring an undertaking from plaintiff to pay damages to the defendant in any event or in any amount."

Abney & Thomson and Thomas & Thomas, for appellant. Shand & Shand, Eafd & Dreher, and De Pass & De Pass, for respondent.

GARY, A. J. These actions were instituted for the purpose of determining the right of the defendants to compensation under condemnation proceedings, for the alleged overflowing of their lands, by reason of raising the plaintiff's dam. The condemnation proceedings were commenced on the 25th of February, 1905. On the 12th of June, 1905, the plaintiff brought these actions, and on the same day, upon motion of its attorneys, a rule was issued requiring the defendants to show cause why they should not be enjoined from prosecuting the condemnation proceedings, and for an order in the meantime restraining them. The defendants made return to the rule to show cause, and on the 22d of June, 1905, his honor, the circuit judge, made an order that the restraining order theretofore

granted should be continued until the final decree in said cases, provided the plaintiff entered into a written undertaking in the manner therein set forth. The plaintiff appealed from this order upon exceptions which will be set out in the report of the case. The sole question is whether there was error in requiring said undertaking.

When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the Court of Common Pleas in order that the court may, in the exercise of its chancery powers, determine such right. *Railway v. Riddlehuber*, 38 S. C. 308, 17 S. E. 24; *Cureton v. Railway*, 59 S. C. 371, 37 S. E. 914; *Glover v. Remley*, 62 S. C. 52, 39 S. E. 780; *Railroad v. Burton*, 63 S. C. 348, 41 S. E. 451; *Riley v. Union Station Co.*, 67 S. C. 84, 45 S. E. 149; *Railway v. Reynolds*, 69 S. C. 481, 48 S. E. 476. These cases show that such action must be regarded as independent, and not ancillary to the condemnation proceedings. If, upon the final hearing of the case, the court should decide that the defendants did not have a right to institute condemnation proceedings, it would then grant a permanent injunction. But the power of the court to render such judgment, is in no wise dependent upon the fact that a temporary injunction was or was not granted, as a right to a temporary injunction constitutes no part of the plaintiff's cause of action. When the circuit judge granted the order of injunction he did not have the power to dispense with the provision of section 243 of the Code, which requires a written undertaking on the part of the plaintiff. *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227.

Appeal dismissed.

On Rehearing.

PER CURIAM. This is a petition for rehearing on the grounds hereinafter mentioned.

1. It is submitted that the court overlooked the distinction made by the appellant in the first exception, between an order of suspension to which it was entitled as a matter of course, and an order of injunction which, under section 243 of the Code of Civil Procedure of 1902, is only granted upon a written undertaking. The appellant contends that section 243 is inapplicable, as this is not an action for injunction, but simply to test a disputed right, and that upon the bringing of the action, the condemnation proceedings were ipso facto suspended without the affirmative order of the court. Section 239 of the Code of Civil Procedure of 1902, provides that "an order of injunction may be made: (1) where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the

litigation, would produce injury to the plaintiff; or (2) when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgement ineffectual, a temporary injunction may be granted to restrain such act."

2. Section 243 of the Code of Civil Procedure of 1902, provides that "when no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff." The case under consideration comes within the provisions of the foregoing sections, and his honor, the circuit judge, did not have the power to dispense with the requirement as to an undertaking. *Hunt v. Smith*, 1 Rich. Eq. (S. C.) 277; *Smith v. Smith*, 51 S. C. 379, 29 S. E. 277. Furthermore, if the complaint should be regarded as an application or petition for an order of suspension, and conceding that the circuit judge had the power to grant such order without requiring and undertaking, nevertheless it was within his discretion, which was not abused.

3. It is submitted that this court overlooked the distinction between ancillary and independent suits. Among the authorities upon which the appellant relies is the case of *Freeman v. Howe*, 24 How. (U. S.) 460, 16 L. Ed. 749, to show that the action herein is ancillary to the condemnation proceedings, in which the court says: "The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen." The appellant also quotes the language of Mr. Justice Bradley, in *Fuentes et al. v. Gaines*, 1 Woods, 112, Fed. Cas. No. 5,145, in which, after stating he was unable to find any precedent for a bill for injunction to stay proceedings in the same court, says: "I cannot see any necessity of it. If any circumstances exist which render it improper or inequitable to carry on proceedings in this court, they can always be brought to the attention of the court by motion or petition in the suit. I shall direct the bill as such to be dismissed, but allow it to stand as a petition in the several suits sought to be suspended. Supposing the matter to be properly brought before the court, on petition and motion thereon, the question arises whether the proceedings in this court ought to be stayed." Conceding that these principles would prevail if the action herein and the condemnation proceedings were in the same court, they are not applicable, for the reason that this action was commenced in the Court of Common Pleas, while the condemnation pro-

ceedings were instituted in a special statutory tribunal from which an appeal may be taken to the Court of Common Pleas.

4. It is lastly submitted that this court overlooked the question presented by the fourth exception, which assigned as error the order requiring the plaintiff to enter into an undertaking, while no such undertaking was required of the defendant, thereby denying the plaintiff the equal protection of the laws. As it is the plaintiff and not the defendant that seeks the injunction, we see no ground whatever for sustaining this assignment of error.

It is therefore ordered that the petition be dismissed, and that the order heretofore staying the remittitur be revoked.

(73 S. C. 579)

WILLIAMS v. ULMER et ux.

(Supreme Court of South Carolina. April 2, 1906.)

JUDGMENT—AMENDMENT AFTER TERM.

Where a circuit judge has closed court in one circuit and is holding a term in another, he has no authority to alter a decree for the sale of land previously filed by him, so as to order a sale of other lands than those described in the complaint, on the basis of the authority of a judge, after adjourning court, to correct clerical errors in orders already filed.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 583, 584.]

Appeal from Common Pleas Circuit Court of Barnwell County; Dantzler, Judge.

Action by Lillian Williams against James M. Ulmer and wife. Decree for plaintiff. Defendants appeal. Reversed.

Robert Aldrich, for appellants. B. F. Rice for respondent.

WOODS, J. In order to understand the questions arising in this appeal, it is necessary to make clear the scope of the action as it appears from the complaint and the evidence. James M. Ulmer conveyed to his wife, Minnie L. Ulmer, on June 23, 1888, a tract of land containing about 335 acres; the consideration expressed in the deed being \$1,500. The plaintiff Lillian Williams, recovered a judgment against James M. Ulmer in November, 1899. Execution was issued, and the sheriff thereafter laid off to the judgment debtor 135 acres of the tract of 335 acres as a homestead, and under the execution sold the remaining 200 acres to the plaintiff. The plaintiff then filed this complaint, setting up two causes of action—in the first alleging that the defendant was the owner of the 200 acres of land, and that he had conveyed to his wife for the pretensive consideration of \$1,500 in fraud of plaintiff and other creditors, and asking that the deed be set aside; and in the second alleging that she was the owner of the 200 acres of land, and demanding judgment for recovery of possession. In the description of the land in both

causes of action one of the boundaries referred to is "homestead lands of James M. Ulmer." The answer was a general denial. Upon hearing the evidence taken by the master, the circuit judge, Hon. C. G. Dantzler, filed a decree in which he said: "But I have carefully read the testimony reported, and am satisfied that the deed in question was executed under 'inequitable circumstances,' and my conclusion is that as a deed of conveyance it should not and cannot stand. But I am not satisfied that the defendant Minnie L. Ulmer was a participant in, or partaker of, such inequitable transaction, and therefore the money paid by her should be refunded to her, the deed in question standing 'as a security for the money paid.'" The amount paid by Mrs. Ulmer, which she was entitled to have refunded, was fixed by the circuit judge at \$600. The decree provided that the master sell "the tract or parcel of land mentioned and described in the complaint" and from the proceeds pay to Minnie L. Ulmer the sum of \$600 and the costs and expenses of the action, and turn over the surplus to the clerk to be held subject to the further order of the court.

The record contains this account of the subsequent proceedings: "That plaintiff's attorney served notice of appeal from said judgment to the Supreme Court, and thereafter plaintiff's attorney made an ex parte motion without notice to defendant's attorney, who appeared for them in the action, before Judge Dantzler, upon the proceedings in the court, while he was holding court in Sumter, S. C., in the third circuit, to correct an alleged clerical error on the part of and by Judge Dantzler in his said decree, which motion was granted, as appears by the letters and orders of Judge Chas. G. Dantzler attached to and by him made a part of his said decree, on the alleged ground of its being a clerical error; the homestead thus defeated not being the subject of the contention either in the pleadings or the argument." The following is the order made by the circuit judge to which reference is made in the foregoing statement: "It being made to appear that in the decree heretofore rendered in the above-stated cause on October, 1, 1904, by a clerical error the lands described in the complaint were ordered to be sold by the master of Barnwell county, whereas it should have been ordered that so much of the lands described in the deed from J. M. Ulmer to Minnie L. Ulmer, dated the 23d of June, 1888, containing two hundred (200) acres, more or less, be sold by the said master, it is therefore ordered that the clerk of court for Barnwell county do forthwith add and annex the following order to the said decree rendered in this cause on October 1, 1904: It is ordered that all that tract of land now in the possession of Minnie L. Ulmer, containing 200 acres, more or less, which lands were conveyed to said Minnie

L. Ulmer by James M. Ulmer on the 23d day of June, 1888, and are therein described and known as the homestead of J. M. Ulmer, to be sold by the master of Barnwell county on sales day in December next or at some subsequent sales day, and that the proceeds arising therefrom be applied in all respects as heretofore provided and ordered in the decree rendered herein on October 1, 1904."

The defendant's appeal from this last order must be sustained. The court might have adjudged that, although Mrs. Ulmer was entitled to receive back the \$600 advanced for the payment of Ulmer's debts, yet she must exhaust the other lands conveyed to her, namely, the homestead, before she could subject the surplus which the plaintiff claimed; and possibly it would have been within the scope of the action, though on that point we express no opinion, to order the homestead sold and the proceeds applied to the payment of the \$600 due Mrs. Ulmer, in order to ascertain how much would have to fall as a prior claim on the land subject to the plaintiff's demands. But the first decree, so far from doing this, contains no intimation that the homestead is to be subjected, and expressly orders the lands described in the complaint which constituted the surplus over the homestead to be sold for the satisfaction of Mrs. Ulmer's claim. The second decree, on the contrary, ordered the homestead itself to be sold for that purpose, and was, therefore, entirely irreconcilable with the first. The change we must regard far more than the correction of a clerical error. It was not a matter of form, and was not clearly the result of the views expressed in the opinion. The first decree in no wise affected the homestead, while the second destroyed it completely. Such a radical change cannot be made out of term time, when the circuit judge is in another circuit, or on an ex parte application. "As is said in 2 Dan. Ch. Pr. 1233, in speaking of rectifying decrees: 'In cases, however, in which a clerical error has crept into the decree, or in which some ordinary direction has been omitted, the court will entertain applications to rectify it, even though it has been passed and entered. * * * It is, nevertheless, to be observed that it is a principle of the court that no alteration can be made in a decree on motion without a rehearing, except in a matter of clerical error or of form, or where the matter to be inserted is clearly consequential on the directions already given.'" *Chafee v. Rainey*, 21 S. O. 17; *Barrett v. James*, 30 S. C. 329, 9 S. E. 263; *Lorick & Lowrance v. Motley*, 69 S. C. 570, 48 S. E. 614.

The judgment of this court is that the decree of Judge Dantzler, dated November 7, 1904, be reversed, without prejudice to any right the plaintiff may have to move the circuit court for leave to amend his complaint or to file a supplemental complaint.

(78 S. C. 572)

SMALLEY v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of South Carolina. April 2, 1906.)

RAILROADS—LEASE—LIABILITIES OF PARTIES— NEGLIGENCE.

Where a railroad company permitted another corporation to operate its road, it must be considered to be operating the railroad through the agency of the corporation to which it turned over its property, and is liable for injuries caused by the negligence of the operating road.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 817-823.]

Appeal from Common Pleas Circuit Court of Greenville County; Gary, Judge.

Action by James D. Smalley, administrator, against the Atlanta & Charlotte Air Line Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. P. Cothran, for appellant. R. J. Jaynes and McCullough & McSwain, for respondent.

WOODS, J. Bennie F. Smalley, a deaf mute, of about 15 years of age, was killed on August 4, 1904, at a public crossing near Westminster, S. C., by a freight train on defendant's railroad; and James D. Smalley, as administrator of his estate, recovered judgment against the defendant for damages, under the allegation that defendant was negligent in not giving the statutory signals at the crossing, in not slackening the speed of the train in approaching the crossing, in not keeping a proper lookout, and in not having a headlight on the engine. The defendant in the answer denied the charge of negligence, and alleged contributory negligence.

The single question involved in the appeal arises, however, under the allegation of the first paragraph of the complaint, that the defendant, as a railroad corporation chartered under the laws of the state, owned the railroad on which Bennie F. Smalley was killed on August 4, 1904, and that on that date and for many years prior thereto it was operated as a common carrier of passengers. The defendant answered this allegation in these words: "That it admits the statements contained in paragraph 1, but denies that at the time mentioned in said complaint it was a common carrier of passengers, or that it was operating any railroad cars or trains in the state of South Carolina." A motion was made by plaintiff to strike out all of this paragraph of the answer except the admission, as irrelevant, but the motion was refused. At the trial the circuit judge refused to admit evidence offered by the defendant to the effect that the train which killed plaintiff's intestate was not operated at the time by defendant, but by another corporation. The appeal depends on the correctness of this ruling.

The defendant's counsel admits if the complaint had alleged, and the answer had ad-

mitted, the defendant's railroad was operated, under a lease from defendant, by another corporation, which committed the alleged breach of duty to the public, the evidence would not have been competent, because the defendant could not have avoided a public obligation imposed by law by contracting with another to assume that obligation. *Bank v. Railway Co.*, 25 S. C. 216; *Harmon v. Railroad Co.*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686. If this is so, when a railroad company leases its road under express authority conferred by the statute (Civ. Code, 1902, § 2034), for a greater reason such corporation cannot rid itself of its obligation to the public by turning over its road to another corporation without statutory authority. A corporation has no implied authority to delegate or relinquish its public duties to another. The public franchises, received through a charter, embrace obligations to the public as well as rights, and these franchises, being deemed public trusts, are not transferable except by legislative authority. Therefore, a corporation owning a railroad by virtue of power conferred by charter, in allowing another corporation to operate it, must be considered to be still itself operating the railroad through the corporation to which it has turned over its property as its agent. *Davis v. Railway Co.*, 63 S. C. 370, 41 S. E. 468; *Penn. R. R. v. St. Louis Ry. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; note to *Lee v. S. P. R. R. Co.*, 58 Am. St. Rep. 147; *Elliott on Railroads*, § 519. A different view is taken in *Pennington v. Railroad Co.*, 35 S. C. 439, 14 S. E. 852, but it is impossible to reconcile this case with the later case of *Davis v. Railway Co.*, supra, and hence the former case must be considered overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(74 S. C. 13)

HARBERT v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of South Carolina. April 4, 1906.)

1. RAILROADS—ACCIDENT AT CROSSING—OPERATION BY ANOTHER COMPANY.

A railroad company cannot avoid its obligation to the public as a chartered road by turning over the operation of its road to another railroad company so as to escape liability for negligence at a railroad crossing.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 440, 817, 824.]

2. APPEAL—APPEALABLE ORDERS.

Under Code Civ. Proc. 1902, § 11, subd. 2, providing for appeals from certain orders, an order refusing to strike out allegations in a pleading as irrelevant is not appealable.

Appeal from Common Pleas Circuit Court of Oconee County; Dantzler, Judge.

Action by James J. Harbert against the Atlanta & Charlotte Air Line Railway Company. From an order refusing to strike out

allegations of answer, plaintiff appeals. Affirmed.

Stribling & Herndon, for appellant. T. P. Oothran, for respondent.

WOODS, J. This is an action to recover damages for the alleged killing of James A. Harbert at a highway crossing over defendant's line of railway, near Ft. Madison, in Oconee county. The complaint alleged that the defendant, under a charter from the state, was, on February 24, 1901, the owner of the line of railway on which the killing occurred; and that the railroad was at that time operated as a common carrier, and had been so operated for many years. It further alleged that on February 24, 1901, "the defendant, its servants and agents, having in their care, control, and management a certain locomotive engine and train of cars thereto attached, carelessly, negligently, recklessly, and willfully" ran the train of cars over and killed Harbert. The specific act of negligent and wilful wrong charged against the defendant was the failure to give the statutory signals at the crossing. The defendant admitted the allegations of the complaint as to its ownership of the railroad under its charter, and as to the operation of the railroad as a common carrier. In the third paragraph of the answer the defendant, after admitting the charter, continues: "But denies that it was, at the time mentioned in said complaint, a common carrier of goods and passengers, or that it was operating or controlling any railroad cars, locomotives, or trains in the state of South Carolina." The fourth paragraph was as follows: "The defendant alleges that if the plaintiff's intestate was killed, that his death was caused by a train of the Southern Railway Company." The appeal is from an order of the circuit judge refusing the motion of the plaintiff to strike out the fourth paragraph entirely and the portion of the third paragraph above quoted as irrelevant and redundant.

1. The question involved in this appeal was decided in the case of *Smalley v. Ry. Co.* (S. C.) 53 S. E. 1000. The defendant could not avoid its obligations to the public as a chartered railroad company by turning over the operation of its road to the Southern Railway Company. As between defendant and the public, it is considered as still operating its railroad through its agent. The allegations of the answer, above quoted, therefore, constituted no defense, and should have been stricken out as irrelevant. The respondent submits, however, that an order refusing to strike out allegations of a pleading does not involve the merits, and is, therefore, not appealable.

2. Section 11, subd. 2, of the Code of Civil Procedure of 1902, provides for appeal from "an order affecting a substantial right made in an action, when such order in effect determines the action, and prevents a judgment

from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial; or when such order strikes out an answer or any part thereof, or any pleading in any action * * *." The omission to provide for appeal from an order refusing to strike out is significant, and there was good reason for it. If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings. On the other hand, if the circuit court errs in refusing to strike out any pleading or portion of a pleading as irrelevant, the error of submitting an irrelevant issue to the jury may be corrected on appeal from the charge actually made, or from refusal of requests to charge. This view of the matter impairs no substantial right, and prevents multiplicity of useless appeals and the delay and inconvenience which would be incident thereto.

The judgment of this court is that the judgment of the circuit court be affirmed, on the ground that the order refusing the motion to strike out allegations of the answer as irrelevant and redundant is not appealable.

(125 Ga. 233)

BROWN v. CITY OF GAINESVILLE.**FREEMAN v. CITY OF GAINESVILLE.**

(Supreme Court of Georgia. May 10, 1906.)

1. CRIMINAL LAW—CERTIORARI.

"Points made in a petition for certiorari, not verified by the answer of the trial judge, present nothing for determination, either by the superior or the Supreme Court." *Little v. Ft. Valley*, 51 S. E. 501, 123 Ga. 503.

2. SAME—ANSWER.

When an answer to a petition for certiorari does not verify an allegation in the petition that there was a final judgment rendered, and no steps are taken to perfect the answer, neither the superior court nor the Supreme Court can properly undertake to pass on the merits of the assignments of error made in the petition. *Jessey v. Dean*, 50 S. E. 139, 122 Ga. 371.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Certiorari by H. T. Brown and by one Freeman against the city of Gainesville. Judgments for the city, and Brown and Freeman bring error. Judgments affirmed.

W. B. Sloan, for plaintiff in error. J. G. Collins, for defendant in error.

COBB, P. J. Judgment affirmed. All the Justices concur.

(125 Ga. 238)

MCCLESKEY v. MAYOR, ETC., OF CITY OF GAINESVILLE.

(Supreme Court of Georgia. May 10, 1906.)

CRIMINAL LAW—CERTIORARI.

The facts of this case bring it clearly within the ruling made in *Stoner v. Magins*, 43 S. E. 45, 116 Ga. 797, which was approved and followed in *Jessey v. Dean*, 50 S. E. 139, 122 Ga. 371, and *Brown v. Gainesville* (this day decided) supra.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Certiorari by Jane McCleskey against the mayor and council of Gainesville. Judgment affirmed.

B. P. Gaillard, Jr., for plaintiff in error. J. G. Collins, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(125 Ga. 240)

COOPER v. CITY OF GAINESVILLE.

(Supreme Court of Georgia. May 10, 1906.)

CRIMINAL LAW—CERTIORARI—ANSWER.

Where the answer of the mayor and council of a municipal corporation to a writ of certiorari, brought to review a judgment alleged in the petition therefor to have been rendered by them, did not verify the allegation in the petition that there was such a judgment, or the other allegations thereof, except that it adopted the evidence set out, as practically correct; and no steps were taken to require respondent to answer over, nor traverse filed to the answer, no reversal can be had in this court. *Manning v. Gainesville* and citations (decided to-day) infra.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Certiorari by Thomas Cooper against the city of Gainesville. From the judgment for the city, Cooper brings error. Affirmed.

W. B. Sloan, for plaintiff in error. J. G. Collins, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(125 Ga. 239)

MANNING v. MAYOR, ETC., OF CITY OF GAINESVILLE.

(Supreme Court of Georgia. May 10, 1906.)

1. CRIMINAL LAW—APPEAL—REVIEW—OVERBULING CERTIORARI.

Where a petition for certiorari alleged that a trial was had before the mayor and council of the city of Gainesville upon a charge of violating certain ordinances of the city, that evidence was introduced which was set out in the petition, that the defendant was found guilty and sentenced to pay a fine of \$100, and assigned error on such judgment, and where the answer of the mayor and council to the writ of certiorari verified none of the allegations of the petition, except that the evidence set out in the petition was practically correct, and no exception was taken, so as to require

them to answer more fully (or traverse, had it been a proper case therefor), this court cannot reverse a judgment of the judge of the superior court overruling the certiorari. *Simpson v. McBride*, 78 Ga. 297; *Gartrell v. Linn*, 4 S. E. 918, 79 Ga. 700; *Knowles v. Coachman*, 84 S. E. 607, 109 Ga. 356; *Childs v. Moran*, 40 S. E. 271, 114 Ga. 320; *Buckner v. State*, 41 S. E. 583, 115 Ga. 238; *Stoner v. Magins*, 43 S. E. 45, 116 Ga. 797; *Garrett v. McIntosh*, 43 S. E. 280, 116 Ga. 911; *Colbert v. State*, 45 S. E. 403, 118 Ga. 302; *Central of Georgia Railway Co. v. Potter*, 47 S. E. 924, 120 Ga. 343; *Stephens v. Mayor and Council of Macon*, 48 S. E. 311, 120 Ga. 462; *Akers v. High & Co.*, 50 S. E. 105, 122 Ga. 279; *Jessey v. Dean*, 50 S. E. 139, 122 Ga. 371; *Little v. Mayor and Council of Ft. Valley*, 51 S. E. 501, 123 Ga. 503; *Williams v. Bradfield*, 53 S. E. 312, 124 Ga. 1003; *Cooper v. Gainesville* (decided to-day) 53 S. E. 1002; *Brown v. Gainesville* (decided to-day) Id. 1002; *McCleskey v. Gainesville* (decided to-day) Id. 1002.

2. SAME.

The point indicated in the preceding note having been urged by counsel for the defendant in error, under the numerous decisions cited above the judgment must be affirmed.

3. SAME.

This court is asked to review and overrule this entire line of decisions, but we decline to do so.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Emory Manning was convicted of violating an ordinance of the city of Gainesville, and brought certiorari. From an order overruling the certiorari, he brings error. Affirmed.

B. P. Gaillard, Jr., and J. A. Bell, Jr., for plaintiff in error. J. G. Collins, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(125 Ga. 168)

CHENEY v. McWHORTER.

(Supreme Court of Georgia. March 28, 1906.)
CANCELLATION OF INSTRUMENTS—LACHES—PLEADING—AMENDMENT.

The petition, as first amended, was held to be a stale demand. 49 S. E. 603, 121 Ga. 541. It was, therefore, not error for the court below to disallow a proffered amendment which did not cure the petition in this regard.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by S. H. Cheney against W. P. McWhorter. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. Davison, and Jos. B. & Noel P. Park, for plaintiff in error. Samuel H. Sibley, for defendant in error.

BECK, J. Before the remittitur was entered in the court below, after the rendition of the first opinion of this court in the present case (121 Ga. 541, 49 S. E. 603), Mrs. Cheney sought to amend her petition by alleging that she was led to believe by McWhorter that the deed which she and her husband signed

in 884 was a security deed; "that she was made to believe by her said husband and the said McWhorter that, even if said debt was not discharged during the lifetime of her husband, she would have the right to take possession of said land under her homestead rights, upon his death, should she survive him," and that said McWhorter led petitioner and her husband to believe that "as soon as said debt was paid in money or by the rents, said land would be surrendered by him"; that her husband did not deliver possession of the premises at the time the deed was executed, but remained in possession until more than a year thereafter. "Petitioner alleges that the conduct of said McWhorter, to wit, his failure to make any improvements on said land, satisfied the mind of petitioner, and led her to believe that he only held said land until the rents or income should be sufficient to pay the amount due him by her said husband, and that he did not hold the same adversely to her rights; * * * that she had often heard her husband say the land was only held by McWhorter for the rents to pay the debt due him by her said husband, and it would come back to them when this was accomplished." Petitioner "is a woman without business experience or capacity." She has implicit faith in both her husband and McWhorter. "Petitioner's husband was a deacon in the church of which she, said McWhorter, and petitioner were also members. When, therefore, she was asked to sign the deed to McWhorter, upon the representations of her husband that it was to secure him, she did not have cause to doubt it, or to investigate." For all of which reasons petitioner "was lulled into a sense of security, and to these facts and circumstances was due her failure to employ the necessary means to discover said fraud. By reason of said facts she was actually deterred from sooner discovering the fraud, or even suspecting that any fraud had been perpetrated upon her." She did not discover the fraud until 1900, when her sons "undertook to ascertain just what was claimed by McWhorter." She then became aware for the first time that the land was claimed absolutely by McWhorter. She did not bring suit at that time, for the reason that she "was deterred by her husband, who would not allow her to bring suit for the land, and the action on the part of her husband was through the influences of the said McWhorter." McWhorter demurred to the amendment, on the grounds, among others, that no sufficient fraud is alleged "that has misled petitioner, or prevented her suing, nor is any such alleged with sufficient particularity and definiteness to enable defendant to defend against the same," and that plaintiff is guilty of such laches as to prevent a recovery. Defendant also renewed his former demurrers to the petition as originally amended. The demurrer was sustained, the amendment disallowed, and the plaintiff excepted.

Of course, the general and very vague allegations, that petitioner "signed the same" (the conveyance to McWhorter executed in 1884), and that "said McWhorter led petitioner's husband to believe," etc.; that "she was made to believe by her said husband and the said McWhorter that, even if said debt was not discharged during the lifetime of her husband, she would have the right to take possession of said land under her homestead rights, upon his death, should she survive him," which appear in the first, fourth, and fifth paragraphs of the proffered amendment, should have been stricken upon special demurrer, on the ground that no act of fraud was alleged with sufficient particularity and certainty to entitle petitioner to recover. And beyond these general allegations of fraud on the part of the defendant, no act of his even contended by the plaintiff to have been fraudulent, except the allegations contained in the sixth ground of the amendment under consideration, which are, in substance, that the failure of the defendant to make any improvements upon the land "satisfied the mind of the petitioner and led her to believe that [defendant] only held said land until the rents or income should be sufficient to pay the amount due him by her said husband, and that he did not hold the same adversely to her rights." It needs no discussion to demonstrate that these allegations were clearly incapable of withstanding the attack of the special demurrer just referred to.

But, taking the amendment as a whole, retaining those allegations which ought to have been stricken upon the special demurrer we cannot see how it avoids the decision of this court (121 Ga. 541, 49 S. E. 603) that the petitioner is precluded from a recovery, by her laches. The substance of her amendment is that she was led to believe that the quitclaim deed which she signed with her husband in 1884 was only a deed to secure the payment of her husband's debt to the defendant, and that she only learned that McWhorter claimed title to land when her sons investigated the matter two years prior to her husband's death. But the fraud alleged in the petition, and the only fraud upon which there could be a recovery under the facts and circumstances of this case, consisted in the scheme of the defendant, and of the petitioner's husband to convey the homestead property to McWhorter, under judicial order of sale for reinvestment, and to apply the proceeds thereof to the payment of the husband's debt to McWhorter. And how the character of the subsequent conveyance executed in consummation of the alleged unconscionable scheme has any bearing upon the question of the plaintiff's knowledge of the fraudulent intent and failure to reinvest, whether it be quitclaim deed, or deed to secure a debt, it is difficult to conjecture. It is true that the petitioner denies in general

terms that she had knowledge of the fraud until 1900, but it does not appear from the amendment that she was ignorant of the failure to reinvest, or that she did not know, when she indorsed the original petition for sale and reinvestment, that the proceeds of the sale would take the direction given them by her husband. If, as a matter of fact, she did not know of the fraud, no sufficient reason appears why she should not have discovered it long ago. In the first amendment to the petition it is alleged that as each of the petitioner's children would attain his or her majority, McWhorter would try to get a deed from such child to the land in question. This in itself should have put her on notice that McWhorter was holding the land adversely to her; and indeed, she alleges that she several times sought to institute this action through the aid of her sons, but that each time she was deterred by her husband. Moreover, it does not appear that she has ever made any effort to ascertain whether the rents had not discharged the indebtedness, and, construing the last amendment with the petition as first amended, we cannot escape the conclusion reached by this court in the former opinion rendered in this case, that "it is clearly inferable [from the record] that she was cognizant of the fraud from its inception," and she is precluded from a recovery, by her own laches. It follows that the court below did not err in refusing to allow the amendment, and in dismissing petitioner's case.

Judgment affirmed. All the Justices concur.

(125 Ga. 159)

GRIFFIN et al. v. COLLINS.

(Supreme Court of Georgia. March 28, 1906.)

1. APPEAL—REVIEW—SECOND GRANT OF NEW TRIAL.

When a case is referred to an auditor and the report of the auditor is, over exceptions of fact, made the judgment of the court without submitting the exceptions to a jury, and the Supreme Court reverses the judgment because the case is one at law, and, upon the submission of the exceptions to a jury, the verdict is in favor of the exceptions of one party and against the exceptions of the other, and the court grants a new trial, the rule laid down in Civ. Code 1895, § 5585, has no application. Under such circumstances it is in effect the second grant of a new trial which is under review.

2. REFERENCE—AUDITOR'S REPORT—EXCEPTIONS.

An exception to an auditor's report, classified as an exception of fact, but which raises only a question of law, should be stricken.

3. SAME.

An exception of fact to an auditor's report, which raises an immaterial issue, or which is so vague and indefinite as not to present any clear cut issue of fact, should be stricken.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reference, § 160.]

4. SAME.

An exception to an auditor's report, complaining of the admission of evidence, should set forth the evidence objected to.

5. GUARDIAN AND WARD—LIABILITY FOR INTEREST.

A guardian is not liable for interest during the first year after his appointment, unless there is interest earned. In that event he is chargeable with the actual interest, and no more.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, §§ 242, 250.]

6. SAME—COMMISSIONS.

Guardians are entitled to 10 per cent. commission on interest made, under the same circumstances that the law allows such commissions to administrators. An administrator is not entitled to such commissions unless he shall return the interest made "to the ordinary, so as to become chargeable therewith as a part of the corpus of the estate."

7. SAME—INTEREST CHARGEABLE.

The rule in reference to the calculation of interest against trustees, laid down in Civ. Code 1896, § 3498, was applicable in the present case.

8. SAME—COMMISSIONS.

In a guardian's account commissions should not be allowed on commissions paid by the guardian to himself.

9. SAME—ACCOUNTING.

Discussion of other matters raised by exceptions of law.

(Syllabus by the Court.)

Error from Superior Court, Green County; H. G. Lewis, Judge.

Action by Pope Collins, administrator, against J. M. Griffin and others. From the judgment, defendants bring error, and plaintiff brings cross-error. Judgment on main bill of exceptions affirmed, and on cross-bill reversed.

Saml. H. Sibley, for plaintiff in error. Hamilton McWhorter, Jos. B. & Noel P. Park, and Jas. Davison, for defendant in error.

COBB, P. J. This is the second appearance of this case. For a statement of the case, reference is made to the opinion of Mr. Justice Candler when the case was here before. *Griffin v. Collins*, 122 Ga. 102, 49 S. E. 827. The judgment was there reversed for the reason that the judge erred in not submitting the exceptions of fact to a jury. The court declined to pass upon the assignments of error in the cross-bill of exceptions filed by the plaintiff at that stage of the case, and said that nothing in the opinion was intended "to preclude the plaintiff from using the same points when the case is tried again." At the last trial the court submitted to the jury such of the exceptions of fact as were held to be sufficiently definite. The jury returned a verdict finding against the exceptions filed by the plaintiff and in favor of exceptions filed by the defendants. The plaintiff made a motion for a new trial, which was granted upon the ground that there was no evidence to authorize the finding as to eight of the exceptions of the defendant. The defendants filed a bill of exceptions, assigning error upon the granting of the new trial and also upon the overruling of certain exceptions of law. The plaintiff filed a cross-bill of exceptions, assigning error upon the overruling of exceptions of law filed by him, upon refusal

to strike certain exceptions of the defendants, and upon the refusal to grant a new trial on all the grounds in the motion.

1. This case was first tried by the judge without a jury, under a misapprehension as to the character of the case. A reversal of the judgment, in its effect, resulted in a new trial before a jury being ordered. Under such circumstances the rule in reference to the first grant of a new trial is not applicable, and the questions of law involved in the case will be considered. The defendant in error would in any event be entitled to have the question raised in his cross-bill of exceptions determined, in so far as they relate to matters which would probably arise on another trial. *Holmes v. Langston*, 110 Ga. 862, 36 S. E. 251 (7); *Thornton v. Travelers Ins. Co.*, 116 Ga. 121, 42 S. E. 287 (1), 94 Am. St. Rep. 99.

2, 3. The assignments of error which refer to the refusal of the court to strike certain exceptions of fact, and the striking of other exceptions of fact filed by the defendants will be first dealt with. There was an exception of fact stating that the auditor had charged 8 per cent. interest against the guardian, and this was excepted to on the ground that 8 per cent. was the contract rate of interest, that the charge was contrary to law, and a grave injustice to defendants. This exception should have been stricken, as raising a question of law rather than a question of fact. Exceptions of fact 12 to 17, inclusive, relate to the finding of the auditor that all commissions of 10 per cent. on interest earned should be stricken from the return of the guardian, and object to this finding for the reasons that these commissions had been duly allowed by the ordinary, and "there was no fraud or trace of fraud impeaching said judgment of the ordinary." These exceptions simply raise a legal question as to whether a guardian's return, which has been approved by the ordinary and which was not attacked for fraud, was conclusive upon the ward, and they should have been stricken as exceptions of fact. There was no error in refusing to strike exceptions of fact 10, 11, and 18. Exceptions of fact 1 to 8, inclusive, were properly stricken. They raised either questions of law or immaterial issues of fact, or were too vague and indefinite. Exception of fact 19, filed by Griffin, is almost identical with exception of fact 20, filed by the sureties, and each was properly stricken for the reason that they were general exceptions to the auditor's final conclusion and were not sufficiently specific to make an issue for a jury. Griffin and the sureties each filed separate exceptions of fact, but they were identical with each other, except as above indicated, and that the sureties filed an exception numbered 19, which was not insisted upon in this court.

4. The only exceptions of law insisted on in the brief of counsel for defendant are the ones numbered 5, 6, and 8. The last relates

to the admission of evidence, but the evidence is not set forth or attached, and therefore this exception will not be considered. The remaining two exceptions complain that the auditor charged the guardian interest at the rate of 8 per cent. If the evidence shows that the guardian made this rate by the use of his ward's money, he must, of course, account to her estate at that rate. There was no merit in the exception as an exception of law.

5. The plaintiff filed 19 exceptions of law. The judge sustained one of these (No. 2), and overruled the others. Of this number, four (Nos. 1, 6, 7, and 19) have been abandoned or are no longer material. Four (Nos. 3, 4, 5, and 8) are subject to the objection that the exception does not set out with sufficient certainty all the facts necessary to enable the court to pass intelligently upon the question raised. The remaining exceptions relate to alleged errors in the accounting made by the auditor. These will now be dealt with. The tenth exception complains of the conclusion of the auditor that the guardian was not chargeable with interest during the first year of his guardianship; the error being that the evidence showed that he made interest. The interest actually made should have been charged against him. This exception was well taken. *Allen v. Hardee*, 30 Ga. 463.

6. The fourteenth exception relates to the allowance of 10 per cent. commissions on interest claimed to have been made by the guardian. Guardians are allowed the same commissions for receiving and paying out the estates of their wards as are allowed administrators, and the Code declares that "extra compensation and travelling expenses shall be allowed them upon the same principles as to administrators." Civ. Code 1895, § 2552. An administrator is entitled to 10 per cent. commission on all amounts of interest received by him on money loaned by his intestate, or by himself as an administrator, provided he "shall return the same to the ordinary so as to become chargeable therewith as a part of the corpus of the estate." Civ. Code 1895, § 3485. This provision is in the chapter which deals with the subject, "Commissions and Extra Compensation" of administrators. The framers of the Code seem to have dealt with these commissions as being embraced under the term "extra compensation." In any event it is extra compensation, and, interpreting the provisions in reference to the commissions of guardians, we think it can be easily inferred that it was the intention of the law-makers that if a guardian should make interest and return it so as to become chargeable therewith as a part of the corpus of the estate, he would be entitled to the same commissions to which an administrator would be entitled under the same circumstances. If, however, the guardian does not return it so as to become chargeable with it as a part of the estate, he is not entitled to the commission.

This exception of law was well taken, and if the evidence shows no return of the interest, and therefore that the guardian never became chargeable with the same as a part of the corpus, the commission of 10 per cent., which was allowed him by the auditor, should be stricken from the account.

7. The auditor struck a balance as of August 6, 1888, and charged the guardian with 7 per cent. interest from that date to August 10, 1903, which seems to be the date of his report. Exception 17 is in the following language: "The auditor finds simple interest at 7 per cent. from August 6, 1888, on the balance due. As a matter of law this is erroneous and is excepted to. The interest should continue at 8 per cent., or should be annually compounded at 6 per cent., in the terms of the statute." The Code provides that the interest to be charged against trustees shall be at the rate of 7 per cent. per annum, without compounding, for six years from the date of their qualification, and after that time at the rate of 6 per cent. per annum, annually compounded. The trustee may relieve himself from this rule by returning annually the interest actually made and accounting for the balance of the fund, and any one interested in the estate may recover greater interest by showing that the trustee actually received more, or used the funds himself to greater profit. Civ. Code 1895, § 3498. See also, *Tipplin v. Perry*, 122 Ga. 120, 50 S. E. 35. We see no reason why this rule is not applicable in the present case. It is true that Griffin is a guardian by estoppel, and his sureties are liable on their bond under the provision of the Code expressly declaring that if the appointment of the guardian is for any reason void the sureties on his bond shall still be liable for any property which may have been received by him by virtue of his appointment. Griffin and his sureties are estopped from denying that he bore to Miss Lane the relation of guardian; and this estoppel operates to prevent him from claiming that he should not be settled with as a guardian should be settled with, and that the settlement should be upon the same basis as if he were simply an agent with her funds in his hands. He has claimed all of the rights that a guardian would be entitled to, and wherever the evidence was such as to authorize it these rights have been accorded to him. This was proper for the estoppel was mutual. He was either a guardian or not a guardian. If he was a guardian he was to be dealt with from the beginning to the end of the suit as a guardian. We think the auditor erred in not following the rule above referred to. The auditor struck a balance as of August 6, 1888, and the exception, properly construed, does not complain that the compounding of interest did not begin prior to 1888, but merely that the auditor did not treat the date on which he struck the balance as the date from which the interest should be compounded annually at the rate of 6 per cent. The exception is

well taken, but no greater benefit must be granted to the exceptor than is claimed in the exception, and therefore August 6, 1888, should be taken as the period from which the compounding of interest should begin. Interest should, from that date, be annually compounded at 6 per cent., unless it appears from the evidence that the guardian annually returned the interest and accounted for the balance of the fund.

8. The eighteenth exception complains that Griffin was allowed commissions as administrator of the estate of W. M. Lane, and as administrator of the estate of E. C. Lane, and also as guardian of Harriet Lane, when the property which passed through his hands in his capacity as administrator and guardian was the same, and also complains that commissions were allowed upon commissions. As administrator of the two estates represented by him, he was, of course, entitled to the commissions allowed administrators. And as guardian he was entitled to the commissions allowed guardians. If these three estates had been represented by three different persons, it would not be contended for a moment but that each administrator and the guardian would be entitled to the commissions allowed by law. The fact that the administration of the three estates is combined in one person would not prevent him from making the same claim as to commissions that the three separate individuals would be entitled to make, each one occupying the position which he occupied in reference to the different estates. Of course, commissions should not be allowed on commissions, and if there is in the account of the auditor such an item it should be stricken.

9. The sixteenth exception contends that as the auditor found that Miss Lane was mentally incapacitated for contracting or making a settlement, or appointing Collins to do so for her, the auditor should not allow the guardian a credit for the amount receipted for by Collins as her agent, and that he should be treated as the agent of the guardian, and the guardian should be credited with only such amounts as were shown to have been used by Collins for the benefit of Miss Lane, and for such items of property at their true value as were turned over by him to the administrator of her estate. Under the circumstances Collins must be treated simply as the agent of Griffin, and Griffin must be held responsible for Collins' administration of the funds and property in his hands. The rule applicable where an administrator or guardian appoints an attorney in fact is by analogy applicable to the state of facts set out in the present case. The guardian should be credited, not with the amount which went into Collins' hands, but with the amount for which Collins accounted. If any property went into Collins' hands and was accounted for, the guardian should be credited, not with the amount fixed by Collins'

receipt, but by the actual value of the property whatever it might have been.

The ninth exception raises an objection to an allowance by the auditor, of a credit to the guardian resulting from compromises of certain notes which he had received from W. M. Lane's estate. It seems that these notes were distributed to the heirs of W. M. Lane, as cash, and received by the guardian as cash, he charging himself with them as such. Subsequently an order of the ordinary was obtained allowing the guardian to compromise these notes, and the ward also agreed that the compromise should be made. The auditor having found that the ward was mentally incapable of making a contract, the consent of the ward to the compromise goes for nothing. If the claims became insolvent or partially insolvent after the guardian received them, and from no fault of his, there seems to be no reason why he should not have been allowed to compromise the claims, and be charged only with the amount received by the compromise. The burden, under the circumstances, would be upon the administrator of the ward to show that the loss resulted from the mismanagement of the guardian. He would not be absolutely bound by having charged himself with the amount of the notes if this charge was the result of a mistake. But he cannot be properly credited with a less amount than the face of the notes, when it appears that the failure to collect the full amount due was owing to his fault.

The eleventh and thirteenth exceptions relate to what is referred to in the record as the investment in the Union Point House. The guardian claimed a credit, for this investment, of \$500. The auditor allowed a credit of only \$270. Complaint is made that the guardian was allowed a credit for repairs and insurance, and was charged with the rents of the property. We do not think this objection was well taken. The auditor simply found that the credit for the investment should be \$270, instead of \$500. The investment made became then an investment of the ward's estate, and treating the house as belonging to the ward, the guardian was chargeable with the rents, and was entitled to a credit for repairs and insurance. We see no error in the rulings complained of in this exception. The twelfth exception refers to the notes dealt with in the ninth exception and the Union Point House investment. It also refers to the matter of charging interest, complaining that the auditor failed to charge against the guardian, interest earned prior to August 26, 1881. If there was any interest earned, of course it should have been charged. This depends upon the evidence.

The fifteenth exception deals with the credit allowed for commissions on the transactions of 1884 and 1886, when no returns were made by the guardian. It is claimed

that the commissions were forfeited by the failure to make returns, and no sufficient reason for relieving the forfeiture was shown to the ordinary. The ordinary appears to have a very broad discretion in these matters, and we will not reverse the judgment of the court below overruling this exception, even if an order of the ordinary relieving from a forfeiture of commissions could be taken advantage of by way of a collateral attack.

The foregoing discussion disposes of all the exceptions raising questions of law, which were so framed that they can be properly dealt with in this court. We have not undertaken, and will not undertake, to decide any of the exceptions of fact. These exceptions can be submitted to the jury at the next trial. If at that time the judge should be of the opinion that any of the exceptions of fact are entirely unsupported by evidence, of course he can direct a verdict on such exceptions. If the evidence is conflicting, the jury must be allowed to decide the issue. Under the view which we have taken of the exceptions of law filed by the plaintiff, a new accounting will have to be taken by the judge himself, or the matter be recommitted to the auditor. This is a matter for determination by the judge at the proper time. We do not think that this whole controversy should be reopened before the auditor, but that there should be a recommitment solely for the purpose of adjusting the account of the rulings on the exceptions. The exceptions of fact should be first disposed of, and, if a recommitment is then had, the auditor should be simply directed to report the amount for which a decree should be rendered, and, if possible, this litigation should be concluded upon the filing of this report.

Judgment on main bill of exceptions affirmed; on cross-bill, reversed. All the Justices concur.

(125 Ga. 153)

BURCH v. AMERICUS GROCERY CO.

(Supreme Court of Georgia. March 28, 1906.)

1. PRINCIPAL AND AGENT—GENERAL AGENCY.

Whenever a general agency has been established for any purpose, all persons who have dealt with the agent have a right to assume that his authority to deal with them in behalf of his principal continues until notice, express or implied, has been conveyed to them that the agency has been revoked. It follows that, until notice has been brought home to them, the acts of the agent within the apparent scope of his authority will be binding upon the principal, even though the agent may assume to act in his representative capacity after his authority to do so has been revoked.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 62, 564.]

2. NEW TRIAL—ADMISSION OF EVIDENCE.

It is not cause for a new trial that the court improperly admitted in evidence a portion of the agreed brief of the testimony adduced on a former hearing of the case, when it is apparent that the effect of so doing cannot

really have prejudiced the excepting party before the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 68.]

3. EVIDENCE—RELEVANCY—CUSTOM OF BUSINESS.

That a letter, properly addressed, was duly stamped before it was mailed may be shown, not only by positive testimony establishing the fact, but also by persuasive proof to the effect that the only envelopes used in the office of the sender were such as bore the printed stamp of the government, and that it was the custom and rule of the clerks in the office to use the envelopes furnished them by the sender for the purpose of conducting his correspondence.

(Syllabus by the Court.)

Error from City Court of Dublin.

Action by the Americus Grocery Company against J. B. Burch. Judgment for plaintiff. Defendant brings error. Affirmed.

J. S. Adams and Saml. H. Sibley, for plaintiff in error. W. C. Davis and J. B. Sanders, for defendant in error.

EVANS, J. The Americus Grocery Company sued J. B. Burch for a balance alleged to be due on open account. The only item in dispute was one of May 8, 1903, for a certain quantity of tobacco. The defendant contended that this item was purchased by his clerk, Mike Burch, after he had left his employment, and that he neither authorized nor ratified the purchase nor received the tobacco. On the other hand, the plaintiff insisted that Mike Burch was the general agent of the defendant in the management of his store, and as such, on previous occasions, had ordered goods of plaintiff on defendant's account, and that the plaintiff, without notice that Mike Burch was no longer employed by the defendant, took the order in the defendant's name and shipped the goods to the defendant, as was usual in the past transactions. On the trial it appeared that the defendant operated a sawmill and in connection therewith conducted a store or commissary. The commissary was in the charge of Mike Burch, who purchased all the merchandise therein sold and managed the business. On former occasions, the plaintiff had sold merchandise to the defendant upon the order of his agent, Mike Burch. When the merchandise, to recover the price of which the present action was brought, was ordered of the plaintiff by Mike Burch, he was not in the employment of the defendant, and had not been for two months past. Neither the plaintiff company nor its "drummer" was aware at the time of receiving the order that Mike Burch was no longer in the service of the defendant. The plaintiff's salesman called at the commissary of the defendant and asked for Mike Burch, as he had always done, and was informed that Mike Burch was about three miles away, superintending the putting down of a sawmill. There he found him and took the order for the merchandise. It was shipped

to the defendant and the bill of lading was mailed to him. The defendant testified that the goods were never received by him, but were taken possession of by Mike Burch without his knowledge, and that he never received the bill of lading for the goods. Upon these facts the jury returned a verdict in favor of the plaintiff for the value of the goods, which verdict the trial judge refused to set aside on motion for a new trial.

1. In the management of the business of the commissary, the agent, Mike Burch, had general powers. Relatively to this business, he was the general agent of the defendant in the purchase of merchandise. "Whenever a general agency has been established for any purpose, all persons who have dealt with such agent, or who have known of the agency and are apt to deal with him, have a right to presume that such authority will continue until it is shown to have been terminated in one way or another; and they also have a right to anticipate that if the principal revokes such authority, they will be given due notice thereof. It is a general rule of law, therefore, upon which there seems to be no conflict of authorities, that all acts of a general agent within the scope of his authority, as respects third persons, will be binding on the principal, even though done after revocation, unless notice of such revocation has been given to those persons who have had dealings with and who are apt to have other dealings with the agent upon the strength of his former authority." 1 Clark & Skyles on Agency, § 173 (b). This rule was stated and applied in *Thompson v. Douglass*, 64 Ga. 57. The obligation resting upon the principal of giving notice of the revocation of the authority conferred upon his agent has been analogized to the duty which the law imposes upon the members of a partnership to give due notice of its dissolution to creditors and the public at large. *Clafin v. Lenheim*, 66 N. Y. 301; 1 *Parsons on Contracts* (9th Ed.) 72, and citations. Where there is no attempt at all to comply with this duty, a retiring partner is to be held liable for the debts of the partnership, created after he ceased to be a member thereof, unless he shows that notice of his retirement had been brought home to the persons who subsequently became its creditors. *Ewing v. Trippe*, 73 Ga. 776; *Pyron v. Ruohs*, 120 Ga. 1064, 48 S. E. 434, and cit. Actual notice alone will affect creditors of the firm. *Askew v. Silman*, 95 Ga. 678, 22 S. E. 573; *Camp v. Southern Banking Co.*, 97 Ga. 582, 25 S. E. 362. And like notice must be shown before one who has revoked the authority conferred upon his general agent will be at liberty, relatively to persons who have dealt with such agent upon the faith of his authority as recognized by his principal in the past, to repudiate a contract made in behalf of the principal by the agent after his authority has been revoked. *Bras-*

well v. Insurance Co., 75 N. C. 8; 1 *Parsons on Contracts* (9th Ed.) 71. The term "actual notice" is intended to be understood in its strictly legal, technical sense, and is not to be confounded with actual knowledge, which, as was pointed out in *Clarke v. Ingram*, 107 Ga. 570, 33 S. E. 802, is by no means a synonymous or interchangeable term. "Notice is actual when one either has knowledge of a fact or is conscious of having the means of knowledge, although he may not use them." It may be either "express notice," or simply "implied notice"; notice communicated by direct and positive information from persons cognizant of the fact, or notice such as "arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact." *Id.* 571.

In the present case no express notice was shown, and the controlling issue was whether or not the plaintiff had "implied notice" that there had been a revocation of the agency, within the meaning of Civ. Code 1895, § 3933, which declares that: "Notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, is equivalent to knowledge in fixing the rights of parties." The only circumstance upon which the defendant could rely as suggesting the necessity of making inquiry whether the agency had been terminated was that the order for the goods was given to the plaintiff's salesman three miles from the defendant's store, where the agent had been employed. The defendant was engaged in the sawmill business, and his "commissary" was run in connection with that business, as an adjunct to it, and not as a wholly independent enterprise. When the order for the goods was taken, Mike Burch, who still assumed to act as the defendant's agent, was superintending the erection of a sawmill. That it did not belong to the defendant or was not to be used in connection with his business was not self-apparent, nor was the fact that Mike Burch was not at the time engaged in his customary duties at the commissary calculated to put the plaintiff's salesman on notice that he had left the service of the defendant. Moreover, the salesman had first driven by the store of the defendant and inquired for Mike Burch, who had theretofore been in charge of it. Instead of being notified that Mike Burch was no longer in the defendant's employ, the salesman was told where Mike Burch could be found. Under these circumstances it is not strange that the salesman should assume that the employee at the store of the defendant understood that he had called on business, as theretofore, and wished to see the defendant's representative, nor is it remarkable that, after being informed as to his whereabouts but given no

intimation that he was no longer the defendant's agent, the drummer should entertain no doubt as to the continuance of the general agency. The jury, after considering all the facts and circumstances brought to light at the trial, found against the contention of the defendant that due caution and prudence on the part of the plaintiff's drummer ought to have suggested to him the propriety of making inquiry, if he did not divine the truth. The burden of proof was upon the defendant to establish his defense that the plaintiff was affected with implied notice. *McLean v. Camak*, 97 Ga. 812, 813, 25 S. E. 493; *English-Am. Loan Co. v. Hiers*, 112 Ga. 823, 38 S. E. 103. The plaintiff being a creditor of the defendant and having had numerous business transactions with his accredited agent was entitled to receive a formal notification from him of the termination of the agency, or the legal equivalent of such a notification. The plaintiff could not in good faith remain passive, so long as the defendant failed in his legal duty to take active measures to impart notice. *Camp v. Banking Co.*, 97 Ga. 586, 25 S. E. 362. "If one of two innocent parties must suffer by the act of a third party" assuming to act as an agent of one of them, "he who put it in the power of such third party to do the wrongful act must suffer the loss, rather than the other innocent party who would be a victim without any fault on his part." *Blaisdell v. Bohr*, 77 Ga. 382. The defendant was admittedly at fault, having failed to take any steps to give notice to the plaintiff, whereas the plaintiff had not omitted to perform any legal duty owing to the defendant, and the plaintiff's drummer admittedly acted in entire good faith. The jury took the view that the plaintiff should not be called on to suffer the loss. "In this there is no hardship upon the defendant," as was pointed out by *Rapallo, J.*, in *Clafin v. Lenheim*, supra, who added that it was the defendant's duty, "after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiffs had been to his knowledge. This was an act easily performed, and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or dubious or equivocal circumstances substituted in place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most usual and necessary precaution." The verdict of the jury appears to be in accord both with the strict law and the common justice of the case, and it should not be set aside unless the court below committed some error

which was obviously calculated to bring about a result which would not otherwise have been probable.

2. The case had been previously tried and a brief of the evidence had been agreed on by counsel. On the trial now under review, the defendant was asked if he did not formerly swear, "when Mike Burch left, young Wilson took his place and did the buying for me." Upon defendant's denial of having previously sworn thus (instead of stating that Frank Burch succeeded Mike Burch as manager of the store), the court admitted in evidence, over the defendant's objection, so much of the agreed brief as contained the quoted extract. The defendant complains of the admission of this evidence, as well as of the omission of the court to instruct the jury for what purposes they could consider it. It does not appear that the agreed brief of the evidence adduced on the former trial had been approved by the presiding judge, as was true in *Anderson v. Tribble*, 66 Ga. 584, 589. But even if this was inadmissible for the purpose of impeachment, the refusal of the judge to exclude it is not cause for ordering a new trial. The main, if not sole, issue in the case was whether the plaintiff had notice of the termination of Mike Burch's agency at the time of receiving the order for the tobacco or before shipping it. The fact that one clerk rather than another may have succeeded Mike Burch as manager of the store could not have aided the jury in the solution of this issue; nor do we see how the evidence admitted over the defendant's objection could have really prejudiced him before the jury in their determination of this controlling issue.

3. When it is shown that a letter was properly addressed, duly stamped and mailed, a prima facie inference of fact may be drawn that it was received by the addressee. *National Building Ass'n v. Quin*, 120 Ga. 358, 47 S. E. 962. A witness for the plaintiff testified by interrogatories that a bill of lading was inclosed in an envelope properly addressed, and mailed to the defendant. This testimony was objected to because it was not shown that the letter was stamped, whereupon the secretary and treasurer of the plaintiff company testified: "We use in our office only envelopes already stamped by the government, with our name thereon; the same being the regular government envelope. I cannot swear of my own knowledge that one of these envelopes was used in mailing the bill of lading, but to the best of my knowledge and belief it was. I believe it because it was our rule and custom to use them." The court then refused to rule out this testimony. The jury could reasonably have inferred from this testimony that the letter was duly stamped, and the court properly refused to exclude the evidence objected to. Though evidence of this nature is by no means as strong or convincing as positive

testimony concerning the fact sought to be established, it should, nevertheless, be allowed to go to the jury for what it is worth. See *Leonard v. Mixon*, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134.

Judgment affirmed. All the Justices concur.

(125 Ga. 149)

STINSON v. HIRSCH BROS. & CO.

(Supreme Court of Georgia. March 28, 1906.)

1. EXEMPTIONS—CLAIM—ESTOPPEL.

When a mortgagee places in the hands of a levying officer a mortgage *fi. fa.*, and an affidavit that the debt upon which the execution is founded is one from which a homestead is not exempt, and the mortgage *fi. fa.* is levied, and the wife of the defendant in *fi. fa.*, in order to stop the sale, files with the levying officer a counter affidavit denying the truth of the plaintiff's affidavit, and claiming the property as having been set apart to her as a homestead, she is estopped from questioning the sufficiency of the entry of levy.

2. SAME—RECORDING CLAIM—AMENDMENT.

If there has been a failure on the part of an applicant for an exemption of personalty under Civ. Code 1895, § 2866, to comply with the law under which the exemption is sought to be made, the recording of the exemption claimed is a mere nullity and cannot be amended.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by Hirsch Bros. & Co. against C. B. Stinson to foreclose a mortgage. Judgment for plaintiff on levy of execution. M. A. L. C. Stinson, wife of defendant, filed a claim. Judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Armistead, for plaintiff in error. Griner & Adams and Jos. K. Hines, for defendant in error.

EVANS, J. Hirsch Bros. & Co. foreclosed a mortgage on personalty, executed to them by C. B. Stinson. At the time of the foreclosure the mortgagees filed with the sheriff an affidavit that the debt upon which the execution was founded was one for which a homestead is not exempt, and that the mortgagee had not sufficient property upon which the *fi. fa.* could be levied, except the homestead property. When the mortgage *fi. fa.* and this affidavit were placed in the hands of the sheriff, he levied on certain property, including "100 bushels of corn, more or less, in the crib," and Mrs. M. A. L. C. Stinson, the wife of the defendant in *fi. fa.*, filed with the levying officer a counter affidavit denying the truth of the plaintiffs' affidavit. The execution and these affidavits were returned to the superior court, and the issue thus formed was tried, and a verdict directed in favor of the plaintiffs. Mrs. Stinson sued out a bill of exceptions complaining of the direction of the verdict against her, and of certain rulings made by the court pending the trial.

1. The plaintiffs tendered in evidence the mortgage *fi. fa.* with the entry of levy on

certain cotton and the "100 bushels of corn, more or less, in the crib," levied on as the property of the defendant in *fi. fa.* Counsel for Mrs. Stinson objected to the admission in evidence of the levy, and moved the court to dismiss the levy, because it was void for want of sufficient description of the property levied on, the description being too vague and indefinite to identify the property, and failing to state in whose possession it was found, or where located, or whether it was any part of the property described in the mortgage execution. The court overruled these objections to the levy. It appears that of the property levied on only corn was embraced in the homestead exemption relied on by Mrs. Stinson. A levy on personalty is made by an actual seizure of the property, and when Mrs. Stinson in her counter affidavit alleged that the property was levied on, she thereby admitted an actual seizure of it by the levying officer. It has been held in a claim case that the interposition of a claim commits the claimant to the fact of the making of a levy, but not to the legality of the process under which it was made. *Pearce v. Renfro*, 68 Ga. 194; *Osborne v. Rice*, 107 Ga. 283, 33 S. E. 54, and *cit.* The issue made by the affidavit and counter affidavit filed in a case such as the present is whether the property levied on is subject to the execution of the plaintiff. It is not until a legal levy has been made that a counter affidavit can properly be filed; hence the filing of the counter affidavit admits the seizure of the property under the levy, and the claimant must be held to have waived any irregularity or informality in the execution of the process, and to be estopped from questioning the sufficiency of the entry of levy made by the officer.

2. The claimant who interposed the counter affidavit in this case complains that the court erred in rejecting from evidence the following homestead exemption, as amended, upon which she relied: "State of Georgia, Laurens County. To the Ordinary of Said County: The following is the schedule of the property of C. B. Stinson, who is the head of a family consisting of himself, his wife, M. A. L. C. Stinson, and seven minor children [naming them], claimed to be exempt from levy and sale for the use and benefit of said wife and family under section 2866 of the Code of Georgia, and following sections. [Here appears the schedule of personal property, including, under the item of provisions, 125 bushels of corn.] Personally appeared M. A. L. C. Stinson, the applicant for exemption above set out, who on oath says that the same is a true and a correct schedule of the property which is claimed to be exempt to deponent and family under section 2866 of the Code and following sections, which deponent prays may be recorded as provided by law. [Signed] M. A. L. C. Stinson." Then appears the attest of the ordinary, his approv-

al and order to record, dated November 28, 1898, together with the following amendment, sworn to on January 10, 1901, and approved and ordered to record by the ordinary on January 11th: "And now comes the applicant for homestead, M. A. L. C. Stinson, and by permission of the court amends her petition for homestead, which was filed by her in said court of ordinary on the 28th day of November, 1898, and approved and recorded on the same date, by adding to said petition, immediately after the words 'and following sections,' in the last line of petition, preceding the enumeration of articles claimed as exempt, the following words: 'And the said C. B. Stinson refused and still refuses to file the same. [Signed] M. A. L. C. Stinson.'" The validity of this exemption, as originally filed and before the amendment thereto, was under review at the October term, 1900, of this court, and it was then held that the exemption was void because it did not affirmatively appear in the schedule that the husband of the applicant had refused to apply for an exemption. See 112 Ga. 348, 37 S. E. 385. After this adjudication, and before another trial in the court below, Mrs. Stinson sought to amend this void exemption, by inserting into the schedule a recital to the effect that her husband had declined to file the same.

The act of the ordinary in receiving and recording a schedule of property sought to be exempted under the provisions of section 2866 et seq., Civ. Code 1895, is ministerial only. *Marcum v. Washington*, 109 Ga. 296, 34 S. E. 585. The scheme of the law with reference to the recording of a schedule of property thus sought to be exempted by the head of a family (or by his wife, if he refuses to claim the exemption) is that the applicant, by merely filing a schedule of the property subject to exemption, shall in this way select and designate the specific property claimed to be exempt from levy and sale. If the head of the family has other property, it is thereby segregated from that to which the applicant wishes the exemption to apply, and creditors and all others concerned are put on notice of the election made by the applicant. If there has been a failure on the part of the applicant to comply with the law under which the exemption is sought to be made, then the recording of the exemption claimed is a mere nullity. *Marcum v. Washington*, supra. As pointed out in that case, the approval of the ordinary is in no sense the judgment of a court, for the filing, approval, and recording of the schedule is not a proceeding before the court of ordinary. So, if the effort to comply with the law relating to the assertion of a claim to such an exemption is so ineffectual as to amount

to nothing, the claim of exemption is a mere nullity and cannot be given life by an amendment supplying any fatal omission in the schedule. The test is, not what the applicant intended to do, but what he actually accomplished; and if he failed to assert his claim of exemption in the manner pointed out in Civ. Code 1895, § 2866 et seq., then he must commence again at the point from which he started, and present another and entirely distinct schedule, for nothing can be cured or accomplished by way of amendment.

What has been above said in no way conflicts with the decision rendered in the case of *Hardin v. McCord*, 72 Ga. 239, where an amendment was allowed in a proceeding before the court of ordinary to set apart a homestead under the Constitution of 1868, and it was held that the court had power to pass on the amendment and allow it even after a judgment approving the homestead had been rendered. A "constitutional homestead" can only be obtained in a regular proceeding instituted in the court of ordinary after due notice to creditors, and the order of the ordinary approving the setting apart of the homestead is a judgment of a court of competent jurisdiction and cannot be collaterally attacked by any one affected by legal notice of the proceeding. *Marcum v. Washington*, 109 Ga. 298, 299, 34 S. E. 585. There is no provision of law for amending a claim of exemption asserted by filing a schedule of property to exemption under the terms of Civ. Code 1895, § 2866 et seq., authorizing the setting apart of what is commonly known as a "short" or "pony" homestead. If there be a failure to comply in the first instance with the statutory requirements imposed upon the applicant for the exemption, his attempt to obtain it must prove entirely fruitless. It would be an anomaly to hold in the present case that, after a final adjudication by this court that the schedule originally filed by Mrs. Stinson was a nullity, she was at liberty to practically annul this judgment and defeat the rights of the plaintiffs thereunder by simply going before the ordinary and procuring his approval and allowance of an amendment to the schedule designed to cure the fatal omission which rendered it absolutely void and of no effect.

3. As the claimant of the property levied on utterly failed to establish her contention that it was exempt from seizure and sale, the direction of a verdict in favor of the plaintiffs, who made out a prima facie case, was eminently proper.

Judgment affirmed. All the Justices concur.

(125 Ga. 187)

COOPER v. SMITH.

(Supreme Court of Georgia. March 28, 1906.)

SALES—REMEDIES OF SELLER IN CONDITIONAL SALE—ATTACHMENT.

Where property is delivered to the buyer under a contract of conditional sale, the vendor retaining title thereto, the same may be seized under an attachment sued out for the purchase price, without first filing and having recorded a bill of sale of the property to the buyer; and the bare fact that, before the rendition of judgment in favor of the plaintiff in attachment, the property is illegally brought to sale by the levying officer and is purchased by the plaintiff, affords no reason for holding that he is thereby estopped from prosecuting his suit, on the theory that, by becoming the purchaser at the illegal sale, he elected to rescind the contract between himself and his vendee.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action by H. H. Smith against E. L. Cooper. Judgment for plaintiff, and defendant brings error. Affirmed.

J. S. Adams, for plaintiff in error. T. V. Sanders, for defendant in error.

EVANS, J. The plaintiff sued out an attachment for the purchase money of a certain horse, returnable to the city court of Dublin. At the appearance term he filed his declaration in attachment, praying a judgment for the purchase money claimed to be due. Amongst other things, the defendant pleaded that he purchased the horse from the plaintiff under a contract of conditional sale, whereby the title was reserved to the plaintiff until the purchase money was paid; that the plaintiff caused his attachment for the purchase money to be levied upon the horse without first filing and having recorded in the clerk's office a bill of sale of the property to the defendant; that the horse was sold under this attachment and was purchased by the plaintiff, and that the effect of thus bringing the horse to sale and purchasing it was to rescind the contract, and the plaintiff was not entitled to maintain his suit for the purchase money. On motion of the plaintiff, the court struck this plea of the defendant; the case was heard on its merits, and the plaintiff obtained judgment for the amount claimed by him.

The special plea which was stricken did not set up any valid defense. It was not necessary nor proper, before the horse was seized under the attachment, to file and have recorded in the clerk's office a bill of sale to the defendant; only after judgment in favor of the plaintiff would this be necessary or proper, in order that title to the horse should be vested in the defendant for the purposes of sale under the judgment against him. *Cade v. Jenkins*, 88 Ga. 791, 797, 15 S. E. 292. If the sale of the horse was premature or was for any other reason invalid, it is to be treated as a mere nullity. The plaintiff would not, by becoming the purchaser at a void sale

under the attachment, estop himself from proceeding with his suit to collect the contract price of the animal. What he did is not to be construed as an election on his part to rescind the contract by retaking the horse from the defendant. Quite the contrary inference is to be indulged. The plaintiff has consistently adhered to his election to proceed against the defendant by way of attachment. That the plaintiff may have been instrumental in bringing about a void sale under the attachment indicates, not a purpose to abandon this remedy, but rather that he has undertaken to pursue it with perhaps more than necessary vigor. He gains nothing by such a sale, nor does it affect the rights of the defendant, who, if entitled to be restored to the possession of the horse, could call upon either the plaintiff or the officer who sold it for its delivery. Clearly, the fact that the plaintiff became the purchaser at the sale did not afford a basis for the contention of the defendant that the contract between himself and the plaintiff was rescinded by the voluntary act of the latter.

Judgment affirmed. All the Justices concur.

(125 Ga. 184)

ODOM v. BUSH et al.

(Supreme Court of Georgia. March 28, 1906.)

1. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—CONSTRUCTION.

Properly construed, the contract declared on by the plaintiff was an agreement under which he was employed by the defendants, for an indefinite term, as superintendent of a proposed manufacturing plant, at a fixed salary per month from a specified date, with the option of becoming a shareholder in a joint-stock company in the name of which the enterprise was to be conducted.

2. SAME—HIRING BY THE MONTH—TERMINATION.

Such a contract of employment, being indefinite as to its duration, is to be deemed a hiring for the term of one month only; and after the expiration of that period, it was the right of the defendants to terminate the employment at will.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 10, 19.]

3. SAME—ACTION FOR BREACH—PLEADING.

Under the allegations upon which the plaintiff relied for a recovery, there was no breach of the contract declared on.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; Wm. A. Little, Judge.

Action by W. G. Odom against Joel Bush and Ben L. Clark. Judgment for defendants, and plaintiff brings error. Affirmed.

Wheeler Williams and Goetchins & Hoffell, for plaintiff in error. L. L. Miller, for defendants in error.

EVANS, J. The plaintiff, W. G. Odom, brought a suit for damages for an alleged breach of a contract by the defendants, Joel Bush and Ben L. Clark, who were doing business under the firm name of the Georgia Con-

an Company. According to the allegations of his petition, the defendants went to Newberry, S. C., where plaintiff was employed by the Carolina Manufacturing Company as superintendent of its factory, and solicited him to go to Columbus, Ga. (where they were to put up and establish a coffin factory), upon the following terms and conditions, to which he assented: (1) "Plaintiff was to be the superintendent thereof, at a salary of \$100 per month, beginning March 16, 1904;" (2) he was "to be also a stockholder in the joint-stock company, it being understood and agreed * * * that plaintiff was to put in whatever money he could raise from the sale of his real estate in the city of Atlanta, Ga., and from the sale of his stock in the Carolina Manufacturing Company"; and (3) the plaintiff, though entitled "to receive a salary of \$100 per month as superintendent of the proposed factory, * * * was to draw at the end of each month only what was required to meet the living expenses of himself and family, the balance of said salary was to remain in the hands of the company until the end of the year, when stock would be issued to plaintiff to cover the same, or, at the option of plaintiff, paid to him in cash." This proposition was made by the defendants and accepted by the plaintiff on March 14, 1904. He at once disposed of his household goods, selling the same at a great sacrifice, in order to be able to leave Newberry at such a time as would permit him to reach Columbus at the time agreed upon for him to begin his duties as superintendent; gave up his position with the Carolina Manufacturing Company, from which he received a salary of \$70 a month, and on March 16th left Newberry for Columbus to assume the duties of his new position. At the instance and request of defendants, he stopped en route, in Atlanta, to arrange for the disposal of his real estate, under the terms of the agreement, it having been understood and agreed that he should do so and that his salary was to start from the day he left Newberry, S. C. He reported to defendants for duty on March 21st. "Upon his arrival at Columbus, plaintiff was met by defendants in the manner and style of an associate in business, and was by them treated with such consideration as his position and his relation to them authorized, and he proceeded to carry out and perform the duties required of him by reason of his said engagement." He found that much repairing upon the factory building was needed, and being interested in the success of the undertaking, he performed much labor and service in making the needed repairs, although it was no part of his duty as superintendent to do so. He also, acting in that capacity and upon the request of the defendants, procured the services of an expert machinist from the Carolina Manufacturing Company, selected and ordered material and machinery for the plant, located places for machinery,

and otherwise arranged all the necessary preliminaries for the business. After he had performed these services, and after the defendants had obtained from him all the information necessary to the successful inauguration of the enterprise, they informed him that they had no further use for him. Plaintiff had been engaged in the coffin manufacturing business for some 25 years, and it was because of his superior skill and knowledge of the business that the defendants sought him and procured his services. They knew absolutely nothing about the business, and relied entirely on him to select proper machinery and material for the plant, to see that the machinery was properly installed, and to do everything necessary for the suitable equipment and conduct of the plant. Acting upon the faith and according to the terms of the contract, "plaintiff placed his Atlanta real estate on the market, and one place thereof has been sold at a great sacrifice in order to carry out his part of said contract, plaintiff losing thereby the sum of \$500." He brought with him to Columbus, "tools and brushes, and it was agreed between him and defendants that they were to be taken, and they were so taken, by the firm at the sum and price of \$25, and that this sum should go to the plaintiff's credit in paying for stock in said company. Defendants are now in possession of said tools and brushes in accordance with said agreement. Plaintiff drew from said company \$75 of his first month's salary, the balance, \$25, being now in the hands of the defendants, according to the terms of the agreement hereinbefore stated."

With respect to the breach of contract relied on for a recovery, the plaintiff alleged: His dismissal by the defendants from their service occurred on May 3, 1904, without fault or blame on his part, and without just cause, the defendants having totally disregarded their contract and their duty to plaintiff, to his injury and damage in the sum of \$5,000. Prior to the breaking of the contract by the defendants, he had done and performed all and every part thereof required of him by its terms up to that time, and was ready to do and perform every other part thereof, if permitted by them to do so; "but defendants have refused to allow plaintiff to further carry out his part of said contract, and have refused to have anything further to do with plaintiff, and have forbidden him to have anything to do with or about the said enterprise in which they had embarked. If defendants had not broken said contract, as aforesaid, said enterprise would have resulted in large profits to plaintiff in addition to his said salary." The items of damages sought to be recovered were: (1) Loss incurred in resigning the lucrative position he held in South Carolina; (2) loss resulting from the sale of his household goods at a great sacrifice; (3) like loss sustained in disposing of his Atlanta real estate; (4) expenses of moving from Newberry, S. C.,

to Columbus, Ga.; (5) loss of opportunity of securing lucrative positions or forming other profitable business alliances, open to him at the time the contract was made, and expenses incurred in endeavoring to secure employment after its breach; and (6) loss of anticipated profits arising from the coffin factory venture, in addition of the salary he was to receive under the contract. The fact that the plaintiff was left stranded in "strange place and among strangers, * * * without a home and without employment," was also stressed as a reason why he had been endamaged in the sum of \$5,000, though the specific amount claimed for leaving him in this situation was not stated, nor was any attempt made to estimate the amount of his loss of the anticipated profits of the business. The plaintiff did not seek to recover any damage for loss of salary for the intervening time between the date of his dismissal, May 3d and the date of the institution of the suit, May 14, 1904, or for any other given period. Nor did he pray for the recovery of the balance of the salary he had earned, and which was in the hands of the defendants, nor ask for any accounting for the tools and brushes he had turned over to them. The defendants demurred to the petition, on the general ground that no cause of action was therein set forth, because the plaintiff did not allege any act on the part of the defendants upon which he could base any recovery of damages, and also upon divers special grounds which called into question his right to claim the specific items of damages stated. The court sustained all of these grounds of the demurrer, and dismissed the petition. Exception is taken by the plaintiff to the judgment rendered.

1. The theory upon which counsel for the plaintiff drafted his petition evidently was that his dismissal from service without cause was a breach of covenant which amounted to a practical repudiation by the defendants of the entire contract, relieved him from the duty of further performing or offering to perform any of his obligations thereunder, and gave him the right to immediately institute suit to recover for all damages which might flow directly or indirectly from the nonperformance of the contract by the defendants. The importance of properly construing the contract declared on is therefore apparent. It has three distinct stipulations affecting the rights of the plaintiff thereunder: First, his salary is definitely fixed at "\$100 per month, beginning March 16, 1904," though no definite term of service was agreed on; second, he was to be a stockholder in a "joint-stock company," the understanding of the contracting parties being that he was "to put in whatever money he could raise" from a sale of his real estate in Atlanta and certain stock of the Carolina Manufacturing Company which belonged to him; but the parties did not arrive at any definite agreement as to the precise amount of money

he was to invest in the proposed venture, or as to the time within which he was to raise the funds and make the investment in stock; third, it was his privilege, at the close of the current year (1904), to elect whether he would demand payment in cash of such part of his salary (if any) as he had not drawn for living expenses, or receive payment in stock of the company (formed or to be formed), covering the amount of the unpaid balance of his salary then remaining in the hands of the defendants. It is obvious that, under this arrangement, he was not to become a partner in the firm of which the defendants were members. *Dawson National Bank v. Ward*, 120 Ga. 861, 48 S. E. 313, and cit. On the contrary, as he clearly says, he was to be the superintendent of the coffin factory (in the employ of either the defendants or "the joint-stock company"), and was, moreover, to become a stockholder in the enterprise. (It is not stated, nor is it material, whether "the joint-stock company" was to be an unincorporated association of which he was to become a member, or a duly chartered company organized for the purpose of conducting the proposed business.) If the contract had been fully carried into effect as contemplated by the parties, the plaintiff would have sustained towards the defendants (or "the joint-stock company") the dual relation of employé and stockholder, but no other relation. The covenant to the effect that the plaintiff was "to put in whatever money he could raise from the sale of his real estate," etc., amounted to nothing more than an option given to him by the defendants to take stock in "the joint-stock company," for an agreement so loose and indefinite in its terms would be incapable of enforcement at the instance of the defendants. *Hart v. Ga. R. Co.*, 101 Ga. 188, 28 S. E. 637; *Ragan v. Smith*, 108 Ga. 664, 665, 34 S. E. 132; *Sedgwick v. Gerding*, 55 Ga. 264. "The rule as to certainty is, that the agreement must be so certain and complete that each party may have an action upon it." *Jernigan v. Wimberly*, 1 Ga. 220. It would be absurd to hold that the defendants could legally have called upon the plaintiff to sell his Atlanta real estate at a sacrifice of \$500, as he voluntarily chose to do. The privilege of being paid his salary partly in stock was, as the contract expressly provides, also a mere option given him. So that the inducement held out by the defendants to the plaintiff, and the proposition which he accepted, was that he should enter into their service simply as an employé, at a salary of \$100 per month, with the privilege or option of taking stock in "the joint-stock company" for such an amount as he might be able to realize from the sale of certain property owned by him, supplemented by such sum as he might save out of his salary up to a specified time.

2. The parties to the contract doubtless entertained the hope and expectation that it

would be to the mutual advantage of all concerned that the plaintiff should continue indefinitely to discharge the duties of superintendent of the factory, invest his money in the venture, and co-operate with the defendants in their efforts to make it a financial success. But the fact remains that the defendants did not bind themselves to employ the plaintiff, nor did he obligate himself to remain in their services, for any definite period beyond the first month of hiring. *Mondon v. W. U. Telegraph Co.*, 96 Ga. 504, 23 S. E. 853. An executory contract of service for no fixed period of time is obviously too indefinite to be capable of enforcement; and it is only by a fiction that the courts are enabled to hold that an engagement at a fixed salary per month, but with no stipulation as to its duration, is a legally binding contract for one month's employment at the agreed wage, upon the supposition that the contracting parties had in contemplation a definite hiring for one month only, either party to then have the right of regarding the engagement as at an end or of treating the contract as continuing of force upon the same terms as to wages till notice was received from the other of his election to terminate the relation of master and servant. The employé is entitled, under such circumstances, to notice of dismissal. *Marietta & N. Ga. Railroad v. Hilburn*, 75 Ga. 379. But the hiring, after the expiration of the first month, being indefinite as to its duration, may be terminated at the will of either party. *Civ. Code 1895, § 2614; Mondon v. Telegraph Co.*, *supra*. Where the contract of hiring is made with reference to a general custom or business usage, which enters into and becomes a part of the agreement, the contract is not, of course, indefinite as to its duration if such custom or usage fixes the term of the engagement. *Beck v. Thompson*, 108 Ga. 244, 33 S. E. 894; *Hobbs v. Davis*, 30 Ga. 423. But an "offer of employment at so much per month will, in the absence of anything, further indicating the period of employment intended, be treated as meaning employment for a term of one month." *Baldwin v. W. U. Telegraph Co.*, 93 Ga. 695, 21 S. E. 212, 44 Am. St. Rep. 194. This rule of construction was first applied in *Magarahan v. Wright*, 83 Ga. 773, 779, 10 S. E. 584, from the decision in which case the section of the Code above cited was framed. The law applicable in cases of this kind now is: "That wages are payable at a stipulated period, raises the presumption that the hiring is for such period; but if anything in the contract shows that the hiring was for a longer term, the mere reservation of wages for a lesser time will not control. An indefinite hiring may be terminated at will by either party." *Civ. Code 1895, § 2614*. The plaintiff in the present case does not pretend that he was hired for one year, or for any other definite period of time. The circumstances indicate that the parties really contemplated an arrangement

whereby the plaintiff would have, in common with the defendants, a personal interest in promoting the business enterprise, and would continue to perform the part assigned to him so long as the parties could work in harmony to that end, though it might be years before the fruition of their hopes was realized in full by assured success. At the same time, we are not at liberty to arbitrarily hold that the defendants impliedly bound themselves to employ the plaintiff as superintendent of the factory so long as they might operate it. On the other hand, nothing in the contract suggests a hiring for one year only, or up to the end of the current year, 1904. Then it was that the defendants obligated themselves to settle with the plaintiff for such portion of his salary as he may have earned but had not drawn. However, this stipulation does not warrant the inference that the plaintiff was employed for a definite period of precisely 9 months and 16 days, and that the parties contemplated that his term of service should include and end with the last day of December 1904. His construction of the contract negatives any such idea, and he does not claim that any specific time was agreed on for the termination of his employment.

3. From what has been said above, the conclusion is irresistible that the defendants committed no breach of the contract by notifying the plaintiff on May 3d that his services were no longer needed; and it follows that the mere fact that he was on that date dismissed gave him no right to recover even nominal damages, much less to enforce his demand for the assessment of the special damages claimed. There is in the plaintiff's petition no hint that the defendants have declined to comply with the covenant to permit him to invest his money in the venture, or have, in any other manner, failed to meet their obligations towards him in his capacity of prospective stockholder. He has never acquired any interest in the business as a partner, nor, so far as appears, as a stockholder. Accordingly, he had, after his dismissal as superintendent of the factory, no right to intermeddle with either the physical or financial affairs of the concern, and the defendants did not subject themselves to a suit for damages when they "refused to have anything further to do with plaintiff" after his dismissal, and forbade "him to have anything to do with or about the said enterprise in which they had embarked." The time for demanding payment of the \$25 in their hands, the balance of his salary for his first month's work, had not arrived when suit was brought, and he makes no demand for premature payment. He could not, in a suit for damages, treat the contract as rescinded in so far as the agreement touching his tools and brushes was concerned, and demand an accounting therefor. *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100; *Timmerman v. Stanley*, 123 Ga. 850, 51 S. E. 760. (2) We do not understand that he attempted to do so, though he did in-

sert in his petition wholly irrelevant allegations concerning the sale of his tools and brushes and respecting divers other matters in no way connected with his supposed cause of complaint, viz., his summary dismissal from service. As the plaintiff signally failed to show any breach by the defendants of their contract obligations, his petition was rightly dismissed on general demurrer, irrespective of the merits of the various special grounds of objection which were interposed by them touching his right to recover the items of damages claimed.

Judgment affirmed. All the Justices concur.

(125 Ga. 226)

BARBER v. BARBER.

(Supreme Court of Georgia. March 23, 1906.)

1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—ACQUISITION BY HUSBAND.

Whenever the husband acquires the separate property of his wife, with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, §§ 501-504, 545.]

2. SAME—ACCOUNTING BY HUSBAND.

As long as the husband is in possession of the property, using it for the wife's benefit and recognizing her ownership, no lapse of time will bar the wife from asserting her title or calling the husband to an accounting.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, §§ 505, 545.]

3. SAME—LIMITATIONS—DEMAND—REFUSAL TO ACCOUNT.

The statute of limitation does not run against the right of the wife to call for an accounting, until there has been an account rendered, accompanied by an offer to settle, a refusal upon demand to settle, a notice of adverse claim, an express repudiation of the fiduciary relation, such a change of circumstances of the parties as would be reasonably calculated to put the wife on notice that the relation was no longer recognized, or something to indicate to a reasonably prudent person that the relation has ceased.

4. SAME—EFFECT OF REFUSAL.

A surrender by the husband of a portion of the property of the wife which had been received by him, being all that was then in his possession, a failure to account for the balance, and an abandonment of all further control or management of the property, would be sufficient to indicate that the husband treated the fiduciary relation as at an end; and the statute would begin to run in his favor after the lapse of a reasonable time from such an event.

5. REFERENCE—AUDITOR'S REPORT.

There was no error in disallowing the exceptions of fact which were filed by the plaintiff to the auditor's report, nor in overruling the exceptions of law, nor in making the report of the auditor the judgment of the court.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Action by Sallie Barber against Preston Barber, executor. From the judgment plaintiff brings error, and defendant assigns cross-

error. Judgment on main bill affirmed, and cross-bill dismissed.

Mrs. Sallie Barber brought suit against the executor of her husband, alleging that he was indebted to her in the sum of \$6,350, besides interest from March 30, 1869, such indebtedness being claimed to have arisen from a trust relation brought about by his having the control and management of her estate during her life. The defendant in his answer denied the existence of the debt, and pleaded the statute of limitations. The case was referred to an auditor, who reported that the husband was indebted to the wife in the sum of \$9,482, but that the debt was barred by the statute of limitations. The plaintiff and the defendant each filed exceptions, both of law and of fact, to the report. The judge disallowed all the exceptions of fact, overruled all the exceptions of law, and made the auditor's report the judgment of the court. The plaintiff excepted to the different rulings adverse to her; and, by cross-bill, the defendant assigned error on different rulings made during the progress of the case which were adverse to him.

S. A. Crump and Whipple & McKenzie, for plaintiff in error. Pope & Bennett, for defendant in error.

COBB, P. J. (after stating the foregoing facts). Edward Barber, in 1869, married a widow who was the mother of two small children and the owner of a small farm, and of one mule, one wagon, 50 head of cattle, and other personal property. He immediately took possession of the property, and managed and controlled the same for his wife until 1884. The farm was worth \$50 per annum for rent. The cattle and other property were used by him according to his own discretion, and practically in the same manner as one would use his own property. No account was ever rendered by him to his wife, and none was ever called for. In 1884 he delivered up to the wife possession of the farm and the cattle then remaining. This suit was brought in 1901, after the death of the husband.

There can be no question that from 1869 to 1884 the husband was, in relation to the wife's property in his possession, a trustee for her. *Oliver v. Hammond*, 85 Ga. 323, 331, 11 S. E. 656; *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113; *Rucker v. Maddox*, 114 Ga. 899, 41 S. E. 68. Did the relation continue until his death? We think not. The surrender of the land and the remaining personalty, in 1884, were sufficient to indicate to any prudent person that he considered the trust relation at an end; and his failure within a reasonable time thereafter to account for the income from all the property, and the proceeds of that not surrendered, was notice to the wife that he did not consider himself further liable to her. It may be that he had used the income,

and the proceeds of that unaccounted for, for the maintenance and education of the wife's children, or in other ways that would make the expenditures a charge against the wife's separate estate. But even conceding that he had converted it all to his own use, the surrender of what was left, without any offer to account for that not surrendered, and the complete abandonment of all control over her property was a loud-sounding notice to her, in effect saying, "I consider myself under no further liability to you on account of your property which I have been managing." She failed to heed this notice at her peril. It is not necessary to determine exactly what would be a reasonable time after this surrender from which the statute would begin to run, for under any circumstances the suit would be barred after the lapse of 16 years from the time of surrender.

The judge did not err in overruling the plaintiff's exceptions of law, nor in entering judgment for the defendants on the basis of the auditor's report. The case was an equity case and the exceptions of fact filed by plaintiff were properly disallowed, under the ruling in *First State Bank v. Avera*, 123 Ga. 598, 51 S. E. 665.

Judgment on main bill affirmed. Cross-bill dismissed. All the Justices concur.

(125 Ga. 228)

KINARD v. FIRST NAT. BANK OF SYLVESTER.

(Supreme Court of Georgia. March 28, 1906.)

1. PAYMENT—DRAFT.

A draft is not payment, until itself paid, unless there is evidence that it was the intent of the parties that it should be so treated.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 63.]

2. SAME—EVIDENCE.

There was nothing in the evidence in the present case to indicate that it was intended that either the draft or the check in question should be treated as payment until actually paid.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Affidavit of illegality between C. L. Kinard and the First National Bank of Sylvester. Judgment for defendant. Plaintiff brings error. Affirmed.

Kinard executed to the First National Bank of Sylvester a note for \$315.50, and secured it by a mortgage. After the maturity of the note, and on a day when he had \$146 to his credit on the books of the bank, he came to the bank and "started to draw a draft" on Muse & Co., of Albany, Ga., for the exact amount due on the note, but upon being informed that a check drawn by him prior to this time for \$200 had not been presented for payment, he drew a draft on Muse & Co. for \$400. This draft was received by the bank, the amount of it placed to his credit on the books, and the draft forwarded to the drawees. At the same time Kinard drew a

check for the amount due on the note, gave it to the bank, and the note and the mortgage were canceled, marked paid, and delivered to him. Subsequently the draft upon Muse & Co. was returned to the bank unpaid. Before the return of the draft by Muse & Co. the check for \$200 was presented to and paid by the bank. The bank obtained a copy of the note and mortgage from the records, and foreclosed the mortgage. An affidavit of illegality was filed by Kinard, setting up that the note was paid. Upon the trial of the illegality a judgment was rendered in the city court in favor of the plaintiffs. Kinard applied for a writ of certiorari. The judge refused to sanction the petition, and Kinard excepted.

Payton & Hay, for plaintiff in error. Robt. A. Holmes and Perry & Lipton, for defendant in error.

COBB, P. J. (after stating the foregoing facts). "Drafts are not payment until they themselves are paid, there being no evidence that they were taken expressly in payment." *Stewart Paper Co. v. Rau*, 92 Ga. 512, 17 S. E. 748 (2). "A bill, acceptance, or promissory note, either of the debtor or of a third person, is no payment or extinguishment of the original demand, unless it is expressly agreed to receive it in payment." *Weaver v. Nixon*, 69 Ga. 699; *Rawlings v. Robson*, 70 Ga. 595 (2); *Hall's Self-Feeding Cotton Gin Co. v. Black*, 71 Ga. 456; *Freeman v. Exchange Bank*, 87 Ga. 46, 13 S. E. 160; *Hatcher v. Comer*, 75 Ga. 732; *Norton v. Paragon Oil Can Co.*, 98 Ga. 470, 25 S. E. 501. The marking of the note "paid," by the payee, is not alone sufficient to take the transaction out of the rule above laid down. *Weaver v. Nixon*, 69 Ga. 699; *Charleston Ry. Co. v. Pope*, 122 Ga. 580, 50 S. E. 374. Whether the acceptance by the bank of the draft, and the cancellation and delivering up of the note and mortgage was an extinguishment of the debt, depended upon the intention of the parties. *Norton v. Paragon Oil Can Co.*, supra. The intention is to be arrived at from all the circumstances. We see nothing in the evidence to take the case out of the general rule that checks and similar instruments are not payment until themselves paid. The check given to discharge the note was not payment until it was paid, and it could not be paid unless the draft was paid. The payment of the check was dependent upon the payment of the draft. It is manifest from the evidence that neither party intended that either the check or the draft was in itself payment of the original demand. The evidence shows that it was the intention of Kinard that \$146 should be applied pro tanto in payment on the check for \$200. The bank was entitled to foreclose its mortgage. The judge did not err in refusing to sanction the petition for certiorari.

Judgment affirmed. All the Justices concur.

(125 Ga. 172)

HOME MIXTURE GUANO CO. v. TILLMAN.

(Supreme Court of Georgia. March 28, 1906.)

1. PLEADING—PETITION—CONCLUSIONS OF LAW.

In an action against a corporation to recover compensation for the plaintiff's services as its president, an allegation in the petition that at the time of the organization and the first election of the officers of the corporation "it was tacitly understood that fair, reasonable, and adequate salaries [for its officers] would be fixed thereafter, to be paid out of the after-earnings of the company," should have been stricken upon special demurrer, as being a mere conclusion of the pleader, and not an allegation of facts or circumstances upon which issue could be joined.

2. CORPORATIONS—PROVISION FOR COMPENSATION.

The law will not imply a promise by a private corporation to pay its officers for their usual and ordinary duties. Hence, in order for one to legally recover of such a corporation for his services as its president, it must appear that, in the articles of incorporation, or in some by-law or resolution of the board of directors, legally passed, provision was made for the payment of such compensation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1334-1337.]

3. SAME—QUANTUM MERUIT.

The action in the present case being based entirely upon a quantum meruit, the petition should have been dismissed upon general demurrer, notwithstanding an allegation therein that the plaintiff "remained as president" of the defendant corporation "for about two weeks or more" after a by-law or resolution had been passed by the board of directors providing that the president should thereafter be paid a designated sum per annum as a salary; there being no separate count in the petition seeking to recover, under this by-law or resolution, for the services of the plaintiff, as president, rendered after such by-law or resolution was adopted.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; E. J. Reagan, Judge.

Action by W. L. Tillman against the Home Mixture Guano Company. Judgment for plaintiff, defendant brings error. Reversed.

W. L. Tillman brought an action against the Home Mixture Guano Company to recover the sum of \$14,650, for services rendered by him as its president. The petition alleged that the corporation was organized in June, 1900, with a capital stock of \$75,000, which was subsequently increased to \$100,000; all of the stock being subscribed for and paid in by the plaintiff, H. Bussey, and Arthur Bussey, each subscribing for and becoming the owner of one-third thereof. In June, 1900, a stockholders' meeting was held, at which a board of three directors, consisting of the three stockholders, was elected. On the same day the directors held a meeting, and by a unanimous vote elected the plaintiff as president, H. Bussey as general manager, and Arthur Bussey as secretary and treasurer of the corporation, for the term of one year and until their successors should be elected. These same persons continued as the only

stockholders of the company during the years 1901, 1902, and 1903; and each during those years filled the same office to which he was originally elected. "At the time of the organization of the company and the first election of officers in 1900, no salaries were fixed for any of the officers, but it was tacitly understood that fair, reasonable, and adequate salaries would be fixed thereafter, to be paid out of the after earnings of the company, and that such salaries should commence and be paid from the date of the organization, to wit, June 19, 1900." H. Bussey and Arthur Bussey are father and son, and during the years above mentioned each owned one-third of the capital stock of the corporation and constituted two-thirds in number of the board of directors, and because of these facts were able to and did control the action of the company at all stockholders' meetings, as well as the action of the board of directors. From June 19, 1900, until July 14, 1904, the plaintiff was president of the defendant company, and carefully and diligently discharged all the duties which devolved upon him as such. "From the date of this organization the business of the company grew, and soon became so extended that it required the use of large sums of money in the manufacture of the product in which the company was engaged, and in the purchase of crude materials, both in this country and in Europe." Being president of the company, the plaintiff "procured and provided all the financial assistance necessary for this purpose, frequently by his own personal indorsement, and put the company on a strong financial basis, through and by means of which it greatly prospered and made large amounts of money for its stockholders," and "the shares of its capital stock of the par value each of \$100 were worth and brought in the market in the year 1904 the sum of \$216 per share." The question of the salaries of the officers "was held in abeyance until the 8th day of May, 1903, when, at a meeting of the stockholders, when all the stockholders were present and all the shares represented, the question of fixing these salaries came up for disposition, and thereupon, by a unanimous vote of all the stock, the salary of H. Bussey as general manager," and the salary of Arthur Bussey as secretary and treasurer, were each fixed at the sum of \$1,800 per annum, "both to commence and be paid from April 1, 1900;" but the stockholders other than the plaintiff "declined and refused to fix and agree on any sum as the salary of the president of said company, over the protest and demand of" the plaintiff that this should be done. After the adjournment of this meeting and on the same day, the plaintiff, because of the action of the majority of the stockholders, determined to resign the office of president, and personally gave notice to the other two stockholders of such determination, whereupon they proposed to him to submit to three disinterested business men the entire question of

salaries of officers of the company and how much each was to receive, if anything, "and to abide the decision of said board of arbitration and to continue the business as it had been done in the past." The plaintiff "on said day promptly accepted said proposition as to his own salary as president, * * * and agreed to arbitrate the matter of his salary at any time they would appoint, but inasmuch as the proper authority, the stockholders, had fixed the salary of the general manager and secretary and treasurer, he declined to agree to an arbitration of the salaries which were to be paid these officers." The salaries fixed for the general manager and the secretary and treasurer, beginning April 1, 1900, were paid to each of them out of the funds of the company, and the plaintiff, "relying upon the proposition of said majority stockholders to fix his salary by arbitration, continued to discharge the duties of president of the company." But H. Bussey and Arthur Bussey, the majority stockholders, "notwithstanding [plaintiff's] repeated request so to do, refused to fix any salary for the office of president, * * * and failed and refused to also submit the question to arbitration; whereupon [plaintiff] on the 14th day of July, 1904, * * * resigned his said office of president and sold and transferred his holdings of stock" in the corporation. A fair and reasonable sum per annum for the salary of the president of the company, during the time which the plaintiff served as such, is \$3,600, "which," for the time he served, "amounts to the sum of \$14,650, for the payment of which he has made a demand" on the defendant company, "and the same has been refused."

By an amendment to the petition, the plaintiff alleged that at a meeting of the stockholders in June, 1902, H. Bussey and Arthur Bussey, being holders of a majority of the stock and also being a majority of the directors, without previous notice to the plaintiff, brought up the question of fixing salaries for certain officers of the company; and, while the plaintiff occupied the chair, they proceeded to have the salaries for the offices filled by themselves fixed, "but made no motion or effort to fix a salary for the office of president;" and "after fixing their salaries they caused the meeting to be adjourned." Such action "was the result of a collusive agreement between [them] to wrongfully withhold from [plaintiff] his just compensation, while paying to themselves the amounts they desired; all of which being done in violation of the understanding between the parties." The two Busseys "wrongfully used their power as a majority to withhold from [plaintiff] the compensation justly due him in his office as president, and wrongfully refused to act in fixing just and adequate compensation for [him], at the same time using their powers to fix their own compensation and to pay themselves out of the funds of the organization." From the

date of the organization of the defendant company, it required very heavy financial backing. The "company was unable to secure the financial assistance necessary, and * * * the same was furnished by the petitioner individually and through his connection and influence with financial institutions, and upon his personal indorsement and guaranty of the company's obligations. At different times, and at nearly all times from the organization of the company up to the time that petitioner's connection therewith terminated, said company was obligated to him, either on personal loans or by way of indorsement or guaranty, for large sums of money, ranging from \$25,000 to \$150,000, and * * * such assistance was necessary to said company and * * * its growth and success was based thereon." The financial assistance rendered by plaintiff to defendant "from his personal means, which at times ranged near \$100,000, from his personal indorsements, which ranged at times from \$50,000 to \$75,000, was necessary to the proper conduct and management and the success of the defendant company, and but for such assistance the company would not have succeeded and prospered as it did." The services thus rendered by plaintiff were "in addition to the other duties and regular duties of the office of president;" and "it was necessary to be done for the protection and success of the defendant company. The by-laws of the company were silent as to the compensation to be paid the several officers of the company in June, 1902, at which time provision was made, as hereinbefore stated, for the offices filled by said H. Bussey and Arthur Bussey." Arthur Bussey, by and with the consent and collusive action of his father, H. Bussey, paid to himself a salary of \$2,400 per annum from the date of the organization of the company, instead of \$1,800 per annum as fixed by the resolution of the directors. When, in June or July, 1904, plaintiff, by reason of the conduct of the other two stockholders of the company, determined to sell his stock, "H. Bussey and Arthur Bussey, with others whom they associated with them, became the purchaser of" plaintiff's stock. After the sale of the plaintiff's stock had been thus agreed upon, "a meeting of the stockholders and directors * * * was held, at which certain resolutions and by-laws were adopted, wherein it was provided that the president of the company should thereafter be paid the sum of \$3,600 annually, payable monthly," and the secretary and treasurer should receive a like amount, as salary, per annum. "It was then known, as stated, that [plaintiff] was no longer to hold or occupy the office of president * * *, but that such office would thereafter be held and occupied by the said H. Bussey;" but plaintiff "remained as president for about two weeks or more after the salary for president had been thus fixed, but it was known and determined that petitioner was not to occupy

said position, and * * * would not be the beneficiary of the sum so named." All of this "was the result of a collusive agreement upon the part of H. Bussey and Arthur Bussey to withhold from petitioner just and adequate compensation, or any compensation whatever, for the services which he rendered, and that compensation should only be paid to father and son to the exclusion of petitioner." Such action "upon the part of the majority stockholders and directors constituted a legal fraud in withholding from this petitioner just and legal compensation for the services which he rendered in the up-building of the defendant corporation, and in the performance of the duties of the office of president thereof." The amendment further alleged that after the stockholders' meeting in June, 1902, there was no further meeting of the stockholders until about July 1, 1904, but the plaintiff continued to act as president of the company under his original election as such; and that shortly after he disposed of his stock, H. Bussey wrote, or caused to be written, "minutes of supposed meetings regularly held, and the same were handed to this petitioner to sign. There were no such meetings." While the plaintiff stated that the minutes so prepared were purely imaginary, when they were presented to him for his signature he signed them, "in order that it might appear that the corporation regularly held its meetings as it should have done under the law."

The defendant demurred to the petition upon various grounds; the first being that the averments in the petition were insufficient, in law, to constitute a legal cause of action. Other grounds, which were but amplifications of this general ground, and specifically pointed out wherein the petition showed that the plaintiff was not entitled to recover upon either an express or an implied contract, were that the petition showed corporate action upon the questions of the salaries and compensation to be paid the officers of the corporation, and that no salary was provided for the president, and, therefore, the plaintiff had no right of action against the defendant, and that the averments of the petition were insufficient, in law, to raise an implied promise to pay the plaintiff upon a quantum meruit for the services rendered as president. The defendant also specially demurred to the allegation in the original petition, that "at the time of the organization of the company, and the first election of officers in 1900, no salaries were fixed for any of the officers, but it was tacitly understood that fair, reasonable, and adequate salaries would be fixed thereafter," etc., as being insufficient to show an express agreement to pay the plaintiff a salary as president, and as being insufficient to raise an implied promise to pay him for such services; and upon the further ground that "the defendant could not plead to the averment 'it was tacitly understood,' as the action and words of the board

of directors are not set forth in the position from which can arise any tacit understanding, and the expression 'tacitly understood' is but the conclusion of the pleader, wherefore the averment is insufficient in law." The defendant also specially demurred to the allegations in reference to the proposition to submit the questions as to the salaries for officers of the corporation to arbitration, as they related to no corporate action, but merely to private conversations between the shareholders after the stockholders' meeting had adjourned, and also because they showed that the proposition was declined by the plaintiff, who submitted a counter proposition of his own. After the petition was amended, the defendant, still insisting upon its demurrers to the original petition, demurred to the petition as amended; one of the grounds of demurrer being that the allegations in reference to the services of the plaintiff in connection with the financial affairs of the corporation, in procuring for it and extending to it financial assistance, indorsing and guaranteeing its papers, etc., were insufficient to authorize a recovery, as the action was not brought to recover for such alleged services, and no recovery could be had for them "under color of a salary as president of the corporation;" and under the allegations of the petition, there could be no recovery for them under a quantum meruit; the value of such services not being even alleged. There were other grounds of demurrer, directed to particular allegations in the petition as amended. The court overruled the demurrers, both general and special, and the defendant excepted.

Hatcher & Carson, for plaintiff in error.
Charlton & Battle, for defendant in error.

FISH, C. J. (after stating the facts). 1. The special demurrer to the allegation, that at the time of the organization and the first election of the officers of the corporation, it was tacitly understood that fair, reasonable, and adequate salaries should thereafter be paid to the officers, should have been sustained. It is obvious that this was the statement of a mere conclusion of the pleader, and not a statement of facts or circumstances which a court or jury could grasp and consider, in order to determine whether or not there was an express or an implied contract to pay the plaintiff a salary as president of the corporation. If nothing was said upon the question of salaries or compensation of officers, the plaintiff might have tacitly understood one thing, and the other two stockholders and directors might have tacitly understood another. In order for a judicial tribunal to determine whether there was or was not a given understanding between parties, it is necessary for it to be informed as to what passed between the parties at the time of the alleged understanding. What was said and what was done should be alleged by the pleader, and not his mere conclu-

sions as to what was in the minds of the parties at the time, unuttered and undisclosed to each other. For these reasons, independently of the question whether the corporation could be bound by any mere private understanding between its shareholders and directors as to what it would do in the future, the special demurrer in question should have been sustained.

2. The court should have then sustained the general demurrer and dismissed the petition, as it failed to state a cause of action against the defendant corporation. Whatever cause the plaintiff may have had for feeling aggrieved by the conduct of the other two stockholders and directors in voting to themselves salaries as officers of the corporation and refusing to provide a salary for him as its president, his petition clearly showed that he could not, under its allegations, recover of the corporation under either an express or an implied contract. The petition expressly negated the idea that any corporate action had been taken providing for the payment of a salary or any compensation whatever to the president for his services. Hence the plaintiff had to rely upon an implied contract, and sought to recover for his services as president upon a quantum meruit. It is well settled in all jurisdictions that the directors of a private corporation are not entitled to a salary or other compensation for performing the usual and ordinary duties pertaining to their office, as defined by the charter or by-laws, or by custom, unless there is an express agreement or provision for compensation when the services are performed. "They cannot recover on implied contract for what the services were reasonably worth, for the law will not imply a promise on the part of the corporation to pay; and it can make no difference, in the application of this rule, that the services were performed with the expectation of compensation, or with the general understanding among the directors themselves that they should receive compensation. The courts have based this doctrine on the ground that the directors, president, and other managing officers of a corporation are, in effect, trustees, and the law does not imply any promise to pay trustees for performing their duties as such, or allow them to take compensation out of the funds in their hands, in the absence of an express provision or agreement for compensation." 3 Clark on Priv. Corp. § 671a, and numerous cases there cited. By the weight of authority, this rule applies to directors serving as president, vice president, treasurer, etc. *Ib.* 21 Eng. & Am. Enc. L. 905-906, and *cit.* The rule is succinctly stated by Judge Thompson in his work on corporations, in the following language: "In the absence of some provision in the articles of incorporation, in the by-laws, or in some resolution of the board of directors legally passed, the general rule is that the president and other officers of private corporations are presumed to serve without com-

pensation, and cannot maintain an action against the corporation to recover compensation for their official services." 7 *Thomp. Corp.* § 8581. In *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530, the court not only announced this rule, but went further and held that a private corporation cannot legally pay its officers for past services rendered in the performance of their usual duties, unless prior to the rendition of such services a by-law or resolution has been adopted authorizing and fixing compensation therefor; and that: "Where a president of an incorporated company performs services as such, without any by-law or resolution providing compensation for his services, and afterwards accepts a salary voted to him for past services, he will be liable to refund the same in favor of creditors of the company." In the opinion it was said that this doctrine was well settled by that court, and a number of its decisions were cited. The general rule which we have been discussing is not applicable where a director or managing officer of a private corporation renders extra services, which are clearly outside of the usual and ordinary duties of his office; but he may recover the reasonable value of such services as upon a quantum meruit, where they were performed under such circumstances as to raise an implied promise on the part of the corporation to pay for them, especially if it was understood by the other officers of the corporation that he was to perform these services and to be paid for them by the corporation. 3 *Clark & Marshall on Priv. Corp.* § 671c. The plaintiff was not obliged to serve the corporation as its president after the majority of its directors had declined to adopt a by-law or pass a resolution providing a salary for the incumbent of that office, and he was not entitled to compensation for services which he had then already rendered the corporation as its president.

Even if the allegations of the petition, as amended, in reference to the assistance which the plaintiff rendered the corporation in the successful conduct and management of its financial affairs, by the use of his personal influence with financial institutions in its behalf and the pledging of his own credit for its benefit, etc., can be considered as presenting a case of services rendered the corporation, outside of his regular official duties, of such a character and under such circumstances as to raise an implied promise on the part of the corporation to compensate him for them, he did not sue for the value of the services. His suit was for "a fair, reasonable, and adequate sum of money in payment of salary as president of the defendant company from the the 19th day of June, 1900, to the 14th day of July, 1904." And he alleged "that such part of the salary as accrued between June 19, 1900, and May 8, 1902, became due and payable on the said last-named day, being the time at which the salaries of the other officers of said company were fixed, and

such part of such salary as accrued after May 8, 1902, became due annually on June 19th of each year, except for the unexpired term extending from June 19, 1904, to July 14, 1904, which became due and payable on the last-mentioned day." He prayed "judgment against the defendant for such fair, reasonable, and adequate sum of money in payment for his services and salary as president for the time aforesaid, to wit, from June 19, 1900, to July 14, 1904, together with interest on said sum from the date the same became due and payable as above set forth." He also alleged that "the sum of \$3,600 per annum is a fair and reasonable sum as a salary for the president of the Home Mixture Guano Company during the time aforesaid, which amounts to the sum of \$14,650, for the payment of which he has made a demand on the said Home Mixture Guano Company, and the same has been refused." This was the character of his suit. It was clearly and simply a suit for salary or compensation for the plaintiff's services as president of the defendant corporation, and not in any wise a suit for compensation for services rendered by him to the corporation outside of his office and duties as its president. There was in the petition neither an allegation as to the value of any extra services rendered to the corporation by the plaintiff, nor any prayer for compensation for such services. So, all the allegations in reference to what he did in behalf of the corporation, in securing for it financial assistance and in rendering such assistance to it, etc., can only be construed as intended to show the nature and character of the services which he rendered it as its president, and to strengthen his claim for adequate compensation for such services.

3. Counsel for defendant in error contends that even if the court should hold that the petition did not set forth a cause of action for compensation for the plaintiff's services as president of the corporation prior to the passage of the by-law or resolution fixing the salary of the president at the sum of \$3,600 per annum, still the petition would show a right in the plaintiff to recover for the time which he served as president after this action was taken by the majority of the board of directors; it being alleged therein "that he remained as president for about two weeks or more after the salary for president had been thus fixed." The contention that the plaintiff would, under the allegations of his petition, be entitled to recover, upon an express contract, compensation for the brief interval of time during which he served as president after a salary for that officer had been provided for by the directors, is not sound, as the plaintiff, as we have seen, sued, and sued only, upon an implied contract. Nowhere in his petition did he allege that he was entitled to recover anything under the by-law or resolution providing a salary for the president, and nowhere did he pray for such a recovery. He did not seek to recover

compensation for the whole time that he was president, at the rate of \$3,600 per annum, but he sought to recover this, not under any resolution or by-law adopted by the directors, but upon a quantum meruit, alleging "that the sum of \$3,600 per annum is a fair and reasonable sum as a salary for the president of the Home Mixture Guano Company during the time aforesaid;" that is, during the whole time that he was president. He never planted his case, either in whole or in the slightest part, upon an express contract on the part of the corporation to pay him, but, always and everywhere, upon an implied contract to pay him "a fair, reasonable, and adequate sum of money" for his services as its president. The allegations that, "after the sale of your petitioner's stock had been agreed upon and the same was to be purchased by the said H. Bussey and Arthur Bussey, with their associates, a meeting of the stockholders and directors * * * was held, at which certain resolutions and by-laws were adopted, and wherein it was provided that the president of the defendant company should thereafter be paid the sum of \$3,600 annually, payable monthly," etc., were apparently made for the sole purpose of showing how unfairly the plaintiff had been treated by his fellow stockholders and directors, in that they had refused to provide any salary for the president while he was holding, and was expected to continue to hold, that office, but "as soon as it was determined that petitioner was no longer to occupy the position of president, * * * a salary for that office was at once fixed for the amount named, * * * and the said H. Bussey was to be the recipient and beneficiary thereof." The manner and connection in which these allegations were made clearly indicate that their sole purpose was to strengthen the plaintiff's claim for "a fair, reasonable, and adequate sum of money in payment of salary as president of the defendant company," upon an implied contract, by showing what was done with reference to a salary for the president as soon as it was ascertained that the plaintiff was to vacate that office. As if to emphasize and make clear the purpose for which these allegations were introduced by the amendment to the petition, the allegation that the plaintiff "remained as president for about two weeks or more after the salary for the president had been thus fixed," is immediately followed by the statement, "but it was known and determined that petitioner was not to occupy said position, and that this petitioner would not be the beneficiary of the sum so named." This last-quoted statement is, in effect, an allegation that the provision for a salary for the president was not to become operative until a new president was elected. There is not the slightest indication that the plaintiff sought to recover anything under the resolution or by-law providing a salary for the president of the company. For these

reasons, we do not think that the allegations in reference to the action of the directors in fixing a salary for the president can be construed into a separate count in the petition, upon an express contract to pay the plaintiff for his services as president "for about two weeks, or more," after this action was taken.

It follows, as we have said, that the general demurrer should have been sustained and the petition dismissed, upon the ground that it set forth no cause of action against the defendant corporation.

Judgment reversed. All the Justices concur.

(125 Ga. 191)

WHITE-DIAMOND v. HIGHTOWER & CO.
et al.

(Supreme Court of Georgia. March 28, 1906.)
EXECUTION—SALE—PROCEEDING TO SET ASIDE—PARTIES.

The plaintiff in execution is not generally a necessary party to a proceeding to set aside a sale under the execution.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 729.]

(Syllabus by the Court.)

Error from Superior Court, Early County; H. C. Sheffield, Judge.

Action by Mrs. White-Diamond against Hightower & Co., and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Mrs. White-Diamond brought an equitable petition against Hightower & Co., Willie Wiley, and Hodges, sheriff, and alleged that an execution was issued against her for the sum of \$47, besides interest, costs, and attorney's fees, in which Hightower & Co. were plaintiffs. The execution was levied by Strong, a deputy sheriff, upon a tract of land owned by the petitioner, worth \$3,000, which was sold by Hodges, the sheriff, for \$1,275, to Willie Wiley. On the day previous to the sale the petitioner made an affidavit of illegality on the ground of excessive levy, and offered it to the sheriff. He refused to accept it, declaring he had been indemnified. All three defendants had notice, at the time of the sale, that the levy was excessive. The petitioner prayed that the sale be set aside and the sheriff's deed to Wiley canceled, that the defendant be enjoined from proceeding further in dispossessing the petitioner, and that the defendants "be required to restore the status by the return of the money paid thereat." Hightower & Co. demurred to the petition, on the ground that it set forth no cause of action as against them. At the hearing this demurrer was sustained, and the petition as to Hightower & Co. was dismissed, and the injunction against the other two defendants was granted as prayed. To the judgment sustaining the demurrer of Hightower & Co. the plaintiff excepted.

Simeon Blue, for plaintiff in error. G. N. Oliver and Powell & Pottle, for defendants in error.

COBB, P. J. (after stating the foregoing facts). In a proceeding to set aside a sheriff's sale, as a general rule, it is proper to make parties all persons interested in the sale. "Notice of a motion to set aside a sheriff's sale should be given to all parties in interest." 20 Ency. Pl. & Pr. 239. But in a case like the one under consideration, the plaintiff in execution is not a necessary party. In *Stanton's Adm'r v. Simmons*, 24 Ala. 410, it was said: "There was no necessity to make the plaintiffs in the execution, under which the officer pretended to sell the property, parties to the motion to set aside the sale. They had no interest, whatever, in the controversy between the officer and the defendant in execution, arising out of the misconduct of the former in executing the process in his hands. The only parties at interest were the constable and the purchaser at his sale." See, also, *Beach v. Dennis*, 47 Ala. 262 (1); *Stone v. Day* (Tex.) 5 Am. St. Rep. 20. The only relief prayed against Hightower & Co., the plaintiffs in execution, was that embraced in the prayer "that the defendants be required to restore the status by the return of the money paid thereat." Whether Hightower & Co. shall repay to the purchaser the amount received by them on their execution, in the event the sale is set aside, is a matter of no concern to the defendant in execution. Indeed, her interests lie directly against such a condition of affairs, for in that event the execution against her would be unsatisfied, and now it is not even a liability against her. If she succeeds in her suit, the purpose of which is to set aside the sheriff's sale and retain possession of her property, all the rights she may have will have been protected and enforced. She may well rest content with this determination of the litigation, and permit the purchaser of her land to seek his remedy in his own behalf.

Judgment affirmed. All the Justices concur.

(125 Ga. 143)

WATKINS v. STATE.

(Supreme Court of Georgia. March 28, 1906.)

1. ASSAULT AND BATTERY—EVIDENCE.

The verdict was supported by the evidence.

2. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Ordinarily newly discovered evidence which is merely cumulative or impeaching of that introduced on the trial will not require the reversal of a judgment overruling a motion for a new trial, based in part upon that ground.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2323-2332.]

3. SAME—DISQUALIFICATION OF JUROR.

While near relationship of a juror to the prosecutor by blood or affinity affects his competency, and generally disqualifies him from serving, yet where the discovery of the relationship of the juror to the prosecutor was made a ground of a motion for a new trial, and the affidavit of the movant in support thereof merely showed that since the trial the defendant had learned that the juror was re-

lated to the prosecutor by affinity, having married a cousin of the latter, of which the defendant was not aware when the jury was selected, without showing the actual existence of the relationship or the source of his information, and where the affidavits in support of the motion only tended to show that one of the jurors who sat in the trial married a cousin of the prosecutrix, not stating in what degree, and without any showing that his counsel was ignorant of the fact before the trial, there was no error in overruling the motion for a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2230.]
(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Flite, Judge.

J. L. Watkins was convicted of assault, and brings error. Affirmed.

Wm. E. Mann, for plaintiff in error. Sam. P. Maddox, Sol. Gen., for the State.

LUMPKIN, J. The evidence was not very precise either as to the weapon used in the assault for which the defendant was convicted, or as to the venue; but we think there was enough to support the verdict. The prosecutrix did not distinctly state the weapon with which the shooting was done. But the defense showed that he had and was shooting a pistol that evening, though the scene of the shooting was located by the witnesses for him elsewhere than the scene of the crime, at about the time when it occurred. The jury, no doubt, believed he had a pistol "about the time" the offense was committed, but rejected the theory that he was not at the place where it transpired.

On the subject of venue the father of the prosecutrix testified that he was coming from the store "that evening" and heard some shots fired. "It was in the direction of the house where my daughter lives. I didn't see anybody and don't know who did the shooting. It was in this county." Fairly construed, we think this means that the shooting was in the county of the trial; and other witnesses were introduced to show that the accused did it.

In *Ledford v. State*, 75 Ga. 856, it was held that a juror "was disqualified, being a third cousin, and within the ninth degree, which fact was unknown to the defendant and his counsel till after the trial." In the headnote in that case the want of knowledge on the part of counsel is not mentioned, but both in the report and in the opinion the necessity for a lack of knowledge of the counsel is coupled with that of the defendant. In *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501, (1), it is stated that the accused and his counsel accepted as true the answers of the jurors to questions propounded to them by the court in regard to their relationship, and that they had no reason to know or suspect the contrary until after the verdict was ren-

dered, having exercised all necessary and proper diligence to discover it. In *Brown v. State*, 28 Ga. 439, the same rule is recognized, and while it is stated generally that one of the jurors was a cousin to the prosecutor, it appears in the opinion that the disqualification was conceded, and the only question was whether diligence was used in ascertaining it. In *Rust v. Shackelford*, 47 Ga. 539, where two judges presided, it was stated generally that the juror, being the cousin of one of the defendants, was incompetent to sit on the trial. The record discloses that he was a second cousin. The ninth degree of relationship, as that expression was used in *Ledford's Case*, has been construed to mean the ninth degree as calculated by the rules of the civil law, and not of the canon law. *Thompson on Trials*, 53; 17 Am. & Eng. Enc. Law (2d Ed.) 1124. It seems, however, that in determining the relationship of a party to a judge in this state, the rules of the canon law should be used. *Short v. Mathis*, 101 Ga. 287, 28 S. E. 918; *Roberts v. Roberts*, 115 Ga. 261, 41 S. E. 616, 90 Am. St. Rep. 108. By the civil law the reckoning was taken from one of the persons up to the common ancestor, and then down again to the other. By the canon law the reckoning was taken from the common ancestor to that one of the two persons who was furthest removed from him. Sir Edward Coke stated that relationship in any degree was sufficient to disqualify a juror. *Co. Litt.* 157a. But later writers state that the relationship must be within the ninth degree, calculated according to the civil law. 3 Bl. Comm. 363; 1 Chitty on Crim. Law, 541; *Finch's Law*, 401. Such seems to be the view adopted in this state, as indicated in *Ledford's Case*, supra. Whether it is necessary to show what the degree of relationship is, and whether it is sufficient to simply state that a juror married a cousin of the prosecutrix, without showing whether it was a first, second, or third cousin, or a cousin within what degree, so as to bring it within the ninth as calculated by the civil law, need not be decided. Certainly it would be the better practice, if it be not indispensable, to specify the degree of relationship. In the affidavits supporting the motion for a new trial it was stated by one person that the prosecutrix had said that the juror married a cousin of hers, and by another affiant that the wife of the juror was a relative of the prosecutrix; that "she was an own cousin." That the mere statement of the accused that he discovered the relationship afterwards is not sufficient in itself to prove such relationship. See *Barron v. State*, 74 Ga. 833. In view of the indefiniteness as to the relationship and the failure to show that the defendant's counsel was ignorant of it, the showing did not require a new trial.

Judgment affirmed. All the Justices concur.

(125 Ga. 145)

HICKEY et al. v. STATE.

(Supreme Court of Georgia. March 28, 1906.)

ROBBERY—EVIDENCE.

The defendants were convicted of robbery, under an indictment framed under the act of August 6, 1903 (Acts 1903, p. 43), the evidence was sufficient to establish their guilt, and there was no error in overruling their motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; Robt. T. Mitchell, Judge.

James Hickey and others were convicted of robbery and bring error. Affirmed.

James Hickey and Frank Moran were indicted for robbery. The indictment charged that the defendant "did suddenly snatch and suddenly take and suddenly carry away from the person of J. T. Roberts, and with intent to steal the same, and without the consent of the said J. T. Roberts, a leather pocketbook of the value of one dollar and of the personal goods of John Young Roberts and in the possession and control of the said J. T. Roberts, and one hundred and eleven dollars in money contained in said pocketbook, there being one 25 [20?]-dollar bill, one one-dollar bill, and some other bills, some 'five' and some 'ten,' but the further description of said money being to the prosecutor and grand jurors unknown, but being commonly known as paper money—said money being of the par value thereof, to wit, \$110, being the property of said J. T. Roberts—contrary to the laws of said state, the good order, peace, and dignity thereof." The evidence submitted by the state showed that the defendants waited and watched about the ticket office at Valdosta, where they saw J. T. Roberts in possession of a purse with considerable money in it. They followed him to the train, and Hickey mounted the train and came to the platform as Roberts was about to enter, and pressed Roberts against Moran; the prosecutor, Roberts, felt the hand of one of them go into his pocket, and exclaimed: "I am being robbed." The defendants quickly disappeared, and the prosecutor felt for his pocketbook, and it was gone. The jury returned a verdict of guilty, and the defendants moved for a new trial on the usual grounds that the verdict was contrary to law and the evidence. The motion was overruled, and the defendants excepted.

G. A. Whitaker, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

ATKINSON, J. It was pointed out in Burke's Case, 74 Ga. 372, and in Spencer's Case, 103 Ga. 692, 32 S. E. 849, that "suddenly snatching a purse, with intent to steal the same, from the hand of another, without using intimidation, and where there is no resistance by the owner or injury to his person, does not constitute robbery." A theft under these circumstances amounted only to lar-

ceny from the person. It was suggested to the General Assembly in Doyle's Case, 77 Ga. 513, that a theft of money or other thing of value from the person, accomplished by a sudden snatching, be made robbery and punished as such. This suggestion was carried out by the act approved August 6, 1903 (Acts 1903, p. 43), amending Pen. Code 1895, § 151, which now reads as follows: "Robbery is the wrongful, fraudulent and violent taking of money, goods or chattels from the person of another by force or intimidation, without the consent of the owner, or the sudden snatching, taking or carrying away any money, goods, chattels or anything of value from the owner or person in possession or control thereof, without the consent of the owner or person in possession or control thereof."

The effect of this amendment was to declare that the offense which was previously known as larceny from the person, and which was committed by the sudden snatching, taking, or carrying away of money or valuables from the owner without his consent, is robbery. It is not necessary that the taking be accomplished by force or intimidation, so as to involve some show of resistance. The snatch thief, by this amendment, is no longer a petty offender; his crime is a felony, and he is classed as a robber. The distinguishing characteristics between larceny from the person and robbery, as defined in the act of 1903, is in the stealthiness of the act. If the taking be secret, stealthy, and without the knowledge of the owner, it is larceny from the person; but if the taking is done with the knowledge of the victim, but without his consent, and by a sudden snatching, the act is robbery. The differentiation between the sneak thief, who secretly purloins, and the bold snatch thief, who takes his victim on surprise and possesses himself of his booty by suddenly snatching his money or other valuables, is perfectly clear from the act of 1903. No force is necessary to be exerted beyond the effort of the robber to transfer the property taken from the owner to his own possession. But if in the effort to take the money or valuables by a sudden snatching, some degree of resistance is made by the owner, while the act may be robbery by force, as defined in section 151, it is also robbery by a sudden snatching, as defined by the act of 1903. If, in the violation of a criminal statute which provides that a certain crime may be committed in one of two ways, the offender commits the crime by doing acts which would bring him under the purview of both provisions of the law, he may be charged in the indictment with the commission of the offense in one of the prescribed ways. And if he is so indicted, and on the trial proof is submitted that he committed the crime in both the prescribed ways, can it be said that there will be a variance between the allegata and the probata, because he might have been indicted under a count charging the offense as having been

committed in the other way prescribed by the statute? We apprehend not.

The case at bar affords a practical illustration of the principle. Here two men select their victim, who is about to enter a train. Just as he reaches the steps, one of the defendants coming up from the car presses the victim against his accomplice, apparently because of the crowd and the haste in getting off and on the train while at the station. While thus pinioned, the victim feels the hand of one of them enter his pockets, where he had his purse. The hand is quickly withdrawn, and with it the purse. The victim cries out he is robbed, and his robbers disappear. The purse is suddenly snatched from his person, without the consent, but with the knowledge of the victim. The robbers possessed themselves of the purse in a manner which is declared to be robbery, by the act of 1903. Is it any the less so because, in the perpetration of the offense, the robbers exerted some degree of force, either as a ruse to disconcert the attention or to prevent possible resistance of their victim? Where all the elements of robbery are proved, as defined by the act of 1903, it is no variance from an indictment under that act that the proof should disclose the superadded element of force, which would have authorized an indictment and conviction under Pen. Code 1895, § 151. The evidence supported the indictment, and was sufficient to demonstrate the guilt of the defendants beyond a reasonable doubt.

Judgment affirmed. All the Justices concur.

(125 Ga. 123)

WARRICK v. STATE.

(Supreme Court of Georgia. March 28, 1906.)

1. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

On the trial of an indictment for murder, where it appeared that the deceased was at the house of one Frank Moody; that he arose from the place where he was sitting and said to another who was present, "Let's go and get Frank's horse and buggy, and we can ride over town"; and that this was said as he started to the lot in front of which the homicide occurred, and just before it took place, such a statement, accompanying the act of starting from the house, was properly admitted in evidence.

2. HOMICIDE—EVIDENCE—THREATS BY DECEASED.

Where it appeared that the accused and the deceased had a quarrel prior to the fatal encounter, and on the same day, and there was some evidence tending to show that shortly before the killing took place the deceased had a pistol, and that about 30 minutes before it occurred he said, "God damn him, I will kill him," such a threat was not objectionable on the ground that it was a mere idle statement, and was not a threat against the accused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 401-404.]

3. SAME—UNCOMMUNICATED THREATS.

When uncommunicated threats by the deceased against the accused are admissible in evidence, and when not, discussed.

4. CRIMINAL LAW—RES GESTÆ—STATEMENTS OF ACCUSED.

Where, after the shooting had occurred, the horse of the defendant, which was standing at the place where it happened, moved off a slight distance, and was stopped by him, and he at once returned, and, some five minutes after the shooting, a person who had not been present during the transaction came up and told the accused to come on, saying that he shot the deceased, to which the accused replied, "I will tell you all about it," it was proper to reject the narrative or statement which the accused proposed to show that he had then made.

5. HOMICIDE—EVIDENCE—REPUTATION OF DECEASED.

There was no error in rejecting the evidence of a witness that the deceased had the reputation of carrying firearms and deadly weapons on his person, there being nothing to show that this was known to the accused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 396.]

6. SAME—CHARACTER OF DECEASED.

Where it was sought to show a general character for violence on the part of the deceased, this could not be established by proof of specific acts. Nor did the fact that certain witnesses for the defendant, who testified in regard to the character of the deceased on cross-examination, stated that they did not know of any specific acts of violence, except one drunken quarrel with the accused, authorize the defendant to prove by other witnesses introduced on his behalf that they did know of certain specific acts of violence on the part of the deceased; such testimony not being invoked in connection with or in reply to any cross-examination of the last mentioned witnesses.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 391-395.]

7. SAME—INSTRUCTION.

In a proper case, on a trial of one indicted for murder, sections 70, 71, and 73 of the Penal Code of 1895 may all be given in charge, but instructions as to the separate branches of the law of justifiable homicide should not be so given as to confuse the different defenses which may arise under those sections.

8. CRIMINAL LAW—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where the evidence is conflicting as to whether a particular thing did or did not occur, and the presiding judge charges the jury the legal principle that the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired, he should also give an instruction to the effect that, in weighing the testimony of witnesses, the jury should consider and pass upon their credibility.

(Syllabus by the Court.)

Error from Superior Court, Appling County; T. A. Parker, Judge.

Dozler Warrick was indicted for murder. On the trial he was found guilty of voluntary manslaughter. He made a motion for a new trial, which was overruled, and he excepted, and brought error. Reversed.

W. W. Bennett and Kay, Bennett & Conyers, for plaintiff in error. Jno. W. Bennett, Sol. Gen., for the State.

LUMPKIN, J. 1. The defendant and the deceased were both at the place of Frank

Moody, the defendant having his horse and buggy. The deceased arose from where he was sitting and said to another who was present, "Let's go and get Frank's horse and buggy, and we can ride over town." This was said as he started to the lot just in front of which the homicide occurred, and just before it transpired. Objection to this evidence was made by the defendant. Such a statement, accompanying the act of starting from the house where he had been, was a part of the *res geste*, and was properly admitted. *Price v. State*, 72 Ga. 441; *Johnson v. State*, 72 Ga. 679; *Thomas v. State*, 67 Ga. 460.

2, 3. A witness for the defendant testified, "He [Robert Sellers, the deceased] said, 'God damn him, I will kill him,' but did not call anybody's name." The motion for a new trial alleges that counsel for the state objected to this evidence, without stating any special grounds, and that the court excluded it. It is insisted that it was admissible to show the mental condition of the deceased when it was made, some 30 minutes before the homicide, and also to illustrate the conduct and acts of the deceased at the time of the killing. The evidence disclosed that earlier in the same day the accused and the deceased had had a quarrel. As to what may be the actual facts we express no opinion; nor as to what witnesses the jury should believe, nor what was the truth of the case; but there was some evidence on behalf of the defendant tending to show, that shortly before the shooting, the deceased had a pistol, although it did not appear that he had it when killed; and that about 30 minutes before it occurred, he made the threat stated above. There was also evidence tending to show, that the deceased struck the first blow; that in the final quarrel some opprobrious language was used, and the deceased started towards the accused, as if for a fight, and, after being held temporarily by a bystander, was released, and he and the accused went together and fought; that the deceased was decidedly the larger man, and struck the accused, knocking him back against the buggy, and that in the fight the accused shot him. He also sought to show that before he fired, a shot or shots were fired by one or more friends of the deceased who were present. Immediately after the shooting the evidence shows that he said he had to do it. Evidence of other threats by the deceased was introduced.

Counsel for the state insists that the threat was properly excluded, on the ground, as stated in his brief, that no threat was made against the defendant, and the statement of the deceased, if made at all, was a mere idle statement. But the fact that it was somewhat indefinite did not render it inadmissible, where it was reasonably capable of being applied to him. *Harris v. State*, 109 Ga. 280, 34 S. E. 583. While, as stated, the specific ground on which it was rejected does not

appear, from the argument of counsel for defendant we think it not inappropriate to discuss somewhat the law of undisclosed threats, as it stands in this state. On the subject of the admissibility of uncommunicated threats against the accused by the deceased, there has not always been perfect uniformity in the decisions of this court. In *Hudgins v. State*, 2 Ga. 173, it was said "When the question is whether a homicide is felonious or justifiable, the opinion of a witness, as to the intention of the deceased in approaching the prisoner, is not evidence; aliter, as to any information which the witness may have communicated, whether true or false." In *Howell v. State*, 5 Ga. 48, it was said, "Where the defendant, on his trial for an assault with intent to murder, proposed to ask a witness 'if he did not know that Dill (the party assaulted) had threatened to drive the defendant from the place or take his life,' it was * * * competent evidence to be submitted to the jury for their judgment under the statute, either as a justification or to rebut the presumption of malice." In the opinion it is stated that, "Whether the threats of Dill, to drive the defendant from the place or take his life, were ever brought home to the knowledge of the defendant, the record is silent." It was further said that, "by the twelfth section of the fourth division of the Penal Code of 1895, it is justifiable homicide to kill a human being in self-defense or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either. * * * The threats of Dill, proposed to be proved by the witness, manifested an intent, on his part, to commit a felony on the person of the defendant." In *Monroe v. State*, 5 Ga. 86, it is said: "Threats, accompanied with occasional acts of personal violence, are admissible to justify the reasonableness of the defendant's fears, provided a knowledge of the threats is brought home to him." In *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269, it was said: "When previous threats, without any overt act, are sought to be introduced by the defendant, by way of justification, it must be shown that they had been consummated [communicated?]; aliter, if used merely to show the state of mind or feeling on the part of the deceased." On page 228 of 18 Ga. (63 Am. Dec. 269) it was said: "The true distinction, we apprehend, as to the admissibility of evidence of threats, and one apparently overlooked in many of the cases, is this: When sought to be introduced by the defendant as a justification for the homicide, and without any overt act, he must show that they have been communicated; otherwise they can furnish no excuse for his conduct; but when offered to prove a substantive fact, namely, the state of feeling entertained by deceased toward the accused, it is competent testimony, whether a knowledge of the threats be brought home to the

defendant or not." In *Lingo v. State*, 29 Ga. 470, it was held that, "Threats by the deceased are not admissible in evidence when they were unknown to the slayer, and where the deceased did nothing in the conflict except to defend himself." In *Hoye v. State*, 39 Ga. 718, it was held that previous threats by the deceased that he would take the life of the accused if the latter did not pay him some money which he owed were not admissible in evidence in justification of the killing claimed to be in self-defense, where not communicated to the slayer before such killing; and that newly discovered evidence of such threats furnished no ground for a new trial. In the opinion *Brown, C. J.*, said that such evidence was admitted in *Keener's Case*, not by way of justification, but merely to show the state of mind or feeling on the part of the deceased; "but that ruling does not seem to have been followed in subsequent decisions. See *Hawkins v. State*, 25 Ga. 207, 71 Am. Dec. 166, and 29 Ga. 470. While we do not overrule that decision, we hold that it is not applicable to this case. We do not see what the state of the mind of the deceased had to do with the case, as the deceased was unarmed, and made no effort to hurt the prisoner further than to make threats, and put his hand in his bosom, where he had no weapon." In *Peterson v. State*, 50 Ga. 142, the evidence showed that the killing was without justification or sufficient excuse. After the defendant was convicted and his motion for a new trial had been overruled, a second motion was made, on the ground of the discovery of new evidence to prove that the deceased had, a few days before the killing, said he intended to kill the prisoner, and had borrowed a pistol, expressing such intent; but it did not appear that at the time of the killing the prisoner was informed of such threats of the deceased. It was held that this furnished no ground for a new trial. In the opinion *McCay, J.*, said: "The *Keener Case* carries the question of the admissibility of such testimony to the point of extreme liberality, and is difficult to reconcile with *Howell's Case*, 5 Ga. 43, and *Monroe's Case*, 5 Ga. 85. We do not feel authorized to go any further in the direction of the *Keener Case* than its terms require. See *Hoye's Case*, 39 Ga. 718." In *Vann v. State*, 83 Ga. 46, 9 S. E. 945 (14) it was held that: "Evidence as to threats made by the deceased, and not communicated to the defendant, was properly rejected." See, also, *Trice v. State*, 89 Ga. 742, 15 S. E. 648. In *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64, it was held that where it appeared from the positive and uncontradicted evidence that the prisoner fired the first shot, a previous uncommunicated threat of the deceased that he would "do up" the accused was not admissible in evidence as tending to show that the deceased fired the first shot, there being no evidence that the deceased was armed. In the opinion it was

said that the state of mind of the deceased needed no illustration if there was no conduct on his part which put the accused in real or apparent danger; and the *Keener Case* was distinguished. It was also said that, "Were the ascertainment of the attacking party dependent upon mere probability, and not put out of question by the direct evidence, an uncommunicated threat, according to many authorities, would be admissible." In *May v. State*, 90 Ga. 793, 17 S. E. 108, the decision in *Keener's Case* was again cited as authority, previous rulings were discussed, and it was held that, "Upon a trial for murder, the evidence being conflicting and leaving it uncertain which of the parties brought on the final conflict, there being some evidence tending to show that both were armed, that the slayer was retiring, and that the man slain advanced upon him and fired the first shot, evidence of an uncommunicated threat by the deceased to take the life of the accused was admissible and material." In *Pittman v. State*, 92 Ga. 490, 17 S. E. 856, it was held that uncommunicated threats by the deceased to kill the accused, made on the same day of the homicide, were admissible, where it appeared that in the final encounter the deceased made the first violent demonstration, by raising a stick in position to strike. In *McKinney v. Carmack*, 119 Ga. 467, 48 S. E. 719, is contained the latest expression of this court upon the subject, and may be considered as stating both the general rule, excluding uncommunicated threats, and the exceptional instance in which they are admissible. The second headnote reads as follows: "As a general rule, evidence of threats previously made by one who is killed by another, but uncommunicated to the latter, are not admissible on the trial of a case involving the question whether or not the slayer was justified in taking the life of the deceased; but when the evidence tends to show the person killed began the conflict and that the slayer killed his adversary in self-defense, proof of threats of this character may be received to show the state of mind or feeling on the part of the deceased, and thus illustrate his conduct and throw light upon his intention and purpose at the time of the fatal encounter. *May v. State*, 90 Ga. 797, 17 S. E. 108, and cases therein cited and reviewed." In 4 *Elliot* on Ev. § 3041, it is said: "Evidence of previous threats of the deceased against the accused is not admissible, unless there is some proof of an attack or over hostile act showing an intent to carry the threats into execution. It has sometimes been stated, in general terms, that evidence of threats uncommunicated to the defendant is not admissible. Thus, it has been held that threats of deceased against the accused are not admissible in evidence, until it has been proved that the accused had been advised of them. But in these cases there was no pretense of self-defense; and it is generally held that evi-

dence of uncommunicated threats by deceased is admissible in a proper case to show his mental attitude, and determine who was the aggressor. And in a recent case it is said that uncommunicated threats, according to the modern and better reasoned cases, are admissible in three instances, namely, to show who began the affray, to corroborate evidence of communicated threats, and to show the attitude of the deceased." The evidence in this case was of doubtful admissibility; but where this is so, in view of the entire case, we think it should have been admitted.

4. Error was assigned because the court rejected the evidence of a witness that the defendant said, "Frank, I will tell you all about it," the contention being that the witness would have testified further that the defendant said to Frank Hall (the person to whom the above stated remark was directed) that he had to shoot the deceased in order to save his life from the attack that the deceased and his friends were making on him. After the shooting occurred the horse of the defendant, which was standing at the place of the encounter, moved off, and the defendant immediately went and stopped him, and on returning said, in effect, to those around him that he would not have done it if some of them had not shot at him, and that it would have been a fair fight, but they all knew he had to do what he did. Frank Moody (the person referred to as Frank, in the testimony offered) was not present when the shooting took place. Afterwards he came out of the house, jumped over the lot gate, and went to where the deceased was, and kneeled or squatted down in front of the latter, Moody arose, went to the house, then came back, jumped over the fence, met the accused, and told him to come on, saying, "You shot Robert." It was in reply to this that the statement of the accused was made which it was sought to prove. This conversation occurred very shortly after the shooting. A witness testified that five minutes had not passed. In *Hall v. State*, 48 Ga. 607, McCay, J., said: "The *res gestæ* of a transaction is what is done during the progress of it, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed a priori where the *res gestæ* ends. Each case turns on its own circumstances. Indeed, the inquiry is rather into events than into the precise time which has elapsed." In the apt and often-quoted language of Chief Justice Bleckley, in *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 775, 12 S. E. 26, "What the law altogether distrusts is not after-speech but afterthought." Tested by these rules, we think that the proposed evidence was not free from the suspicion of afterthought, but was rather in the nature of a narration of a past transaction, by which the accused proposed to exculpate himself, than a part of the *res gestæ*. In *Mitchum v. State*, 11 Ga. 615, the accused

ran from the house where the deceased was shot, a distance of 30 or 40 yards, to where the witness was. He seemed to be greatly agitated and troubled, and, at the moment of coming up to the witness, exclaimed that he would not have done it for the world. This was within one minute from the firing. It was held to be admissible. A comparison of the facts of that case with those here involved will show the difference. In *Thomas v. State*, 27 Ga. 287, the accused said, as he turned and was leaving the place, about a minute or a minute and a half after he had shot the deceased, that he wanted the witness to protect him, and that he had done nothing but what he was compelled to do in self-defense. This was a voluntary statement very closely connected with the transaction, and was not a proposition to narrate to a witness who was not present the details of a rencounter which was already over, and had been so for five minutes. In *Futch v. State*, 90 Ga. 478, 16 S. E. 102, the declaration of a witness, made within a minute of the time of the shooting, when she ran into the house from the scene where it occurred, were held inadmissible, the court giving weight to the manner in which they were made. In *Thornton v. State*, 107 Ga. 683, 33 S. E. 673, it was held that on the trial of a defendant for the murder of his wife, his declaration, that "he had tried to care for his wife but that she had forced him to do what he had done," was not admissible in evidence in his behalf, although made in a half minute after the commission of the crime; it appearing that such statement was made to one in his house, where he had gone after he had left the scene of the killing, and the circumstances not indicating that the statement was free from the suspicion of afterthought. An examination of the facts in other cases where declarations have been held to be part of the *res gestæ* will show that they differ from those here involved. See *Monday v. State*, 32 Ga. 672, 79 Am. Dec. 314; *O'Shields v. State*, 55 Ga. 697.

5. There was no error in rejecting evidence that the deceased "had the reputation of carrying firearms and deadly weapons on his person," there being nothing to show that this was known to the accused. Where the general character of the deceased is admissible, it may be proved by reputation, but particular acts cannot be so proved. It has been held that evidence that the deceased in fact habitually and notoriously carried deadly weapons, and that this was known to the accused, was admissible. *Daniel v. State*, 103 Ga. 202, 29 S. E. 767. But reputation that he carried weapons, unknown to the accused, would not be so.

6. Where it was sought to show a general character for violence on the part of the deceased, this could not be established by proof of specific acts. *Doyal v. State*, 70 Ga. 134. Nor did the fact that, on cross-examination, certain witnesses for the defendant testified

that they did not know of the deceased having ever committed any specific acts of violence, except when he got into a drunken quarrel with the accused, authorize the defendant to prove by other witnesses introduced on his behalf that they knew of certain other specific acts of violence on the part of the deceased.

7. Section 73 of the Penal Code of 1895 does not qualify or limit the law of justifiable homicide as laid down in sections 70 and 71. In *Teasley v. State*, 104 Ga. 738, 30 S. E. 988, it was said: "The section first mentioned [section 73] applies exclusively to cases of self-defense from danger to life arising during the progress of a fight wherein both parties had been at fault. The other two sections are applicable when the homicide is committed in good faith to prevent the perpetration of any of the offenses mentioned in section 70, or under the fears of a reasonable man that such offense will be perpetrated unless the person who is actually, or apparently, about to commit it be slain. Instructions as to these two separate branches of the law of justifiable homicide should not be so given as to confuse the one with the other." *Pugh v. State*, 114 Ga. 16, 39 S. E. 875; *Jordan v. State*, 117 Ga. 405, 43 S. E. 747; *Smith v. State*, 119 Ga. 564, 46 S. E. 846. In the present case the court charged sections 70, 71, and 73 of the Penal Code of 1895 in immediate sequence. He did then add that an apparent necessity, acted upon bona fide, is the same as a real necessity, and gave some instances in which this might be true. But we cannot feel sure that a jury might not have been confused by the context in which they were given. In view of the entire charge on this subject perhaps a new trial would not have been required by this ground alone. In a proper case all of these sections may be given in charge, but this should be done so as not to confuse the jury or make them all applicable to the same theory or state of facts.

8. It is error to charge without qualification that positive evidence is stronger than negative, or in similar language. In *Southern R. Co. v. O'Bryan*, 115 Ga. 659, 42 S. E. 42, the first headnote reads as follows: "A charge to the effect that the testimony of a witness testifying positively is entitled to more weight than that of one who testifies negatively is open to serious criticism unless it embraces an instruction that the jury, in weighing the testimony of such witnesses should consider and pass upon the question of their credibility." See, also, *Southern Ry. Co. v. O'Bryan*, 119 Ga. 148, 43 S. E. 1000; *Minor v. State*, 120 Ga. 490, 48 S. E. 198; *Cowart v. State*, 120 Ga. 510, 48 S. E. 198. It has been suggested that this has the somewhat apparently singular result of reversing a judge who charges a section of the Code and stops. Pen. Code 1895, § 985. But the profession will readily understand that the former decisions re-

ferred to above did not hold that there was any error in charging the section of the Code in proper cases; but that, in cases of conflicting evidence, it should be accompanied by an additional charge touching the credibility of witnesses. *Welborn v. State*, 116 Ga. 522, 523, 42 S. E. 773; *Innis v. State*, 42 Ga. 473. Similar to this is the rule that the contention of one side may be correctly stated, but it should not stand entirely alone; and the law bearing only on one side of the issue should not be given and that touching the other entirely ignored. In weighing evidence, its character as to being positive or negative is one element for consideration, but it is not the only one. Credibility is also essentially involved. The section of the Code does not mean that the jury is bound to believe the positive evidence of one whose credibility is little or nothing, or who may have been successfully impeached or shown to be a perjurer, in preference to the evidence of many honest, upright witnesses of unquestionable credibility who had equal opportunity of observation, though their testimony may be negative. The rule does not mean that a witness must be credited, regardless of anything else, if he swears positively. If so, hard swearing would necessarily import truth. The rule as to positive and negative evidence has reference to the nature of the evidence; but the jury consider not only what a witness swears, but also what credit is to be given to him as a witness.

Judgment reversed. All the Justices concur.

(125 Ga. 203)

MAX SIMONS & CO. v. McDOWELL et al.
(Supreme Court of Georgia. March 28, 1906.)

1. BILLS AND NOTES—BONA FIDE HOLDERS—RIGHTS.

"If a party make a contract in such a manner as is authorized by law, he has a right to object to being bound by any other. A bona fide holder before maturity is allowed to receive the genuine contract, discharged from any equities attaching to the contract itself, as between the original parties; but he cannot get a contract where none was made."

2. SAME—ALTERATION OF NOTE.

A paper in the form of a negotiable promissory note payable to A., on which B. and C. appeared as joint makers, and D. as indorser, though C. and D. were mere sureties, was, without the consent of C. and D., altered so as to convert it into a draft on which B. and C. appeared as joint drawers, and D. as drawee and acceptor. It did not appear by whom the alteration was made. In its altered condition it was transferred by the payee, before maturity, to a purchaser for value, who bought in good faith and without notice of the fact of alteration. *Held*, that the alteration was a material change in the instrument, rendering the persons who were merely sureties bound in a different capacity from that in which they had agreed to be liable, and that the purchaser could not recover on the paper in its altered condition against those who were only sureties for the principal debtor on the original paper.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 985, 986.]

3. APPEAL—QUESTIONS REVIEWABLE—REQUESTS FOR INSTRUCTIONS.

Assignments of error upon the refusal of written requests to charge will not be considered, when the written requests to charge do not appear in the record, properly identified by the trial judge.

4. BILLS AND NOTES—ACTION—EVIDENCE.

The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by Max Simons & Co. against M. T. McDowell and others. There was judgment for certain defendants, and plaintiffs bring error. Affirmed.

Max Simon & Co. brought suit on two drafts against McDowell and Pinkston as drawers and Irvin as acceptor. The Bank of Southwestern Georgia was the payee named in the drafts, and had indorsed them in blank, without recourse. It was alleged that the plaintiffs were bona fide holders for value before maturity. The defendants filed a joint plea of non est factum. McDowell and Irvin filed a further plea, alleging that they were sureties on two notes made by Pinkston for the amount sued, and that after they had signed the notes, McDowell signing as a co-principal with Pinkston, and Irvin as indorser, the notes, without their knowledge or consent, were altered so that they became drafts, wherein McDowell appeared as a co-drawer with Pinkston, and Irvin as an acceptor, and that this was a novation of the contract, which released the defendants as sureties. Pending the litigation Pinkston died, and his administrator, Brown, was made a party. The jury returned a verdict in favor of the plaintiffs for the full amount sued for against Pinkston, and found for McDowell and Irvin. The motion for a new trial was overruled, and to this judgment the plaintiffs excepted.

J. E. Chapman and E. T. Hickey, for plaintiffs in error. J. H. Lumpkin, J. T. Harrison, and E. A. Hawkins, for defendants in error.

COBB, P. J. (after stating the foregoing facts). One of the grounds in the motion for the new trial was the failure of the court to charge that, "if Simons & Co. came into possession and ownership of the two notes sued on for value before maturity and in good faith, they would be entitled to recover thereon, unless notice was brought to them that said papers had been changed or altered in a material part thereof." If the court had charged this doctrine, it would have committed a serious error. If the two defendants were sureties, as they claimed, and a variation in the terms of the contract had been brought about by an alteration of the instrument—i. e., changing the notes to drafts—it was immaterial whether a holder of the drafts was a bona fide purchaser before maturity or not. The change in the

terms of the contract releases the surety from liability as against any person, no matter how he comes into possession of the instrument. If the alteration be admitted, the contract becomes one to which the surety is not a party, and he cannot be sued "upon a debt he never did contract." *Hill v. O'Neill*, 101 Ga. 832, 28 S. E. 996.

2. Error is also assigned "because movant contends the court refused and failed to determine and decide whether the alteration was material or not, and the failure to do so was error, as it is not a matter to be determined by the jury." It appears, from the charge, that the court instructed the jury that, if the alterations were made as contended by the defendants, they were material. There is, therefore, no merit in this assignment.

3. Another assignment of error is that "the court erred in not giving in charge the written requests made by the plaintiff." No written request to charge, properly identified by the trial judge, appears in the record. There are two sheets with the heading "Requests to Charge." There is nothing in the record to show that these were the requests submitted in the trial of the case, and therefore we cannot pass upon this assignment. The charge of the court was full, and correctly set forth the law of the case.

4. The evidence was conflicting, and the jury would have been authorized to find for either side. The trial judge has approved the verdict, and we will not undertake to control his discretion.

Judgment affirmed. All the Justices concur.

(125 Ga. 206)

RYLANDER et al. v. ALLEN.

(Supreme Court of Georgia. March 23, 1906.)

INSURANCE—ASSIGNMENT OF LIFE POLICY—VALIDITY.

One has the right to procure insurance on his own life and assign the policy to another, who has no insurable interest in the life insured, provided it be not done by way of cover for a wager policy.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Insurance, § 166.]

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by Hattie Allen, administratrix of Thomas M. Allen, against Hattie Rylander and the Travelers' Insurance Company. Judgment for plaintiff, and defendants bring error. Reversed.

The administratrix of Thomas M. Allen brought an action against the Travelers' Insurance Company and Mrs. Rylander to recover the amount of an insurance policy issued by the insurance company upon the life of Allen. The substance of the petition, so far as material to the controlling question involved, was as follows: On May 20, 1897, Allen procured an insurance policy on his

own life in the Travelers Insurance Company, payable at his death to his estate. On August 2, 1897, he assigned this policy to Mrs. Rylander, who had no interest, as a relative, creditor, or otherwise, in the continuance of his life. Allen paid no premiums on the policy, but the first and all subsequent premiums were paid by Mrs. Rylander. Allen died on February 19, 1905. At the time of executing the assignment, he was "of very advanced age," and there was, at or about that time, "or soon thereafter, in existence insurance upon [his life] to the amount of twelve or fifteen thousand dollars, and all of said policies were payable to [his estate] and afterwards assigned to some assignee; * * * the premiums on said policies amounted to a large sum, * * * to eight hundred or a thousand dollars a year and * * * [he] was not financially able to take out and carry said large insurance policies and pay the premiums on same; * * * this the said Mrs. Hattie Rylander well knew at the time said policy was assigned to her." Mrs. Rylander, at the time of the assignment, intentionally entered into a speculation upon the life of Allen, staking small premiums from time to time against large profits, should Allen die, she having no counterbalancing interest in his life, and, therefore, the assignment of the policy was a speculation and a wagering contract, and void. Mrs. Rylander demurred to the petition, generally and specially. One of the grounds of special demurrer was "that the allegations as to the illegality of the assignment of said policy of insurance to this defendant are too vague and indefinite, except as to the want of insurable interest in the life of the insured on the part of this defendant." The demurrer was overruled, and Mrs. Rylander excepted. Pending the suit the insurance company paid the amount due on the policy into court, and the action was dismissed as to the company.

Lane & Maynard, for plaintiffs in error.
W. A. Dodson, for defendant in error.

FISH, C. J. (after stating the facts). Where one has procured insurance on his own life, in good faith, is an assignment of the policy by him to one who has no insurable interest in his life valid, when the assignment is not made by way of cover for a wager policy? This exact question has never been decided by this court. There is a contrariety of judicial opinion on the subject in other jurisdictions. "An insurance upon life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the assured, or of another in whose continuance the assured has an interest." Civ. Code 1895, § 2114. "The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such

direction, given and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent." Id. § 2116. A policy of life insurance, even before the death of the assured, is a chose in action, arising upon contract, and therefore may be assigned. Steele, v. Gatlin, 115 Ga. 929, 42 S. E. 253, 59 L. R. A. 129. As will be seen, Civ. Code 1895, § 2114, limits the life that may be insured to that of the person taking out the insurance, or to that of another in the continuance of whose life he has an interest; but section 2116, in declaring that the assured may direct the money to be paid to his assignee, does not prescribe that such assignee must have an insurable interest in the life of the insured. In Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350, Pughly, a member of the league, procured from it a membership certificate of insurance on his own life, in which Mrs. Walton was named as beneficiary. At his own expense he kept the insurance in force. After his death, Mrs. Walton sued the league to recover the amount of the certificate. On the trial it was admitted that she had no insurable interest in the life of the insured. The sole question for adjudication was whether the certificate of insurance, being in favor of one who had no insurable interest in the life of the insured, was for that reason a wagering policy and void. It was held: "While a valid contract of insurance cannot lawfully be taken on the life of another by one who has no insurable interest therein, because it contravenes public policy, yet, as one has an insurable interest in his own life, he may lawfully procure insurance thereon for the benefit of any other person whose interest he desires to promote. Such a contract cannot be defeated because of the want of insurable interest in the beneficiary, when it appears that the person whose life was insured acted for himself, at his own expense and in good faith, to promote the interest of the beneficiary, in taking out the policy. A contract so entered into is in no sense a wagering or speculative one. Lumpkin, P. J., dissenting." In delivering the opinion for the majority of the court, Mr. Justice Little said: "By section 2116 of the Civil Code 1895, it is provided that the assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and it is further provided that when the insured gives such directions, no other person can defeat the same, and that the assignment is good without such assent [the assent of the assurer]. We are aware that there is seemingly irreconcilable conflict between the adjudicated cases as to whether the assignee of a life policy takes anything under the assignment unless he has an insurable interest in the life insured. But it will be noted that, under the provisions of our Code, no such qualifications are made es-

sential to the validity of the assignment, nor do we think under sound reasoning any can exist. The rule which restricts the execution of a valid contract of insurance on the life of another to one who has an insurable interest in that life is founded alone upon public policy, and it may be stated in general terms that where one has an interest in a life that interest is insurable. Beyond all controversy a man has an insurable interest in his own life, and we fail to see, when having that interest he enters into a contract with an insurer by which, for a stipulated sum which he periodically pays, the insurer becomes liable to pay a given sum of money at the death of the insured, why he who is most interested, whether actuated by ties of relationship, motives of friendship, gratitude, sympathy, or love, may not make the object of his consideration the recipient of his own bounty. If it be replied that a temptation is extended to the beneficiary by improper means to hasten the time when he should receive the amount of the policy (and it is for this reason that such contracts will only be upheld when the idea of temptation is rebutted by the natural ties of blood or affinity), we might well ask ourselves why executory devises, bequests, provisions for support and maintenance provided for friends and even strangers are not subject to the same inhibition, as being against public policy. But while, as we have before said, many adjudicated cases, frequently contrary to natural justice, clearly hold that unless the beneficiary or assignee has an insurable interest in the life of the insured the policy or assignment is void, we shall undertake to show by authority that such is not the rule of the law." The learned justice then cites and comments upon many authorities which abundantly sustain the position taken by the majority of the court. It will be noted that he treats the beneficiary without insurable interest in the life of the insured and an assignee without such interest as in the same category; indeed, he seems to argue that as, under the provisions of our Code, the assured may direct the policy to be paid to an assignee who has no insurable interest in the life of the insured, it follows that the insured may insure his life for the benefit of one who has no interest in its continuance.

In *Ancient Order of United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890, a mutual beneficiary association issued a certificate of membership on the life of Harvey, in which Miss White was named as the beneficiary. Subsequently Harvey surrendered this certificate to the order, which canceled the same, and a new certificate was issued, in which, at his direction, Mrs. Brown, who was neither related to nor in any way dependent upon him, was designated as the beneficiary; her relationship to him being stated as that of "friend." This change of the beneficiary was made by Harvey in consideration of an agreement between him and Mrs. Brown that she

would take the certificate in satisfaction of four months' board; she agreeing to pay all future assessments made by the association. She received the new certificate under this agreement and paid all the future assessments made by the association upon Harvey until his death. Afterwards, in an action brought by Mrs. Brown to recover the amount due on the certificate, the order contended that as she had no insurable interest in the life of Harvey, the certificate of insurance in which she was named as beneficiary was a wagering policy and therefore void. The majority of the court held that this point was covered by the ruling made in *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350. In the opinion delivered for the majority of the court by the writer, it was said: "It is true that in that case the assessments were kept up by the assured, while in the case in hand the assessments becoming due after the benefit fund was made payable to Mrs. Brown were to be paid by her, the beneficiary. We are unable to see, however, why that difference should alter the principle underlying the conclusion reached by the majority of the court in *Union Fraternal League v. Walton*. The public policy which prevents one person from insuring the life of another in whose life he has no insurable interest is based upon the presumption that a temptation would be held out to the one taking out the policy to hasten, by improper means, the time when he should receive the amount named in the policy. Such temptation would be as strong, we think, in a case where the assured took out a policy upon his own life for the benefit of one having no interest therein, and was to keep up the premiums or assessments, as it would be where the premiums or assessments were to be paid by the beneficiary. Indeed, the temptation to hasten the death of the assured might be stronger where the assessments were to be paid by him than where they were to be paid by the beneficiary, for the reason that the beneficiary could not be certain that the assured would continue to pay the assessments. But be that as it may, the temptation generally would be to hasten the time for the payment of the insurance, rather than to avoid the payment of premiums or assessments." If, where one who has in good faith procured a policy of insurance upon his own life and kept it in force for a time, and thereafter has had a new policy issued in lieu thereof, payable to one who has no insurable interest in the life insured, the policy is not void as a wagering policy, although such beneficiary thereafter keeps the policy alive by paying the premiums or assessments falling due thereon, it must necessarily follow, we think, that if one in good faith procures a policy of insurance upon his own life, an assignment of the policy made by him will be valid, if not done by way of cover for a wager policy, though the assignee has no insurable interest in the life insured. For it will be

observed that in the Union Fraternal League Case, *supra*, the surrender of the old benefit certificate and the issuance of the new one, payable to one who has no insurable interest in the life insured, and who paid the subsequent assessments thereon, was tantamount to an assignment of the certificate to the new beneficiary.

Counsel for defendant in error cites the case of *Exchange Bank of Macon v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372. In that case Hudgins applied to the insurance company for a policy on his life for \$5,000. The company sent to its local agent two policies, each for that amount, on Hudgins' life, both payable at his death to his legal representatives. Hudgins accepted one and declined to take the other. The agent, knowing that Hudgins was indebted to the Exchange Bank, carried the policy which Hudgins had declined to accept to the cashier of the bank, stated to him the facts, and requested him to take the policy for the bank, as a creditor of Hudgins, and pay the premiums thereon. The cashier consented to do so, provided Hudgins would assign the policy to the bank. This was done by Hudgins; the agent of the insurance company delivering the policy to the bank and receiving from it the premium due thereon. The cashier had no conference or consultation, in any way, with Hudgins about the transaction, and it was distinctly understood between the cashier, representing the bank, and the agent of the insurance company, representing it, that the policy was taken out by the bank for its own protection as a creditor of Hudgins, and that in no event was Hudgins to be liable for the first premium or any future premiums, either to the bank or to the insurance company. No demand was ever made upon Hudgins for any premium, but the bank paid all premiums on the policy, without charging Hudgins for the same. On the trial of an equitable petition brought by Loh, as administrator of Hudgins, against the bank and other creditors of Hudgins, to marshal the assets of his estate, etc., the above-stated facts appeared; and the cashier testified: "What induced me to take out this * * * policy was the fact that the bank was practically carrying Mr. Hudgins' business, and had been for two or three years, probably longer, and his business had been getting worse, and I wanted all the protection that I could get in the carrying of his business, and I took this as additional protection." Upon being asked: "To what extent were you influenced in the taking out of the policy as an investment?" he replied: "I regarded it as good investment. He was quite an old man, and in the ordinary course of life he would probably not live very long, and I thought even as an investment it would do to take." The bank had collected the amount of the policy from the insurance company, and its contention was that after crediting a sufficiency of the net proceeds of the policy to pay the indebted-

ness due it by Hudgins' estate, the balance of such proceeds was its property. This contention was not upheld by the trial court, which decreed that the proceeds of the policy, after first reimbursing the bank for the premiums paid by it, with interest thereon, was the property of the estate of Hudgins, and not the property of the bank, but that the bank had the right to apply a sufficiency of such balance to pay the indebtedness due it by Hudgins. In other words, the effect of the decree was that the bank held the policy as collateral security for what Hudgins owed it, and not as its own property. Upon a review of that decree, this court held that the evidence in the case warranted a finding that the policy was not a wagering policy, but that it was in good faith taken out by the assured himself and by him assigned to his creditor, the bank, as a collateral security merely, and, therefore, the judgment rendered was not contrary to law. So it will be seen that the ruling in that case was that where a debtor in good faith takes out insurance upon his own life he may assign it to his creditor as collateral security for the debt, which may include the cost of taking out and keeping up the insurance. This was as far as it was necessary to go in order to determine the case which was before the court; and this in no way conflicts with the ruling which we make in the present case. In that case it was not necessary to decide whether one who, in good faith, takes out a policy of insurance upon his own life can afterwards assign such policy of insurance to one having no insurable interest in such life; nor was such point decided, though there are expressions, in the opinion delivered by Presiding Justice Lumpkin, to the effect that such an assignment would be void, and in some of the cases cited by him from other jurisdictions it was so held.

Another case cited by counsel for defendant in error is *Quillian v. Johnson*, 122 Ga. 49, 49 S. E. 801. There it appears that Thomas, on April 15, 1902, procured an insurance policy on his own life, payable at his death to his legal representatives or assignees. On February 11, 1903, he assigned it to Quillian, who had no insurable interest in the life of Thomas; the assignment reciting that it was for value received, subject to any indebtedness due on the policy to the insurance company. The insurance company, on April 27th following, recognized the assignment by an indorsement thereon. The policy and assignment were delivered to Johnson, the local agent of the company and a creditor of Thomas. Contemporaneously with the assignment, Quillian executed a written instrument in which it was stated that as there was a quarterly premium of \$151.52 due on the policy January 15, 1903, with 30 days grace allowed for its payment, and as Thomas had requested Quillian to pay the same for him, in case Thomas did not pay it by February 15, 1903, that Thomas "for

valuable considerations has assigned said policy to Quillian." This instrument further stipulated that Quillian should pay the premium on or before February 15, 1903; that Johnson should hold the assignment for 90 days, and Thomas have the privilege of repaying the premium to Quillian within that period, and in case he did so the assignment should be returned to him, but upon his failure so to do, then the policy should go to Quillian "to do as he deems best with it"; that should Thomas die within the 90 days, Quillian should pay to the named minor children of Thomas specified amounts out of the proceeds of the policy and pay Johnson the amount due him by Thomas on certain promissory notes. There was no consideration for the assignment other than Quillian's promise to pay the past due quarterly premium, which he afterwards fulfilled, and his agreement to pay out of the proceeds of the policy specified amounts to Thomas' children, and to pay therefrom the notes of Thomas held by Johnson. Thomas died within the 90 days, and Quillian paid Johnson the amount of the notes. This court held: "Irrespective of whether the holder of a policy of insurance on his own life may legally sell and assign the policy to one having no insurable interest in his life, the policy-holder is certainly not at liberty to make the policy the subject-matter of a purely wagering and speculative contract between himself and a person having no interest therein;" and that whether the written agreement executed by Quillian be construed by itself or in connection with the oral evidence submitted at the trial, which left the intention of the parties free from all doubt, such agreement between Thomas and Quillian was a wagering and speculative contract pure and simple, and for that reason could not be enforced at the instance of Quillian. In construing the agreement, Mr. Justice Evans, in delivering the opinion of the court, said: "If Thomas did not die within the 90-day period, he could, but was not bound to, redeem or repurchase the policy by paying Quillian the amount advanced to pay the quarterly premium; if Thomas elected to redeem on these terms and actually did so, Quillian would make nothing, but would lose interest on the money advanced by him; if Thomas lived, but declined to redeem, Quillian would lose the amount advanced and interest thereon, while Thomas would forfeit all interest in the policy, if the premiums thereafter falling due were not paid. The 'stake' which Thomas put up was the policy; that 'stake' put up by Quillian was \$151.52 in cash." In the opinion it is expressly stated that the decision was rendered without reference to the doctrine on which were based the cases of *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350, and *Ancient Order United Workmen v. Brown*, 112 Ga. 554, 37 S. E. 890. "The stronger reasons, the decided trend of the decisions of the

courts and the great weight of authority, concur to establish the rule that an insurable interest in an assignee of a policy of life insurance is not essential to the validity of the assignment if the party to whom it was originally issued had such an interest, and the assignment is not made as a cover for the issue of a wager policy." *Gordon v. Ware Nat. Bank*, 132 Fed. 444, 65 C. C. A. 580, 87 L. R. A. 550.

The courts of Alabama, Kansas, Kentucky, Missouri, North Carolina, Pennsylvania, Texas, and Virginia have not adopted this rule, but have followed the decision rendered in the earlier cases of *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313, wherein it was declared that such an assignment was as obnoxious to the rule against wager policies as the issue of a policy to one without insurable interest, and was therefore void. See *Gordon v. Ware National Bank*, supra, where the decisions of the courts of the above-named states are collated. In that case Sanborn, Circuit Judge, said: "The rule adopted by these states greatly detracts from the value of life insurance policies, and restricts their commercial value; for, if their possible purchasers are limited to those who have insurable interests in the lives they insure, it is obvious that buyers will be few and their commercial value and the traffic in them must be much less than if all men may become their lawful purchasers. In view of this fact the Supreme Court of the United States and the courts of the great commercial communities of the country—of New York, Ohio, Massachusetts, Illinois, Michigan, New Jersey, California, Minnesota, Connecticut, Louisiana, Rhode Island, Wisconsin, Nebraska, Tennessee, South Carolina, Mississippi, and Maryland—have repudiated the old declaration of the Supreme Court of Indiana, and have adopted the more modern and rational rule that 'any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy.'" In support of this more modern rule, the following cases are cited: *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287; *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Chamberlain v. Butler*, 61 Neb. 730, 738, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. Rep. 478; *Crosswell v. Connecticut Indemnity Ass'n*, 51 S. C. 103, 28 S. E. 200; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848; *St. John v. Ins. Co.*, 13 N. Y. 31, 64 Am. Dec. 529; *Valton v. Ins. Co.*, 20 N. Y. 32; *Olmsted v. Keyes*, 85 N. Y. 593; *Steinback v. Diepenbrock*, 37 N. Y. Supp. 279, 1 App. Div. 417; *Eckel v. Renner*, 41 Ohio St. 232, 233; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Brown v. Greenfield Life Ass'n*, 172 Mass. 498, 53 N. E. 129; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; *Prudential Ins. Co. v. Liersch*, 122 Mich. 436,

81 N. W. 258; *Trenton, etc., Ins. Co. v. Johnson*, 24 N. J. Law, 576, 585; *Vivar v. Knights of Pythias*, 52 N. J. Law, 455, 20 Atl. 36; *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114; *Widaman v. Hubbard* (C. C.) 88 Fed. 806; *Hogue v. Minnesota Packing & Provision Co.*, 59 Minn. 39, 60 N. W. 812; *Brown v. Equitable Life Assur. Soc.*, 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; *Fitzgerald v. Hartford, etc., Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 17 Atl. 411, 7 Am. St. Rep. 288; *Succession of Hearing*, 26 La. Ann. 326, 327; *Clark v. Allen*, 11 R. I. 439, 443, 23 Am. Rep. 496; *Strike v. Wisconsin, etc., Ins. Co.*, 95 Wis. 583, 70 N. W. 819; *Clement v. N. Y. Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; *Murphy v. Red*, 64 Miss. 614, 1 South. 761, 60 Am. Rep. 68; *Rittler v. Smith* (Md.) 16 Atl. 890, 892, 893, 2 L. R. A. 844; *Souder v. Society* (Md.) 20 Atl. 137, 138. For a full discussion of the cases on the subject, see 1 Cooley's *Briefs on Law of Ins.* 262 et seq.

The doctrine announced in *Franklin Life Insurance Co. v. Hazzard*, supra, was subsequently repudiated even in Indiana, in the case of *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95, wherein it was held: "When the person himself in good faith makes the contract, procures the insurance on his own life, and pays the premiums, it is immaterial whether the beneficiary designated by him, or the assignee of the policy, has any insurable interest in the life of the insured or not." In *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496, *Durfee, C. J.*, said: "A life policy is a chose in action, a species of property, which the holder may have perfectly good and innocent reasons for wishing to dispose of. He should be allowed to do so unless the law clearly forbids it. It is said that such an assignment, if permitted, may be used to circumvent the law. That is true, if insurance without interest is unlawful; but it does not follow that such an assignment is not to be permitted at all, because if permitted it may be abused. Let the abuse, not the bona fide use, be condemned and defeated. See *Shilling, Adm'r, v. Accidental Death Ins. Co.*, 2 H. & N. 42. * * * Again, the assignment is said to be a gambling transaction, a mere bet or wager upon the chances of human life. But the wager was made when the policy was effected, and has the sanction of the law. The assignment simply transfers the policy, as any other legal chose in action may be transferred, from the holder to a bona fide purchaser. It is true, there is an element of chance and uncertainty in the transaction, but so there is when a man takes a transfer of an annuity, or buys a life estate, or an estate in remainder after a life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void on that account. But finally it is urged that the purchaser or assignee

subjects himself to the temptation to shorten the life insured, and that this the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate, which exposes the purchaser to a similar temptation."

Of course, one cannot do indirectly what the law prohibits him from doing directly, and as it is unlawful for a person to effect insurance upon the life of another in the continuance of whose life he has no interest, an invasion of this rule by the issue of a policy to one who has an insurable interest, and its immediate assignment, pursuant to a preconceived intent, to one without such interest, who undertakes to pay the premiums for his chance of profit upon his investment, is ineffective, and such assignment is void. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997, and cit.; 1 Cooley, *Briefs on Insurance*, 273, 274. But there are no allegations in the petition in the case under consideration going to show an intention on the part of Allen and Mrs. Rylander to circumvent the law against wagering policies; it not appearing from the petition that Allen, at the time he effected this insurance upon his life, intended to assign the policy to Mrs. Rylander, or that she even knew of his intention to take out the policy. Nor does it appear from the petition that Mrs. Rylander did not pay Allen a valuable consideration for the assignment. The mere fact that Allen, at the time he took out the policy and at the time of the assignment, was of very advanced age is not sufficient to invalidate the assignment. It is true that the amendment to the petition alleged that at or about the time of the assignment or soon thereafter, there existed insurance upon Allen's life to the amount of twelve or fifteen thousand dollars, and that he was not financially able to carry insurance to so large an amount, and that the other policies were assigned to some other assignee, and that these facts were known to Mrs. Rylander. But if the object in making these allegations was to show that Mrs. Rylander, at the time of the assignment of this policy to her, knew that Allen had taken out policies of insurance upon his life for the mere purpose of assigning them to persons having no insurable interest in his life, it was not accomplished by the allegations actually made. A mere cursory examination of the allegations of the amendment to the petition will show this. Even if the amendment to the petition could be construed as positively alleging that at the time of the assignment of this policy to Mrs. Rylander, there was in existence upon the life of Allen insurance to the amount of twelve or fifteen thousand dollars, which he was not financially able to carry, and that Mrs. Rylander knew this, it would not materially strengthen the case made by the original petition. At the time of this assignment there might have been in ex-

istence insurance to such an amount upon Allen's life, all of which, except this policy of \$5,000, he had taken out long years before, when he was a much younger man; for it is not alleged when he procured the insurance other than that which he assigned to Mrs. Rylander. So Mrs. Rylander might have known of the existence of this other insurance, and have also had reason to believe that Allen was not financially able to keep in force all the insurance which he had obtained upon his life, and yet might, in perfect good faith, have purchased the policy in question, believing that Allen wanted to dispose of it because he then realized that he had made a mistake in attempting to carry this policy of \$5,000 in addition to the seven or ten thousand dollars of insurance which he previously had. Of course, if the insurance other than that covered by the policy in question was procured by Allen after the assignment of this policy to Mrs. Rylander, she could not have known of its existence at the time of the assignment. She could not then have known of the existence of a fact which subsequently transpired. Again, this amendment to the petition did not even allege that the insurance other than that involved in the present case was assigned to some one who had no insurable interest in Allen's life. So the allegations in reference to this other insurance fail to even indicate that Allen himself had sought, in any instance, to circumvent the law in reference to wager policies.

Our conclusion is that the petition did not set forth a cause of action against Mrs. Rylander, and the court, therefore, erred in overruling the general demurrer.

Judgment reversed. All the Justices concur.

(125 Ga. 55)

LOWE v. STATE.

(Supreme Court of Georgia. March 23, 1906.)

1. CRIMINAL LAW—EVIDENCE—CONFESSIONS.

The statement made to the witness by the defendant showed, in substance, that a conspiracy was formed between him and another to commit a murder; that in pursuance of that conspiracy they went to the place where the person against whom the plot was made was to be found; that the other conspirator did the actual killing while the defendant was present or near by for the purpose of keeping watch to enable the murder to be successfully committed. Held, that such a statement amounted to a confession of being guilty as a principal in the second degree. It was properly admitted in evidence, and there was no error in charging on the law of confessions.

2. SAME.

Where one accused of crime made a confession on more than one occasion, each confession may be proved.

3. SAME—STENOGRAPHIC NOTES.

Where one such confession was taken down in stenographic characters by a stenographer and afterwards transcribed into longhand, and he testified that such paper contained an accurate transcription of the confession orally made by the accused in his presence, the paper was admissible and was not subject to the objection either that it was hearsay evidence, or that

it deprived the defendant of the right to be confronted with the witnesses against him.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1208-1211.]

4. INDICTMENT—HOMICIDE—PRINCIPALS IN DIFFERENT DEGREES.

Where principals in the first and second degree are punished alike, no distinction between them need be made in the indictment.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 226.]

5. CRIMINAL LAW—APPEAL—REVIEW.

There was nothing in any of the other grounds of the motion for a new trial which requires a reversal.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Henry Banks and Cornelius Lowe were jointly indicted for murder. They were tried separately, and from a judgment of conviction, Lowe brings error. Affirmed.

Henry Banks and Cornelius Lowe were jointly indicted for the murder of Will Russell. They were tried separately. On the trial of Lowe the corpus delicti was proved, and it was shown that the defendant made a statement or confession orally, and that afterwards he repeated substantially the same thing in the presence of a stenographer, who took down the statement stenographically and subsequently transcribed it in longhand. The confession was elaborate and rambling, but the substance of it was, that Banks had entered into an arrangement with the defendant to accomplish the death of Will Russell; that Banks was to do the actual killing, while Lowe was to keep watch; that they went to the place where Russell was at work, and that this arrangement was carried out, Banks doing the actual killing, using both a pistol and an ax, while Lowe remained near by, keeping watch; that Banks took from the body of the murdered man a pistol and other property, and subsequently gave the pistol to Lowe for his part in the transaction. There was evidence showing that he attempted to pawn the pistol; that the ax used was found where he said it was thrown, and that Banks pawned a pistol, and his mother afterwards had the watch which had belonged to the deceased. After a verdict of conviction the defendant moved for a new trial, which was refused, and he excepted.

Jno. R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

LUMPKIN, J. (after stating the foregoing facts). While the statement made by the defendant contained certain expressions to the effect that he did not do the killing, and was long, rambling, and full of immaterial details, the substantial effect of it was, that he entered into a conspiracy with Banks to kill Russell, and that Banks did the actual killing, while he remained at a short distance away, keeping watch. In other words, it was a confession that Banks was a prin-

cipal in the first degree, while he was a principal in the second degree. There was, therefore, no error in admitting it as a confession, or in charging on the law of confessions. The defendant made his confession first orally in the presence of one or more witnesses, and afterwards repeated it in the presence of a stenographer, who took it down in stenographic characters and transcribed it into ordinary writing. Both the original oral confession, and the written statement were introduced in evidence, the stenographer testifying that the writing was a correct reproduction by him of what the defendant had said. Both of these were objected to because they did not amount to a confession. The oral confession was also objected to because the writing was the best evidence, and the writing was objected to because it was only hearsay, and because its admission would deprive the defendant of his right to be confronted with the witnesses and to cross-examine them. These were substantially the objections made, though several grounds of objections were stated. The court properly overruled them. If a defendant makes a confession at two different times, both confessions may be proved. Where his statement was reduced to writing by a stenographer who testified that the paper offered in evidence contained an accurate reproduction of what he had said, the stenographer himself being on the stand and subject to cross-examination, the admission of the written paper did not deprive the defendant of his right to be confronted with the witnesses against him.

The motion for a new trial raised the point, both by exception to the refusal to give requests in charge and by objection to charges which were given, that since the indictment charged the defendant as one of the perpetrators of the crime of murder, he could not be convicted if the evidence showed him to be only a principal in the second degree, and not the actual slayer. A principal in the second degree, except where it is otherwise provided, receives the same punishment as the principal in the first degree. Pen. Code 1895, § 43. Principals in the first and second degree guilty of the crime of murder are punished alike, and no distinction between them need be made in the indictment. Both may be indicted for murder and may be convicted under such an indictment, although one may be shown to have been the actual slayer, while the other was a principal in the second degree, who had conspired with him and was keeping watch or guard

close by while the homicide was being committed. *Leonard v. State*, 77 Ga. 764; *Collins v. State*, 88 Ga. 347, 14 S. E. 474; *Morgan v. State*, 120 Ga. 294, 48 S. E. 9; *McWhorter v. State*, 118 Ga. 55, 44 S. E. 873; Pen. Code 1895, § 42. There were other objections to certain parts of the charge, but none of them were well taken. The motion for a new trial was properly overruled.

Judgment affirmed. All the Justices concur.

MEMORANDUM DECISIONS.

COTTON v. HIGHLAND PARK MFG. CO. (Supreme Court of North Carolina. May 16, 1906.) Appeal from Superior Court, Mecklenburg County; Bryan, Judge. Action by N. H. Cotton against the Highland Park Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed. Tillett & Guthrie, for appellant. Stewart & McKae, for appellee.

PER CURIAM. On examination of the entire record and the charge of the judge below, the court is of opinion that the case has been fairly presented to the jury, and there is no substantial error which entitles the defendant to a new trial. No error.

WALKER, J., did not sit on the hearing of this appeal.

GUYTON v. WESTERN UNION TELEGRAPH CO. (Supreme Court of North Carolina. May 1, 1906.) Appeal from Superior Court, Gaston County; Bryan, Judge. Action by J. M. Guyton against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed. A. G. Mangum, for appellant. Tillett & Guthrie, for appellee.

PER CURIAM. In this case, and under a charge free from error, the jury have determined that the defendant never entered into any contract with the plaintiff, or any one for him, to transmit the message. No error.

HEFNER v. HIGHLAND PARK MFG. CO. (Supreme Court of North Carolina. May 16, 1906.) Appeal from Superior Court, Mecklenburg County; Bryan, Judge. Action between Curtis Hefner and the Highland Park Manufacturing Company. From a judgment for the latter, the former appeals. Affirmed. Brevard Nixon, for appellant. Tillett & Guthrie, for appellee.

PER CURIAM. The court has carefully examined the record in this case, has given the briefs and argument of counsel full consideration, and is of opinion that there is no error.

WALKER, J., did not sit on the hearing of this appeal.







